THE UNIVERSITY OF
WARWICK

University of Warwick institutional repository: http://go.warwick.ac.uk/wrap

This paper is made available online in accordance with
publisher policies. Please scroll down to view the document
itself. Please refer to the repository record for this item and our
policy information available from the repository home page for
further information.

To see the final version of this paper please visit the publisher's website.
Access to the published version may require a subscription.

Author(s): Ming-Sung Kuo
Article Title: Cutting the Gordian knot of legitimacy theory? An anatomy of Frank Michelman's presentist critique of constitutional authorship
Year of publication: 2009
Link to published article:
http://dx.doi.org/10.1093/icon/mop024
Publisher statement: This is a pre-copy-editing, author-produced PDF of an article accepted for publication in Oxford Journal of Legal Studies following peer review. The definitive publisher-authenticated version Kuo, M. –S. (2009), Cutting the Gordian knot of legitimacy theory? An anatomy of Frank Michelman's presentist critique of constitutional authorship. *International Journal of Constitutional Law*, **7**(4), 683-714 is available online at: http://dx.doi.org/10.1093/icon/mop024

Draft not for citation. The final version of this article appears in
International Journal of Constitutional Law, Vol. 7, No. 4 (2009), pp. 683-714.

Cutting the Gordian Knot of Legitimacy Theory? An Anatomy of Frank Michelman's Presentist Critique of Constitutional Authorship

Ming-Sung Kuo*

The question of legitimacy occupies center stage in debates on various constitutional developments. For as long as constitutional scholars cannot settle on a theory of legitimacy, the specter of a legitimacy deficit will continue to haunt the practitioners of constitutional law. Constitutional scholar Frank Michelman engages different schools of constitutional theory, seeking the definitive answer to the legitimacy question. He classifies theories of legitimacy into three categories, premised on notions of contract, acceptance, or authorship. Arguing that contract-based and acceptance-oriented legitimacy theories assume the notion of authorship, he distinguishes constitutional authorship in terms of its presumed transtemporal character and abandons it because of this character. To cut this Gordian knot, Michelman proposes a presentist view of legitimacy. Through an analysis of his theoretical engagement, this article argues that his effort to abandon authorship-based theories fails. A commonly chosen, authoritative dispute- settling institution, in line with Michelman's presentist alternative, cannot stand without assuming a transtemporal concept of constitutional authorship. Thus the Gordian knot remains.

---

* Visiting Researcher, Yale Law School. The author would like to thank Bruce Ackerman and Owen Fiss for their reading and commenting on early drafts of this article, which is based on part of the author's unpublished J.S.D. dissertation at Yale Law School. Wojciech Sadurski's suggestions and comments on an early version of this article are heartily acknowledged. The author is deeply grateful to Frank Michelman for his generous, gracious, and illuminating reply to this article and his toleration of the author's bold construction of his work. The author expresses wholehearted gratitude to Paul Kahn for his meticulous reading of numerous drafts of this article and critical interrogation of its arguments in the course of supervising the author's dissertation. Finally, the author benefits greatly from Karen Barrett's expert editing. Any errors remain the author's responsibility. Email: KUO@aya.yale.edu

Electronic copy available at: http://ssrn.com/abstract=1421415

TABLE OF CONTENTS

Introduction

"We the People," or its equivalent, appears in so many constitutions, all over the world, that "constitution"—as a verbal form defined in part by that phrase—may be said to have become a literary genre.[1] While it may sound like anachronistic revolutionary rhetoric or, worse, an empty demagogic cliché,[2] "We the People" presents a substantial principle around which to organize discussion of the legitimacy of constitutional democracy. Although it seems to distinguish the state—the archetype of the body

[1] *See* ÉTIENNE BALIBAR, WE, THE PEOPLE OF EUROPE? REFLECTIONS ON TRANSNATIONAL CITIZENSHIP 184–85 (James Swenson trans., Princeton Univ. Press 2004) (2001). Most exemplary is the United States Constitution, which starts with "We the People of the United States of America." U.S. CONST. pmbl. French philosopher Étienne Balibar notes that the performative utterance of "[the] self-designation of the sovereign people" exemplified in "We the People of the United States of America" in the United States Constitution can be translated into a constative statement as expressed in the preamble to the German Constitution—"The German People has given itself the following Fundamental Law by virtue of its constituent power (. . . *hat sich das Deutsche Volk kraft seiner verfassungsgebenden Gewalt diese Grudngesetz gegeben*)." *See id*. at 273 n.6.

[2] *Compare* BALIBAR, *supra* note 1, at 185 (noting the persistent reference to "we the people" at times of insurrection), *with* MICHAEL MANN, THE DARK SIDE OF DEMOCRACY: EXPLAINING ETHNIC CLEANSING 55–69 (Cambridge Univ. Press 2005) (discussing the relationship between two versions of "We the People" and genocides in history).

Electronic copy available at: http://ssrn.com/abstract=1421415

politic—from other political entities,[3] it also figures in the transnational equation. Paralleling its traditional role in the nation building of modern states,[4] "We the People" plays a role in the constitutional-legitimacy debate regarding European integration. Even when we dissociate the ideal of constitutional democracy on the European level from statehood,[5] the notion of "We the People" remains relevant to the EU constitutional project; it may be construed in various ways in order to legitimize the EU as a supranational political entity.[6] As Étienne Balibar would have it, the constitutional genre expresses "the functioning and use of 'we' [in 'We the People'] as a self-designation of the sovereign people in proclamations of democratic rights."[7] If so, what is the magic power of "We the People" as the author of the constitution—that is, the idea of constitutional authorship[8]—in relation to the "spectral" existence of popular

---

[3] *See*, *e.g.*, Dieter Grimm, *Integration by Constitution*, 3 INT'L J. CONST. L. 193, 207–08 (2005).

[4] *See*, *e.g.*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (Belknap 1990).

[5] *Compare* J.H.H. Weiler, *Europe: The Case against the Case for Statehood*, 4 EUR. L.J. 43 (1998), *with* G. Federico Mancini, *Europe: The Case for Statehood*, 4 EUR. L.J. 29 (1998).

[6] *See* Hans Lindahl & Bert van Roermund, *Law without a State? On Representing the Common Market*, *in* THE EUROPEAN UNION AND ITS ORDER: THE LEGAL THEORY OF EUROPEAN INTEGRATION 1, 8–13 (Zenon Bankowski & Andrew Scott eds., Blackwell 2000). *See also* Erik Oddvar Eriksen, *The EU and the Right to Self-Government*, *in* DEVELOPING A CONSTITUTION FOR EUROPE 35, 45–46 (Erik Oddvar Eriksen et al. eds., Routledge 2004); J.H.H. Weiler, *European Neo-constitutionalism: In Search of Foundations for the European Constitutional Order*, *in* CONSTITUTIONALISM IN TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES 105, 110–116 (Richard Bellamy & Dario Castiglione eds., Blackwell 1996). *Cf.* HAUKE BRUNKHORST, SOLIDARITY: FROM CIVIC FRIENDSHIP TO A GLOBAL LEGAL COMMUNITY 169–173 (Jeffrey Flynn trans., MIT Press 2005) (2002); ULRICH K. PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 25–107 (Deborah Lucas Schneider trans., Humanities 1995) (1990); Robert E. Goodin, *Designing Constitutions: the Political Constitution of a Mixed Commonwealth*, *in* CONSTITUTIONALISM IN TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES, *supra*, at 223. *But see* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 11–31 (Princeton Univ. Press 2004); Jürgen Habermas, *Why Europe Needs a Constitution?*, *in* DEVELOPING A CONSTITUTION FOR EUROPE, *supra*, at 19, 27.

[7] *See* BALIBAR, *supra* note 1, at 184.

[8] For a discussion of the concept of authorship from the perspective of philosophical ethics, see DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 113–114 (Princeton Univ. Press 2008).

sovereignty?[9] What is the nature of its grip on our political imaginings regarding constitutional legitimacy?

In *Ida's Way* and other recent essays,[10] constitutional scholar Frank Michelman engages a variety of theories of constitutional legitimacy, developing a tripartite argument with regard to this sixty-four-thousand-dollar question. First, Michelman aims to establish that existing legitimacy theories are all premised on constitutional authorship, whether they are presented as contract-based or acceptance-oriented. Second, Michelman points to the transtemporal character of constitutional authorship, which, taken together with the concomitant presupposed identity or authorship, constitute the Gordian knot of constitutional legitimacy theory. This knot comes into being because these vexed elements are not based on personal critical judgment, which lies at the core

---

[9] *See* BALIBAR, *supra* note 1, at 185.

[10] *See* Frank I. Michelman, *A Reply to Baker and Balkin*, 39 TULSA L. REV. 649 (2004) [hereinafter Michelman, *Reply*]; Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 MOD. L. REV. 1 (2003) [hereinafter Michelman, *Constitutional Legitimation*]; 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, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345 (2003) [hereinafter Michelman, *Ida's Way*]; Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 REV. CONST. STUD. 101 (2003) [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, *The Problem of Constitutional Interpretive Disagreement: Can "Discourses of Application" Help?*, *in* HABERMAS AND PRAGMATISM 113 (Mitchell Aboulafia et al. eds., Routledge 2002) [hereinafter Michelman, *Interpretive Disagreement*]; 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); Frank I. Michelman, *Morality, Identity and "Constitutional Patriotism,"* 76 DENVER U.L. REV. 1009 (1999) [hereinafter Michelman, *Constitutional Patriotism*]; Frank I. Michelman, *Constitutional Authorship*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 64 (Larry Alexander ed., Cambridge Univ. Press 1998) [hereinafter Michelman, *Constitutional Authorship*]; Frank I. Michelman, *How Can the People Ever Make the Laws? A Critique of Deliberative Democracy*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 145 (James Bohman & William Rehg eds., MIT Press 1997) [hereinafter Michelman, *Deliberative Democracy*]. For an overview of Michelman's scholarship on the issue of constitutional legitimacy in a liberal state, see Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485 (2004).

of legitimacy. Instead, they are simply presumed to frame the legitimacy of a constitutional project. The third prong of Michelman's argument is the most ambitious. Departing from the concept of constitutional authorship, Michelman proposes a "presentist" alternative to contemporary theories of constitutional legitimacy in his 2003 essay *Ida's Way*.[11] Is the version of constitutional legitimacy that he propounds, in this series of essays, as presentist as he claims? Does it succeed in justifying constitutional theories in the face of the transtemporal nature of constitutional authorship? Whether Michelman has managed, at last, to cut the Gordian knot of constitutional-legitimacy theories is the question this article seeks to answer.

Tracking Michelman's theoretical odyssey as he engages various attempts to solve the legitimacy conundrum, this article argues that Michelman's assertion that a transtemporal concept of constitutional authorship lies at the heart of existing theories of constitutional legitimacy is, indeed, correct. However, the argument will be made that he has not managed in "Ida's way" to come up with a concept of legitimacy that does not itself hinge on such a concept. "Ida's way" offers a presentist, all-things-considered analysis that fails to account for the continued prevalence of a particular institution—namely, judicial review, retained at the heart of Michelman's alternative theory of constitutional legitimacy—as the authoritative mechanism for settling disputes. This failure serves, albeit indirectly, to substantiate the centrality of constitutional authorship in our thinking about the rule of law.

---

[11] Michelman, *Ida's Way*, *supra* note 10. *See also* Michelman, *Reply*, *supra* note 10.

Section 1 paraphrases Michelman's diagnosis of contract-based and acceptance-oriented theories of constitutional legitimacy, showing why both theoretical positions on constitutional legitimacy remain embedded in the idea of constitutional authorship one way or another. Section 2 illuminates the transtemporal character of constitutional authorship. Section 3 introduces Michelman's presentist alternative theory of constitutional legitimacy, and Section 4 argues that his presentist, all-things-considered theory of constitutional legitimacy remains rooted in the idea of constitutional authorship. The fifth section is a summary of the argument.

1. Beyond contract and acceptance: Michelman on legitimacy

According to Michelman, the content-based point of view is exemplified by John Rawls's theory of justice, which builds on the liberal political tradition of social contract.[12] Contractarians argue that "the constitution is binding if and only if it says what a constitution, now, needs to say . . . if it is to be capable of bestowing respect-worthiness on political acts taken in conformity to it."[13] To function as a "legitimacy contract" that makes the entire legal system worthy of respect, the constitution must include only certain content that grounds its moral bindingness.[14] The respect-worthiness of a constitution is contingent on whether citizens judge its contents

[12] John Rawls has been the protagonist of Michelman's discussion on the issue of the legitimacy of constitutional democracy. *See supra* note 10. In addition, Michelman's list of constitutional contractarians includes Jürgen Habermas, Charles Larmore, and himself as well. *See* Michelman, *Interpretive Disagreement*, *supra* note 10, at 113, 134 n.3.

[13] Michelman, *Constitutional Legitimation*, *supra* note 10, at 9.

[14] *See* Michelman, *Interpretive Disagreement*, *supra* note 10, at 117–118.

to be capable of bestowing validity. This is why a legitimacy theory founded on the tradition of a social contract is content-based.[15]

Michelman observes that this contractarian view of constitutional legitimacy falters when faced with ethical pluralism, both as a conceptual position and as an empirical situation. He suggests that Rawls did not take his own starting point—reasonable pluralism—to its logical limit. Rather, Rawls based his contractarian view on a poorly thought-out preconception embedded in Western liberal democratic societies. Moreover, to the extent that there is reasonable disagreement on value choices in every aspect of today's social life, it is unlikely, if not impossible, that individuals charged with burdens of judgment on the essential contents of a constitution will reach consensus.[16]

Michelman also identifies the problem of interpretive disagreements regarding a constitution,[17] which this article calls the second order of reasonable disagreement. The first order occurs when a draft constitution is under discussion and poses a challenge to contractarianism that is more empirical than conceptual. In contrast, the second order of reasonable disagreement arises after an original constitutional consensus has been forged. It is concerned with the following key issue: even if the contents essential to securing a sufficiently legitimated constitutional agreement—what Michelman calls

---

[15] *Cf*. BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 336–342 (Yale Univ. Press 1980).

[16] *See* Michelman, *Constitutional Legitimation*, *supra* note 10, at 10–12; Michelman, *Ida's Way*, *supra* note 10, at 352; Michelman, *Contract for Legitimacy*, *supra* note 10, at 122–123; Michelman, *Judicial Supremacy*, *supra* note 10, at 586–587; Michelman, *Interpretive Disagreement*, *supra* note 10, at 118–23; Michelman, *Constitutional Authorship*, *supra* note 10, at 88–89; Michelman, *Deliberative Democracy*, *supra* note 10, at 165.

[17] *See generally* Michelman, *Interpretive Disagreement*, *supra* note 10.

"constitutional essentials"—are agreed to,[18] the practice of constitutional interpretation could lead to the collapse of the dualist conceptual architecture of the content-based view of constitutional legitimacy, an architecture in which the distinction between the constitution and the body of nonconstitutional ordinary law is assumed.[19]

In the practice of constitutional adjudication, interpretation is necessary to bridge the inherent gap between norms and their application.[20] For example, while the normative principle of equal protection is enshrined in the Fourteenth Amendment of the U.S. Constitution, whether affirmative action gives effect to the principle, or violates it, is a matter of interpretation. The content and meaning of constitutional essentials are subject to debate among those who adopt varying interpretive attitudes.[21] Thus, postconstituent interpreters of the constitution are challenged to reach consensus when the second order of reasonable disagreement arises.[22]

The implication of the "re-making" of a constitution by means of constitutional interpretation is that the constitution itself becomes incomplete and unstable. According to Michelman, at the core of constitutional legitimacy is the idea that the constitution should be capable of completely resolving all issues on the basis of the essentials that have been agreed upon during the framing of the text.[23] If interpretation is inevitable, then everything written in the constitution is potentially open to future redefinition.

---

[18] *See* Michelman, *Constitutional Authorship*, *supra* note 10, at 65 (listing the plan of political government and the list of personal rights and liberties as constitutional essentials).
[19] *See* Michelman, *Constitutional Legitimation*, *supra* note 10, at 9.
[20] *See* Michelman, *Interpretive Disagreement*, *supra* note 10, at 118–120.
[21] *See also* Jiří Přibáň, *The Time of Constitution-Making: On the Differentiation of the Legal, Political and Moral Systems and Temporality of Constitutional Symbolism*, 19 RATIO JURIS 456, 475 (2006).
[22] *See* Michelman, *Constitutional Legitimation*, *supra* note 10, at 11–12.
[23] *See* Michelman, *Contract for Legitimacy*, *supra* note 10, at 120–121.

Further, if such is the case, then the constitution is in a state of constant uncertainty,[24] and it becomes impracticable to assess the respect-worthiness of other public acts in light of agreed-upon constitutional essentials. Rather, every instance of constitutional interpretation effectively casts the respect-worthiness of the constitution itself into question, thereby obliterating the distinction between the constitution and ordinary law and undermining the premise of constitutional legitimacy.[25]

Thus, the practice of constitutional interpretation means that the supposed consensus on constitutional essentials is, at best, temporary and, at worst, nominal.[26] Whatever is resolved in the drafting process merely defers the issue of constitutional bindingness rather than settling it. This susceptibility of constitutional essentials to redefinition is at odds with the contractarian content-based view of legitimacy.[27]

Michelman proceeds to address another strain of the liberal political position on legitimacy within the broad social-contract tradition, namely, Jürgen Habermas's proceduralism.[28] He asserts that Habermas's proceduralist theory of the legitimacy of constitutional democracy boils down to the following propositions: (*a*) "For a norm to be valid, the consequences and side effects that its general observance can be expected to have for the satisfaction of the particular interests of each person affected must be such that all can accept [it] freely"; and (*b*) "[O]nly those norms of action are valid to which

---

[24] *See* Balkin, *supra* note 10, at 488.
[25] *See* Michelman, *Constitutional Patriotism*, *supra* note 10, at 1023.
[26] *See id*.
[27] *See* Michelman, *Interpretive Disagreement*, *supra* note 10, at 120–123.
[28] *See* Michelman, *Constitutional Patriotism*, *supra* note 10, at 1023–1028 (including Habermas in "the practitioners of constitutional contractarian justification"); Michelman, *Interpretive Disagreement*, *supra* note 10, at 132 (noting the contractarian character of Habermasian proceduralism). *See also* ANDREAS

all possible affected persons could assent as participants in rational discourse."[29] Michelman observes that this position, while ostensibly proceduralist in nature, still "characterizes political justification in terms of *hypothetical* universal agreement."[30] Furthermore, says Michelman, "hypothetical consent based on correct reasoning is a substantive, not a procedural test for the justified character of a set of fundamental laws."[31] To conclude, "Habermas has no [proceduralist] argument yet for the requirement of an actual democratic-procedural provenance for a set of fundamental laws."[32] In sum, if Habermasian proceduralism is actually content-based, then proceduralism will face the same challenges that second-order reasonable disagreement poses to the Rawlsian strain of contractarianism.

In the process of exploring Habermas's proceduralism, as a successful alternative account of constitutional legitimacy, Michelman paraphrases it, relating it to the moral supportability of the political regime conceived in the constitution. With respect to the legitimacy of constitutional democracy, he distinguishes between the constitutional regime's justice-seeking capacity and its moral supportability.[33] This distinction results from two different conceptions of the objectives of constitutional democracy: the first conceives of the constitution as an instrument for seeking justice,[34] while the second focuses on "the moral justifiability of supporting the [existing] coercive regime" as an

---

KALYVAS, DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY: MAX WEBER, CARL SCHMITT, AND HANNAH ARENDT 249 (Cambridge Univ. Press 2008).

[29] Michelman, *Constitutional Authorship*, *supra* note 10, at 87 (citation omitted).

[30] *Id*. at 88.

[31] *Id*.

[32] *Id*. at 88 (emphasis in original).

[33] *See id*. at 85, 88.

[34] *See also* PREUSS, *supra* note 6, at 25–37.

effective mechanism for maintaining a peaceful social order.[35] Michelman maintains that, inevitably, if the constitution's legitimacy is conceived of in terms of its justice-seeking capacity, this would impinge on the substantive issue of justice, that is, the content of constitutional essentials. In this view, Habermas's proceduralism remains substantive. However, the moral justifiability of an existing coercive regime can be enhanced when the regime includes "an influential process of truly democratic critical reexamination that is fully receptive to everyone's perceptions of situation and interests and, relatedly, everyone's opinion about justice."[36] Such a process, one in which all concerned are free and equally able to make their own judgment as to the moral supportability of coercive government measures, certainly might involve citizens more closely in the constitutional regime under which they live. This arrangement could bolster the legitimacy of the existing system; thus, the procedure itself—not content or substance—delivers a "legitimacy surplus" to the existing constitutional regime.

For the sake of argument, Michelman argues that reframing Habermas's proceduralism this way would shed light on whether proceduralism truly distinguishes itself from content-based contractarianism as a way of conceiving the legitimacy of constitutional democracy. However, as Michelman observes, even in terms of moral supportability, the validity-bestowing capacity of Habermas's proceduralism is not unconditional. It turns on the nature and practices of the "influential process of truly democratic critical re-examination," which "may itself at any time become a matter of

---

[35] Michelman, *Constitutional Authorship*, *supra* note 10, at 88. *See also* Michelman, *Reply*, *supra* note 10, at 657.

[36] Michelman, *Constitutional Authorship*, *supra* note 10, at 90.

contentious but reasonable disagreement."[37] "Arguing thus," he says, proceduralists face two alternatives:

> 1) the obligation to justify, on substantive moral grounds, any claim that normative legitimation flows from the visible operation of any particular, empirically given, positive-legally constituted process we may be pleased to call "democracy"; or, 2) the impossibility of a publicly reasoned demonstration that the laws by which the supposedly legitimating process is constituted really are a fulfillment of the "democracy" that is capable of conferring respect-worthiness on a regime.[38]

Choosing the first option would drive proceduralists back to their point of departure, embroiling them in all the challenges of reasonable disagreement that their Rawlsian, content-based counterparts have failed to resolve. Alternatively, they would accept the existing political regime without justification and resign themselves to the impossibility of legitimacy. Is this the end of Habermas's proceduralist answer to the questions regarding the legitimacy of constitutional democracy? Not quite.

Michelman notes that, to escape the dilemma, Habermas turns to the idea of reflexivity. Subjecting the discursive process at the center of proceduralism to discursive reflection, Habermas argues, "[t]he idea of the rule of law sets in motion a spiraling

---

[37] *See id*. at 91. *But see* KALYVAS, *supra* note 28, at 241–253 (asserting that symmetry, autonomy, solidarity, equality, mutuality, and inclusiveness are implicit in democratic procedures and independent of substantive values).

[38] Michelman, *Human Rights*, *supra* note 10, at 75.

self-application of law."[39] In other words, the "influential process of truly democratic critical re-examination" must itself be the object of the "influential process of truly democratic critical re-examination."[40] The problem, as Michelman points out, is that this reflexivity evokes "an infinite regress of validity claims" because in the process of reflexivity the validity-bestowing attribute itself is subjected to an endless spiral of debate.[41] To resolve the concern about an infinite regress of validity claims, Habermas articulates the principle of reflexive democracy as follows: "The citizens themselves . . . decide how they must fashion the rights that give the discourse principle legal shape as a principle of democracy [once they] make an originary use of a civic autonomy that thereby constitutes itself in a performatively self-referential manner."[42]

For Michelman, Habermas's last push to save proceduralism—as a solution to the legitimacy of constitutional democracy—from the challenges facing contractarianism and from degeneration into infinite regress does not succeed. As for Habermas's assertion of the performatively self-referential constitution of reflexive democracy, Michelman states bluntly: "[A]n originary use of a civic autonomy" [is evocative of the] founding act of citizens' authorship [in the] 'originary' constitutive moment."[43] It turns out that Habermas plays down his proceduralist foundation by basing his proceduralist

---

[39] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 39 (William Rehg trans., MIT Press 1996) (1992).
[40] *See* Michelman, *Constitutional Authorship*, *supra* note 10, at 90.
[41] *See id*. at 91.
[42] HABERMAS, *supra* note 39, at 74, 128. *See also* Michelman, *Constitutional Authorship*, *supra* note 10, at 91.
[43] Michelman, *Constitutional Authorship*, *supra* note 10, at 91. *See also* Michelman, *Constitutional Patriotism*, *supra* note 10, at 1026–1028. *Cf.* Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POL. THEORY 766, 775 (2001) ("[W]ith this

contractarianism and reflexive democracy on the idea of constitutional authorship rather than on proceduralism itself.[44]

Taken as a whole, Michelman argues, the fair procedures at the core of proceduralism turn out to be "very much a matter of what we . . . call *substance*," if they are to be divorced from a presumed authorship and based simply on the Habermasian discourse ideal and without being plunged into infinite regress.[45] The proceduralist turn neither solves the problem of ethical pluralism nor bridges the gap between norms and applications. Rather, it returns to its point of departure: Rawlsian content-based contractarianism. Thus, both the content-based and procedure-based strains of contractualism fail to establish the respect-worthiness of the constitution.

The second attitude toward constitutional legitimacy that Michelman considers is an acceptance-based, legal nonvolitionalism,[46] characterized by the proposition that "the foundations of legal orders are and can only be organically grown facts of social practice, as distinguished from acts or expressions of anyone's will."[47] According to Michelman, legal nonvolitionalists regard a legal system as "an effectively regulative social practice of reference to an identifiable collection or system of norms."[48] Whether

---

[concrete] act [of founding for the political community] the grounds for a world-historically new practice have been established").

[44] *Cf*. HABERMAS, *supra* note 39, at 120. The role of reflexivity in constitutional authorship will be further explored *infra* Section 3.

[45] *See* Michelman, *Constitutional Patriotism*, *supra* note 10, at 1027–1028 (emphasis added). *See also* Balkin, *supra* note 10, at 489.

[46] *See* Michelman, *Contract for Legitimacy*, *supra* note 10, at 126; Michelman, *Constitutional Authorship*, *supra* note 10, at 68–74.

[47] Michelman, *Constitutional Authorship*, *supra* note 10, at 69.

[48] *See* Frank I. Michelman, *Can Constitutional Democrats Be Legal Positivists? Or Why Constitutionalism?*, 2 CONSTELLATIONS 293, 293 (1996) [hereinafter Michelman, *Why Constitutionalism*]. According to this view of legal nonvolitionalism, Michelman names Frederick

the moral status of the legal order has any bearing on its acceptance is of no concern to them. Thus, in contrast to the contractarian model, the acceptance-based, nonvolitionalist conception of constitutional legitimacy is content-independent in the sense that neither consent nor the object of consent bears on the legitimacy of the constitution itself.

From the nonvolitionalist perspective, the fact of acceptance itself establishes the constitution's respect-worthiness.[49] Michelman observes that legal positivism—evoking H. L. A. Hart's dichotomy of primary and secondary rules—argues that there exists an "ultimate" rule of recognition among the secondary rules, controlling "which purported determinations of primary normative contents, uttered by whom, in what forms and circumstances, are to be respected and given respect."[50] Following this line of thought, nonvolitionalists, as distinguished from Kelsenian positivists, further argue that the ultimate rule of recognition must reside outside the legal system and thus it "cannot itself consist in the command of any sovereign."[51] The nonvolitionalist version of the ultimate rule of recognition is not a norm but, rather, an overdetermined social fact.[52] While the secondary rules that govern the process of lawmaking are purportedly stipulated in the

---

Schauer, Hans Kelsen, and H.L.A. Hart as nonvolitionalists. *See* Michelman, *Constitutional Authorship*, *supra* note 10, at 94 n.21.

[49] *See* Michelman, *Interpretive Disagreement*, *supra* note 10, at 116; Michelman, *Constitutional Authorship*, *supra* note 10, at 69, 88. This actual acceptance stands in contrast to the hypothetical as well as actual consent based on the *acceptability* of normative substance. *See* Michelman, *Contract for Legitimacy*, *supra* note 10, at 126.

[50] Michelman, *Constitutional Authorship*, *supra* note 10, at 69–70.

[51] *See id*. at 70. Here is what distinguishes between the two most influential legal positivists in the twentieth century: H.L.A. Hart and Hans Kelsen. *See* Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145, 148–152 (Sanford Levinson ed., Princeton Univ. Press 1995).

[52] *See* Schauer, *supra* note 51, at 149–150. Frederick Schauer further points out, "In referring to the ultimate rule of recognition as a *rule*, Hart has probably misled us." *Id*. at 150 (emphasis in original). Following Brian Simpson, Schauer suggests thinking of the ultimate rule of recognition as a *practice*. *See id*. at 150–151 (emphasis in original).

constitution,[53] that which bestows legitimacy and controlling power on the constitution is itself an extralegal fact.[54] Take the United States Constitution as an example: in the legal nonvolitionalist perspective, its legitimacy rests on "the fact of [the American public's] social acceptance of the Constitution as the supreme law" instead of on "the acceptance of someone's entitlement to make the Constitution be supreme law by legislating it as such."[55]

By attributing the legitimacy of the constitution to organically grown facts of social practice, nonvolitionalists seem to solve the challenges facing contractarians. The failure to agree on the essential contents of the constitution as a legitimacy contract poses no challenge to their vision of constitutional legitimacy. For legal nonvolitionalists, the social awareness that a society is, in fact, governed by a constitution suffices to lay the groundwork for the acceptance-based theory of the legitimacy of constitutional democracy. Legal nonvolitionalism as a legitimacy theory is rendered free of the thorny challenges facing contractarianism by excluding the fact of ethical pluralism from its theoretical purview and by reducing the facts of social practice to a single question: Is the constitution socially accepted?[56]

Regardless of its ostensible perfection, Michelman finds a weakness in the nonvolitionalist strategy. Legal nonvolitionalism seeks to banish the fact of ethical pluralism, together with the accompanying issues concerning constitutional completeness, to the extralegal area of empirical contingency. Issues connected with

---

[53] *See*, *e.g.*, U.S. Const. art. I § 7.
[54] *See* Schauer, *supra* note 51, at 156–157, 160–161.
[55] Michelman, *Constitutional Authorship*, *supra* note 10, at 70 (emphasis omitted).

ethical pluralism are the objects of empirical investigation rather than that of normative analysis.[57] Nevertheless, acceptance-oriented nonvolitionalists cannot avoid the question that has been placed in the field of empirical contingency: Why does "a critical mass of the country's inhabitants . . . intersubjectively concede a regulative force to an actually operative practice of government that these inhabitants . . . tend to identify with (or hypostatize as) a textoid that they call 'the Constitution'?"[58]

Once framed thus, the acceptance-based nonvolitionalist model faces a serious "identity" crisis. By extending its query to those issues relegated to the extralegal field of empirical contingency, legal nonvolitionalism turns out to be a mere theoretical façade. To answer the question of how the constitution is socially accepted, one needs "[f]ull knowledge of a social practice of referring questions of legal validity to [the system's own ultimate standards of legal validation]."[59] The required knowledge includes "how participants in the practice experience it, 'from the inside.'"[60] Their experience may have little to do with the nonvolitionalist conception of legitimacy, however.

Take the United States constitutional order. Michelman stresses, "We should be clear . . . that the legal nonvolitionalist argument, cogent as it is, in no way impugns [the proposition] that Americans do in fact recurrently think of the Constitution as containing the ultimate legal grounding . . . and, furthermore, as doing so by virtue of its legislated

---

[56] *See id*.
[57] *See id*. at 71.
[58] *See id*. at 73.
[59] *See id*. at 71–73.
[60] *See id*. at 73.

character."[61] Specifically, in terms of American constitutional jurisprudence and culture,[62] Michelman finds that one of the features of the social practice to which acceptance-based constitutional theories attribute legitimacy suggests something that would contradict legal nonvolitionalism: "participants refer all questions about legal authority and validity to sets of standards to which . . . they attribute *the character of having been intentionally legislated*."[63] While such attribution is a social practice, what matters to the legitimacy of the constitutional order is what the attribution entails. The United States Constitution derives its authority from the fact that it is the work of a special legislative author. In other words, "[t]he legal nonvolitionalist argument . . . does not preclude but rather sharpens the position that we trace the Constitution's bindingness on us at least partly to its reputation-as-legislated."[64] Moreover, Michelman notes, "[i]n the face of an apparently cogent refutation of any essential tie between the legal force of a country's constitution and attribution of its authorship, we persist in tying our constitution's authority for us . . . to attributions of its authorship."[65] Thus, acceptance-based legal nonvolitionalism amounts to another content-independent

---

[61] *Id*. at 73 (emphasis omitted).

[62] Although Michelman builds on American constitutional jurisprudence, Larry Alexander, in his characterization of Michelman's account of the "authority-authorship syndrome," notes that no constitutional regime can escape it. *See* Larry Alexander, *Introduction*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, *supra* note 10, at 1, 6. *See also* Ulrich K. Preuss, *Constitutional Powermaking of the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 143,143–144 (Michel Rosenfeld ed., Duke Univ. Press 1994) (noting the prevalence and significance of the grounding of the constitution in men's will in the constitutional tradition of the European continent).

[63] Michelman, *Constitutional Authorship*, *supra* note 10, at 73 (emphasis added).

[64] *Id*.

[65] *Id.* at 73–74.

concept—the idea of constitutional authorship—at least in the constitutional regime and culture of the United States.[66]

2. Michelman's engagement with authorship

Constitutional authorship—or, simply, authorship—lies at the center of the third conventional approach to legitimacy described by Michelman. He establishes the concept of constitutional authorship by asking: "Does the statement ['The United States has a good constitution'] . . . carry praise of any *agent* for making our constitution a good one?"[67] "[I]t does," Michelman claims, "because we incorrigibly think of good constitutional charters or regimes not as blessings that luckily befall us as strength and health befall [an] animal, but as designed creations by responsible human authors and as laws . . . whose expressly legislated character is a part, at least, of what gives them their claim on our allegiance and support."[68] Michelman adds, "For us (for you), . . . a political-institutional constitution has always . . . the character of a law expressly and designedly laid down by politically circumstanced human agents, which gains its bindingness on us at least in part by force of its reputed intentionality as a product of their express political exertion."[69] Essentially, the author-based conception of constitutional legitimacy holds that "we owe respect to a constitution having

---

[66] The transmutation of the acceptance-based conception of constitutional bindingness to the author-based conception is not peculiar to the United States. It also exists, for example, in German constitutional jurisprudence. *See generally* Gerhard Casper, *The "Karlsruhe Republic:" Keynote Address at the State Ceremony Celebrating the 50th Anniversary of the Federal Constitutional Court*, 2 GERMAN L.J. No. 18, Dec. 1, 2001, http://www.germanlawjournal.com/article.php?id=111.

[67] *See* Michelman, *Constitutional Authorship*, *supra* note 10, at 65.

[68] *Id*.

such-and-such prescriptive content just because of who that constitution's authors were."[70] This is what Michelman calls "the authority-authorship syndrome."[71]

Michelman regards the author-based conception that "[t]he Constitution . . . is an enacted law, a piece of legislation, the intentional production of a political will" as the "sheerest banality," "a common vernacular notion that cannot withstand critical examination."[72] Nonetheless, he concedes that the authorial view of constitutional legitimacy is "inevitable."[73] The implications of inevitable banality or banal inevitability pose questions to Michelman's readers: Do they suggest that belief in the legitimacy of the United States constitutional order is the result of a self-congratulatory, unexamined political cliché? Or, does the inevitability of the appeal to authorship indicate that something crucial to the whole idea of constitutional legitimacy is clouded by the label of "banality"?[74]

Michelman answers these questions with a strictly *modern* sensibility; it is simply unimaginable, to us, in this day and age, for a constitution to be no more than "blessings that luckily befall us as strength and health befall [an] animal."[75] At the core of the modern sensibility is the belief that we are rational and reasonable; we make critical judgments, creating the difference between experience and expectation. Based on

---

[69] *Id*. (emphasis added).
[70] Michelman, *Contract for Legitimacy*, *supra* note 10, at 126. *See also* WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION 189 (Johns Hopkins Univ. Press 1993).
[71] Michelman, *Constitutional Authorship*, *supra* note 10, at 67.
[72] *See id*. at 64.
[73] *See id*. *See also* Alexander, *supra* note 62, at 6; Bert van Roermund, *Sovereignty: Unpopular and Popular*, *in* SOVEREIGNTY IN TRANSITION 33, 47–48 (Neil Walker ed., Hart 2003).
[74] Michelman, *Constitutional Authorship*, *supra* note 10, at 64.
[75] *Id*. at 65.

our critical view of what we have experienced, we project our ideals into the future.[76] Insofar as the constitution is "a legally binding blueprint for constructing a rational society,"[77] it epitomizes "[the] modern social experience of the future as something designed." [78] This explains the deficiency of the acceptance-based concept of constitutional legitimacy; it leaves out the question of the participants' consciousness in the process of legal evolution. Attachment to constitutional authorship reflects the prominence of human agency in modern society.[79]

At the center of constitutional authorship is the idea that the legitimacy of the constitution is built on the nature of the relationship between us, who live under a constitutional regime, and the authors of that regime. According to Michelman, the we-they relationship is more than one of mere association. It is a relationship of "allegiance," in which "you and I might consider ourselves and the country bound to [the authors'] word by communal ties."[80] Addressing whether this allegiance is in harmony with his modernist, critical philosophical-anthropological view of rational agency,[81] he recalls his observation (which this article calls his "incorrigibility proposition") that "we *incorrigibly* think of good constitutional charters . . . as laws . . . whose expressly

---

[76] *See* REINHART KOSELLECK, THE PRACTICE OF CONCEPTUAL HISTORY: TIMING HISTORY, SPACING CONCEPTS 45–147 (Todd Samuel Presner et al. trans., Stanford Univ. Press 2002).

[77] PREUSS, *supra* note 6, at 31.

[78] Přibáň, *supra* note 21, at 472.

[79] This attachment to constitutional authorship may turn out, arguably, to be to the actual design of the constitutional architecture rather than to the agency of constitutional architects. Still, situated in the presumed modern sensibility that Michelman identifies, it must trace back to the agency from which the actual design originates. This is what differentiates constitutional authorship from legal nonvolitionalism in terms of the legitimacy of constitutional democracy. The author owes this distinction to Paul Kahn's critical interrogation.

[80] *See* Michelman, *Contract for Legitimacy*, *supra* note 10, at 126.

legislated character is a part, at least, of what gives them their claim on our allegiance and support."[82]

Michelman elaborates on the "we" that features as the subject in the "incorrigibility proposition," which he sees as the key to constitutional authorship. The "we" is not merely a pronoun or a syntactic element but, instead, according to Michelman, refers to *us*—We the Observant Citizen-Readers—including all those reading his *Constitutional Authorship* at present as well as in the past or future.[83] We the citizen-readers are urged to ask ourselves: What is the relationship between us and the authors of the constitution that makes us owe allegiance to their opus?[84] The answer, Michelman holds, is that the allegiance is based on who the constitutional authors are, not on what they have authored. Thus, in order to conceive of a relationship of allegiance based on the identity of the constitution's authors rather than on its contents and, at the same time, to take seriously the "burden of judgment" concerning the legitimacy of the constitutional order, the author-based conception of legitimacy centers on the conceit that we, the observant citizen-readers, are "identical" with those constitutional authors. Yet, the question is: How is it possible for us to identify with these authors given Michelman's critical, individualist philosophical-anthropological point of view?

---

[81] *See* Michelman, *Constitutional Authorship*, *supra* note 10, at 87. On this individualist philosophical-anthropological view, the legitimacy question poses a "burden[] of judgment" on every citizen. *See id*. at 88–89.

[82] *Id*. at 65 (emphasis added).

[83] *See id*.

[84] *Cf.* PAUL W. KAHN, THE REIGN OF LAW: *Marbury v. Madison* AND THE CONSTRUCTION OF AMERICA 184 (Yale Univ. Press 1997).

This question lies at the heart of theories regarding the rule of law as self-government, epitomized by Rousseau's concept of "general will."[85] In explaining the general character of the law, Rousseau wrote, "[w]hen the people as a whole makes rules for the people as a whole, it is dealing only with itself; and if any relationship emerges, it is between the entire body seen from one perspective and the same entire body seen from another, without any division whatever."[86] Rousseau employs the notion of general will to link the one (the ruler) to the many (the ruled), making possible the idea of the rule of law as self-government.[87]

To Michelman, however, the idea of general will does not shed much light on how the collective sense of "we" or the construct of "we" would emerge. Rather, it sounds like "a romantic dream of universal participation."[88] To implement universal participation, plebiscites are generally considered to be the institutional replacement of representative democracy. Specifically, a plebiscite asking the electorate to say "yes" or "no" by vote is perceived as the modern substitute for the acclamation of the people assembled in a stadium or on the street. On those ideal occasions, when the ruler acts in accordance with "the consent or disapproval by a simple calling" from the assembled masses, the acclaimed ruler and the acclaiming ruled are seen to become practically identical.[89] Thus, when put into action, the ethereal idea of general will does not always

---

[85] *See also* Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2690 (2003).
[86] JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 81 (Maurice Cranston trans., Penguin 1968) (1762).
[87] *See* ROUSSEAU, *supra* note 86, at 81–83.
[88] van Roermund, *supra* note 73, at 42.
[89] *See* CARL SCHMITT, CONSTITUTIONAL THEORY 131–135, 272–279 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928). *See also* CARL SCHMITT, THE CRISIS OF PARLIAMENTARY DEMOCRACY 16–17

connote democracy or self-government. In fact, a vision of plebiscitary democratic dictatorship finds its inspiration in Rousseau.[90] Worse still, in the early 1930s, Carl Schmitt even fancied the Führer's pronouncement of the law in a racially homogeneous society to be the realization of the dream of "actual identity between the ruler and the ruled."[91] Taken together, once understood as actual sameness, identification between ruler and ruled can be imagined to exist only in the instantaneous "immanence" in which the ruler speaks his will into law, while the ruled mass acclaims his pronouncements.[92]

In view of these historical lessons, is Rousseau's proposition that "the people as a whole makes the rule for the people as a whole" merely a tragic myth? Or, is there any way to make sense of this Rousseauian fable? To what does the identity between the ruler and the ruled point other than actual sameness? While Michelman does not explore these issues, his "incorrigibility proposition" suggests the conceptual structure within

---

(Ellen Kennedy trans., MIT Press 1985). For a critique of Schmitt's idea of democracy by acclamation, see HABERMAS, *supra* note 39, at 184–185.

[90] *See* Melvin Richter, *Toward a Concept of Political Illegitimacy: Bonapartist Dictatorship and Democratic Legitimacy*, 10 POL. THEORY 185 (1982); William Henry Chamberlin, *The Jacobin Ancestry of Soviet Communism*, 17 RUSSIAN REV. 251 (1958).

[91] *See* CARL SCHMITT, *State, Movement, People: The Triadic Structure of Political Unity*, *in* STATE, MOVEMENT, PEOPLE: THE TRIADIC STRUCTURE OF POLITICAL UNITY (INCLUDING THE QUESTION OF LEGALITY) 3–54 (Simona Draghici trans., Plutarch 2001) (1933). This does not mean that Rousseau's theory leads to Hitler's rise to power. Nor does it mean that Hitler's Nazi regime is the culmination of Rousseau's general will. The point here is that Rousseau's mysterious general will is open to dictatorship, even totalitarianism, although dictatorship may be embodied by President Lincoln instead of Robespierre or Hitler. *Compare* Eric Lott, *The Eighteenth Brumaire of Abraham Lincoln: Revolutionary Rhetoric and the Emergence of Bourgeois State*, 22 CLIO 157 (1993) (discussing President Lincoln as the embodiment of democratic dictatorship in Rousseau's theory), *with* Richard Brookhiser, *Springtime for Rousseau*, *in* THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000, at 250 (Arthur J. Jacobson & Michel Rosenfeld eds., Univ. of California Press 2002) (noting the link between Rousseau and Hitler). *See also* CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 224–230 (Transaction ed. 2002) (1948) (discussing the "Lincoln Dictatorship"). The author thanks Paul Kahn for bringing the role of President Lincoln as a democratic dictator to his attention.

[92] *Cf.* CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 30, 49 (George Schwab trans., MIT Press 1985) (1922).

which the Rousseauian proposition would operate. Explaining the former, Michelman emphasizes, "I use [we] to refer to whoever *reading* this will admit to thinking . . . in the ways I am here beginning to map, my use of it thus representing my bet that you[,] Reader, are one of the party [who attributes the constitution to an author]."[93] The fact that Michelman is so confident that the "we" in his "incorrigibility proposition" emerges when readers engage with the text—and stands not only "for us" but also "for you"[94]—suggests an understanding of identity as constructive reflexivity instead of actual sameness.[95]

To illustrate the difference between actual sameness and constructive reflexivity with regard to the construction of identity, let us focus, first, on the situation of the first-person singular. Understood as actual sameness, the identity of the first-person singular centers on the question "What am I?"[96] Individuals that can be observed objectively define the identity of the first-person singular. In contrast, in terms of constructive reflexivity, the central question about the identity of the first-person singular is "Who am I?"[97] This question cannot be answered ostensibly, by pointing to objective characteristics. Instead, we can only get a sense of "who I am" by entering into an inner dialogue between the different selves in various aspects of personal life and by

---

[93] Michelman, *Constitutional Authorship*, *supra* note 10, at 65 (emphasis added).
[94] *See id*.
[95] These two distinct understandings of identity are derived from the distinction that Paul Ricoeur made between *idem* and *ipse*. *See* PAUL RICOEUR, MEMORY, HISTORY, FORGETTING 80–82 (Kathleen Blamey & David Pellauer trans., Univ. of Chicago Press 2004). *See also* van Roermund, *supra* note 73, at 42; Hans Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 9, 14–17 (Martin Loughlin & Neil Walker eds., Oxford Univ. Press 2007).
[96] *See* Lindahl, *supra* note 95, at 14.
[97] *See id*.

embarking on the process of narrating personal experiences with which we map out the identity of the first-person singular.[98] For example, a clone is identical to its original in terms of objective features and perhaps subjective dispositions as well, but still they may tell different personal stories.[99]

Bearing in mind the distinction between these two meanings of identity, let us move, now, to the situation of the first-person plural "we." Given that individuals are not identical in nature, it would be unintelligible to understand the identity of the first-person plural as actual sameness unless this "we" is narrowed and understood as the sense of collectivity that results from those exceptional, transitory moments in which a single voice speaks out not because personal identities are forcefully suppressed but because they are temporarily forgotten in the moment of immanence.[100] Thus, the identity of the first-person plural "we" cannot be made sense of by generalizing the common characteristics of the individuals who partake of the first-person plural "we." Rather, it is constructed around a common "project" that individuals share with one another.[101] While this shared project may be traced to particular minds,[102] to hold individuals

---

[98] *See*, *e.g.*, TZVETAN TODOROV, THE POETICS OF PROSE 74 (Richard Howard trans., Cornell Univ. Press 1977) ("narrative equals life; absence of narrative, death"). Essayist and literature scholar Reynolds Price suggests that since time immemorial, stories have been concerned with "arrang[ing] the evidence of daily life into sequential, even causal patterns implying *order*." REYNOLDS PRICE, A PALPABLE GOD: THIRTY STORIES TRANSLATED FROM THE BIBLE WITH AN ESSAY ON THE ORIGINS AND LIFE OF NARRATIVE 26 (Atheneum 1978). *See also* Gerald J. Postema, *Melody and Law's Mindfulness of Time*, 17 RATIO JURIS 203, 211 (2004).

[99] *See generally* Søren Holm, *A Life in the Shadow: One Reason Why We Should Not Clone Humans?*, 7 CAMBRIDGE Q. HEALTHCARE ETHICS 160 (1998).

[100] *See* SCHMITT, *supra* note 92, at 49. *Cf.* Emilos Christodoulis, *Against Substitution: The Constitutional Thinking of Dissensus*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM, *supra* note 95, at 189, 195–97, 202.

[101] *See* Lindahl, *supra* note 95, at 15.

[102] This is "the performative element" in any invocation of "we." *See* Christodoulis, *supra* note 100, at 202.

together as a first-person plural "we," it needs to be open to deliberation and reflection among the individuals involved.[103] If the particular project is forced on individuals, it may still succeed in bundling them together, but it falls short of bringing about a sense of collective identity. For this reason, the common project at the heart of the identity of the first-person plural "we" is similar to the personal story central to the question "Who am I?"[104] This project, constituting the identity of the first-person plural "we," is to be narrated and codetermined through the dialogues that take place among the component individuals of the "we."[105]

The reflexive relationship shared by individual participants, when involved in a mutual constitutional project, is the conceptual structure in which Michelman uses "we" in his "incorrigibility proposition." Engaged in the shared activity of making sense of his "incorrigibility proposition," readers join the author, Michelman himself, in a dialogue around the idea of "an incorrigible constitution."[106] It is through this dialogic reflection that the collective identity of "we," in the sense of constructive reflexivity, emerges in

---

[103] *See* Ulrich K. Preuss, *The Exercise of Constituent Power in Central and Eastern Europe*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM, *supra* note 95, at 211, 215–216. *See also* Postema, *supra* note 98, at 209–213.

[104] To constitute human life as ordered against chaos, William F. Harris argues that there are two "composition" approaches: language and polity. In general, the linguistic order of composition is the "story," which is "the codification of life's events in language." Moreover, in this line of reasoning, a story of origins would become "a canon of authority for the identity of a people" because it is to be redacted to accommodate subsequent events in the communal life in the hermeneutical process that centers on the particular story of a particular political community. *See* HARRIS, *supra* note 70, at 48–50 (citation omitted).

[105] *See* Preuss, *supra* note 103, at 216. *See also* Lindahl, *supra* note 95, at 14–16. *Cf.* Christodoulis, *supra* note 100, at 200–06.

[106] *Cf.* Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U.L. REV. 893 (1990).

Michelman's "incorrigibility proposition," which is constitutive of us, the observant citizen-readers, and of them, the constitutional authors.[107]

Taken together, the identification of us citizens with the constitutional authors, which lies at the heart of the idea of constitutional authorship and bridges the gap between the ruler and the ruled in Rousseau's proposition on the general character of the law, is conceptually resolved by understanding identity as constructive reflexivity.[108] Moreover, at the heart of constitutional authorship is the ideal of the rule of law as self-government: "the people as a whole makes rules for the people as a whole."[109] Thus, the first-person plural subject of "we" in the idea of constitutional authorship, which consists of us citizens and the constitutional initiator-revolutionaries, always acts in the name of "the people."[110] This is the conceptual matrix in which "We the People" grounds the concept of constitutional authorship.

As the preceding section shows, in the final analysis, both constitutional contractarianism and legal nonvolitionalism must be grounded, one way or another, in some form of constitutional authorship. Understood as constructive reflexivity, the idea of constitutional authorship and the identity of "We the People" can be inferred from Michelman's critical, philosophical-anthropological view of rational agency and without reducing constitutional authorship to democratic dictatorship as history has suggested.

---

[107] *See* Michelman, *Constitutional Authorship*, *supra* note 10, at 65.

[108] Rousseau himself suggested a reflexivity reading of the Rousseauian proposition, which he left unexplored. Following the proposition that "[w]hen the people as a whole makes rules for the people as a whole," Rousseau wrote, "it is dealing only with itself." *See* ROUSSEAU, *supra* note 86, at 81. *See also* van Roermund, *supra* note 73, at 42 (citation omitted).

[109] *See* ROUSSEAU, *supra* note 86, at 81.

[110] *See* Preuss, *supra* note 103, at 213.

The inclusiveness implied by the reflexive construction of the first-person plural authorship of "we" and the emphasis on human agency seem to explain why enchantment with constitutional authorship is "inevitable."[111] It remains unclear, however, whether Michelman would be thus enchanted.

3. Michelman's systematic proceduralism in "Ida's way": A presentist view of constitutional legitimacy

While observing that the author-based conception of constitutional bindingness is gaining currency in American constitutional debates and discussions,[112] Michelman decides, nonetheless, to distance himself from it, taking what he calls "Ida's way," even at the expense of the whole notion of the constitution as a legitimacy contract" underpinned by constitutional authorship.[113] He turns, instead, to the concept of "full-merits legitimation" of constitutional democracy.[114] Why? It is not because understanding constitutional authorship as a function of constructive reflexivity ignores the empirical issues of constitutional legitimacy, as legal nonvolitionalism attempts to do.[115] Bruce Ackerman's account of American political history and constitutional change, for example, provides empirical evidence in support of the possibility that

---

[111] *See supra* text accompanied by notes 2–9.

[112] *See* Michelman, *Contract for Legitimacy*, *supra* note 10, at 126–127 & n.109.

[113] *See* Michelman, *Ida's Way*, *supra* note 10, at 347–352; Michelman, *Judicial Supremacy*, *supra* note 10, at 611 (arguing that no American political contract is expressed in the Constitution and pinning the hope for political legitimacy on "the possibility . . . that we do not need a national political contract"). *See also* Michelman, *Reply*, *supra* note 10, at 654–57 (agreeing with Edwin Baker's rejection of constitution-as-contract).

[114] *See infra* text accompanied by notes 122–125.

individuals concerned about their private interests may turn into citizens focused on public affairs, leading to the emergence of "We the People" as constitutional authorship.[116] If not an empirical issue,[117] what is it that sets Michelman on Ida's way?[118] This article contends that the view of legitimacy put forth in the latter, as well as in other essays, shows that he fails to escape from the enchantment of constitutional authorship; his journey attests, instead, to the inevitability of constitutional authorship and sheds light on the transtemporal character of political identity.

Michelman identifies two positions relating to the legitimacy of constitutional democracy: "constitutional legitimation" and "full-merits legitimation."[119] What characterizes constitutional legitimation is that the legitimacy of a particular exercise of political power in a constitutional democracy is translated into a question of constitutionality. Thus, all forms of political power under constitutional democracy are legitimate to the extent that they conform to the constitution.[120] The constitution stands

---

[115] According to Michelman, constitutional authorship substantiates the empirical part legal nonvolitionalists left out of their theoretical architecture, at least in the context of American constitutional culture. *See* Michelman, *Constitutional Authorship*, *supra* note 10, at 73.

[116] *See* ACKERMAN, *supra* note 4, at 230–249.

[117] Nevertheless, whether a narrative of constitutional authorship, as Ackerman suggests, is convincing enough to Michelman is not clear. In his series of essays on constitutional legitimacy, Michelman seems skeptical about citizens' ability to reach, collectively, a consensus on normative principles; rather, he puts stress on the phenomenon of reasonable disagreement. *See supra* text accompanying notes 16–22. In contrast, in his earlier works on civic republicanism, Michelman indicates his hope for citizens' ability to self-legislate by introducing the notion of "jurisgenerative politics," in which "private-regarding 'men' become public-regarding citizens and thus collectively a 'people.'" *See* Michelman, *Why Constitutionalism*, *supra* note 48, at 301, 306. *See also* Ciaran Cronin, *On the Possibility of a Democratic Constitutional Founding: Habermas and Michelman in Dialogue*, 19 RATIO JURIS 343, 360–61 (2006).

[118] *See* Michelman, *Ida's Way*, *supra* note 10. *See also* Michelman, *Reply*, *supra* note 10.

[119] *See* Michelman, *Constitutional Legitimation*, *supra* note 10, at 4.

[120] *See id*. at 3-4.

as a "legitimacy contract" in constitutional democracy.[121] In contrast, according to Michelman, "full-merits legitimation" pins the legitimacy of a disputed exercise of political power on "[the] direct, approving judgment [on the part of citizens] of [its] rightness, goodness, aptness, and prudence . . . *all things considered*."[122] On this view, the legitimacy of a particular exercise of political power relates to the functioning of the constitutional regime as a whole. A judgment on the legitimacy of a particular act of political power is a function of an all-things-considered evaluation of the total performance of the constitutional regime.

Michelman distances himself from the three major theoretical strands, all of which center on the idea of constitutional legitimation, preferring a position of "full-merits legitimation." With regard to the latter, he identifies three deviations from the constitutional legitimation concept. First, his theory departs from the notion that the legitimacy of ordinary legal acts translates as "constitutionality," with the constitution serving as the "legitimacy contract" for ordinary legal acts. In contrast, "full-merits legitimation" is inclined toward "an all-things-considered, full-merits judgment."[123] According to the view in "Ida's way," the legitimacy of constitutional democracy must be assessed in light of "the governmental totality" of the system in which the constitution operates.[124] This judgment centers on "whether [the system's] total

---

[121] *See* Michelman, *Contract for Legitimacy*, *supra* note 10, at 120–121.
[122] *See* Michelman, *Constitutional Legitimation*, *supra* note 10, at 4 (emphasis added).
[123] *See id*.
[124] *See* Michelman, *Ida's Way*, *supra* note 10, at 347–348.

performance is good enough, on the whole, to be accepted [by individual citizens] considering the practical, imaginable alternatives."[125]

Second, full-merits judgment deviates from the completeness of the constitution that is assumed by the concept of constitutional legitimation. To the extent that "judgments of constitutional bindingness [are] strictly a function of sundry full-merits judgments,"[126] "the constitution is incomplete."[127] Rather than serving as the complete legitimacy contract under which ordinary statutes and their enforcement are evaluated, Michelman explains, "[t]he constitution [through the lens of full-merits legitimation] becomes as good or bad, as valid or invalid, as binding or non-binding, as worthy or unworthy of respect, as *the entire corpus juris* over which in a sense it presides but of which it merely is a part."[128] Thus, the constitution, or rather, the entire contents of the constitution, consisting of substantive stipulations as well as procedural requirements, is considered "an institutional framework for use in settling sundry, concrete controversies in the field of public policy that practically require political resolution one way or the other."[129] Emerging from this understanding is a procedural view of the constitution. Thus, to the extent that procedure means the institution by which controversies of morality and public policy are resolved in accordance with "a test that is abstracted or deflected from the most immediate and concrete issues of morality and public policy that

---

[125] *Id.* at 348 (emphasis added).
[126] *See* Michelman, *Constitutional Legitimation*, *supra* note 10, at 14.
[127] *Id*. at 12.
[128] *See id.* at 14 (emphasis added).
[129] *See* Michelman, *Reply*, *supra* note 10, at 658.

are obdurately and divisively controversial in society," the constitution is procedural.[130] While the constitution functions as the institutional procedure through which such controversies are settled, it does not provide all the criteria under which acts of public authority are to be judged.

The third deviation of full-merits legitimation from constitutional legitimation concerns Ida's own subjectivity. Since constitutional legitimation requires that controversies concerning public authority be judged solely by criteria inhering in the constitution, constitutional interpretation becomes the pivotal activity in assessing constitutional legitimacy and, as a consequence, the image of an ideal judge tends to occupy a central position. Nevertheless, Michelman emphasizes that—through the lens of full-merits legitimation—Ida, who makes judgments on the total performance of the political system, stands in stark contrast to Dworkin's Hercules, who is a superjudge, although the governmental totality may evoke Ronald Dworkin's notion of "integrity."[131] Essential to the concept of legitimacy in "Ida's way" is the idea that "each member of the political community is authorized to decide what [the political system under] the Constitution means for him or herself."[132] Specifically, Ida, "[a] non-official personage," refers to any member of the political community who "attempt[s] to gauge the respect-worthiness of her country's extant system of government in [the] total performance way."[133] From Michelman's point of view, when each and every Ida is expected to be able to "accommodate the pull each reasonable

---

[130] *See id*.
[131] *See* Michelman, *Ida's Way*, *supra* note 10, at 348.
[132] Balkin, *supra* note 10, at 490.

[co-]participant will feel, for good reason toward finding [the governmental system] respect-worthy," the political institutions of constitutional democracy at issue are legitimate.[134]

Overall, Michelman's theory of the legitimacy of constitutionalism as practice centers on a "contract-independent, holistic-presentist assessment of the practice of [the existing constitutional regime]."[135] By substituting a holistic view of the constitutional system or the totality of governing practice for the constitution itself, Michelman resolves the problem of constitutional completeness over which constitutional contractarianism stumbles in the face of interpretive disagreement. The focus of attention switches from the completeness of the constitution to the totality of the governmental system in practice, of which the constitution is a part. Legitimacy or "respect-worthiness," he writes, "is not a fact, it is a judgment" at the present moment.[136] That judgment is located in the consciousness of the "first person," of the "I."[137] Thus, "[l]egitimacy . . . is, from the standpoint of a reciprocity-minded liberal, an insuperably and irreducibly decentralized, personal judgment."[138]

As a corollary, the origin of a current constitutional regime is not a central concern of the legitimacy query; it constitutes only one part of a systematic appraisal of the totality of governing practice. In other words, the presentist concern centers on the "moral supportability" of the existing political system—that is, whether the system

---

[133] Michelman, *Ida's Way*, *supra* note 10, at 348.
[134] *See id*. at 365.
[135] *See* Michelman, *Reply*, *supra* note10, at 658.
[136] *Id*. at 660.
[137] *Id*.

under which Ida lives should be considered legitimate and deserving of respect and observance.[139] Thus, the constitution, as well as the whole constitutional system, is regarded not as containing substantive judgments but, instead, as a functional procedure for settling controversies concerning public authority. Michelman sums up this presentist perspective of the constitutional system in practice as follows: The moral justifiability of supporting "the coercive operations of constitutional democracy in my country" is completely contingent on "*my* judgment that every [reasonable] person concerned has reason to accept the governmental system in place . . . although reasonable disagreements persist about whether the system in place is in all respects what justice requires."[140]

4. Toward constitutional authorship

While the presentist first-person standpoint of the legitimacy of constitutionalism as practice embodies Michelman's critical, philosophical-anthropological view of individual rational agency, it is also what sets him apart from the idea of constitutional authorship and the whole author-based concept of legitimacy. To him, the identitarian sense of "we" that emerges in the creation of the new constitutional project is merely "an empirical, contingent matter."[141] The legitimacy of the constitutional order must be a completely personal judgment that has no bearing on a collective "we" apart from

---

[138] *Id*. at 661.
[139] *See id*. 657.
[140] *Id*. at 660 (emphasis in original).
[141] Michelman, *Constitutional Patriotism*, *supra* note 10, at 1028.

individuals. In contrast, the conceptual matrix from which the first-person-plural "we" of constitutional authorship emerges already presupposes "some sort of unity" in the formation of identity, which is not merely contingent on personal judgment.[142]

While considering whether to incorporate a notion of identity in theorizing the legitimation of politics, Michelman considers the activity of constitutional interpretation. According to him, there are two alternative ways of characterizing debates over constitutional interpretation.[143] On the one hand, they can be viewed as debates "over the meanings or applications of a set [of] canonical items, already securely certified as acceptable to everyone as reasonable, come what may in dispute over how to apply them."[144]

Of this view Michelman observes "a nominal constitutional essential's rational acceptability to the reasonable,"[145] which is "independent of what that nominal essential is going to turn out in practice to mean."[146] Prior to the conclusion of the interpretive activity, the acceptability of constitutional essentials that constitute the object of interpretation has been assumed without being critically judged. This suggests that "anyone could purport to judge that any given regime is justified, *without* having to wait forever to see how every one of a never-ending succession of interpretive disputes is going to be resolved."[147]

---

[142] *See also* van Roermund, *supra* note 73, at 44–45.
[143] *See* Michelman, *Constitutional Patriotism*, *supra* note 10, at 1024. *See also* Michelman, *Why Constitutionalism*, *supra* note 48, at 305.
[144] *See* Michelman, *Constitutional Patriotism*, *supra* note 10, at 1024.
[145] *Id*..
[146] *See id*..
[147] *See id*. (emphasis added).

From Michelman's perspective, this characterization of constitutional interpretation rests on constitutional authorship and contradicts his philosophical-anthropological position. As noted above, at the center of constitutional authorship in the vein of constructive reflexivity is the identity of the first-person plural "we," which emerges from the process of deliberations centering on the constitution or, rather, on the set of constitutional essentials as a common project.[148] During the time when intentional action such as a project is prospectively oriented and temporally extended, an initial or *ex ante* moment in the development of a common project in which a *strictly forward-looking* perspective is held by all participants is conceivable. At that exceptional moment, to be "common," the project is open to deliberation without assuming any preexisting structure that would organize the deliberations. Correspondingly, it is at that moment that the identity emerges on the identitarian model of constructive reflexivity: a first-person plural "we" materializes in the process of dialogue on the content and future of this "project."[149] Yet, a constitutional project is not only extended in time but conceived to extend down the generations.[150] Later generations that enter into the dialogue on the deliberative development of a constitutional project—part of which is constitutional interpretation—will have to walk the path taken by preceding generations of "We the People."[151] This does not mean that those who come after that initial constitutional moment or generation cannot change the

---

[148] *See supra* text accompanying notes 101–110.
[149] *See* Postema, *supra* note 98, at 211–212.
[150] *See* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (Yale Univ. Press 2001). *See also* Richard S. Kay, *Constitutional Chrononomy*, 13 RATIO JURIS 31, 33–37 (2000).

project's course—only that, to partake of "We the People," they first must address what was set out by their forebears.[152] Emerging from this cross-generational relationship is a transtemporal constitutional identity.[153] Constitutional authorship is transtemporal. Underlying this view is Michelman's first characterization of constitutional interpretation as the attempt to uncover the meaning of given constitutional provisions, which are assumed to be "acceptable to the reasonable."[154] The problem for Michelman is that this view posits acceptance as preceding the establishment of meaning; he finds the notion of acceptance without knowledge unacceptable.

Alternatively, Michelman proposes that debates concerning constitutional interpretation may be characterized as hinging on "which of the contesting meanings or applications [of essential constitutional items] will render these items acceptable to everyone as reasonable."[155] According to his presentist, first-person, systematic view of constitutionalism as practice, nothing is presumed because Ida cannot make a judgment regarding legitimacy without "full knowledge" of the content of constitutional essentials.[156] In contrast to the first characterization above, under the second view constitutional interpretation seems to Michelman to presuppose neither the transtemporality of a constitutional project nor the acceptability of constitutional essentials. To a presentist Ida, the point of undertaking constitutional interpretation is not

---

[151] *See also* Postema, *supra* note 98, at 211–212.
[152] *See id*. at 224–225. *See also* RUBENFELD, *supra* note 150.
[153] *See generally* Paul W. Kahn, *Political Time: Sovereignty and the Transtemporal Community*, 28 CARDOZO L. REV. 259 (2006).
[154] *See* Michelman, *Constitutional Patriotism*, *supra* note 10, at 1024–1025.
[155] *Id*. at 1024 (emphasis omitted).
[156] *See* Michelman, *Ida's Way*, *supra* note 10, at 358, 362.

to identify the meaning of given constitutional provisions but, rather, to discover how to render them acceptable for application to the particular controversy she faces. Centering on a particular constitutional provision does not mean that that provision is already "acceptable to everyone as reasonable."[157] The provision at the center of interpretation functions merely as the horizon on which different views on a particular issue engage with each other. The legitimacy of the constitutional system as a whole—including the provisions that serve as the engaging horizon—is a function of the all-things-considered judgment resulting from the debate over which of the competing meanings of essential constitutional items will be adopted by the system's interpreting institution in order to "render these items acceptable to everyone as reasonable."[158] Thus, the second view of contentions over constitutional essentials is the one that would correspond to "Ida's way."

Does "Ida's way" propose a viable theoretical alternative to the identity-embedded concept of constitutional authorship in accounting for constitutional legitimacy? The answer can be illuminated by a closer look at the structure of Ida's presentist, full-merits view of legitimacy. As noted above, characteristic of Ida's approach to constitutional interpretation—Michelman's second alternative—is her indifference to the character of the essential constitutional items.[159] Instead, those disputed constitutional provisions are functionally reconstructed; together with the institutions and procedures in the constitutional system, they constitute a functional

---

[157] Michelman, *Constitutional Patriotism*, *supra* note 10, at 1024.
[158] *See id*. at 1024 (emphasis omitted).
[159] *See supra* text accompanying notes 156–158.

mechanism in which controversies concerning public authority are settled.[160] From Michelman's point of view, Ida resorts to this functional mechanism not as the result of historical necessity but, instead, because of a contingent fact: it exists and is accessible to her.[161] But why does a critically minded Ida, who does not accept anything without full knowledge of it, choose this particular existing and accessible functional institution over others?

Based on what Rawls calls "Hobbes's thesis"—to the effect that a government's readiness to enforce legal ordering is the necessary condition for the production of "goods of union"[162]—Michelman acknowledges that "[a] judgment regarding legitimacy refers . . . to a judgment regarding stability."[163] This means not that Ida herself equates legitimacy with stability in forming her judgment on legitimacy[164] but, rather, that her assumption that the existing institution is the proper functional mechanism to settle controversies concerning public authority arises from her inclination toward stability. Concern over stability is not irrational or unreasonable; however, stability alone does not account for Ida's choice of a controversy-resolving mechanism. It is only one of the factors weighed by a critically minded Ida as portrayed by Michelman, when she

---

[160] Specifically, the constitution, substantive as well as procedural, functions as "an institutional framework for use in settling sundry, concrete controversies in the field of public policy that practically require political resolution one way or the other." *See* Michelman, *Reply*, *supra* note 10, at 658.

[161] *See id*.

[162] *See* Michelman, *Ida's Way*, *supra* note 10, at 346 (citing JOHN RAWLS, POLITICAL LIBERALISM 211 (Columbia Univ. Press 1996)). Michelman substitutes "goods of 'union'" for Rawls' political good. *See id*.

[163] Michelman, *Reply*, *supra* note 10, at 661.

[164] In his reply to Balkin's characterization of his theory of the legitimacy of constitutional democracy, Michelman emphasizes "the depth of protestantism" in his theory and notes Balkin's mistaken attribution to him of a conflation of empirical judgments regarding stability and normative judgments regarding legitimacy. *See id*. at 659.

assesses to which existing institution she should turn. Suppose, for example, that the existing institution is tarnished by past prejudices against, say, political speech, and the secretary of defense is suing Ida for defamation on account of her criticism of his defense policies. While, as a presentist, Ida bases her judgment of legitimacy only on how the institution would decide her case, she is not ignorant of its reputation. Under such circumstances, her presumption in favor of the tarnished existing institution cannot be fully explained by her inclination toward stability, considering her critical thinking ability and disposition. It is not a matter of trading freedom for stability; rather, Ida's critical decision to stick with this institution suggests that she holds that her odds of winning the case are good if she does so.[165] How does she strike a balance between her inclination toward stability and her love of freedom in this situation?

This balance apparently rests on three interrelated attitudes that she holds regarding the existing institution, which have been lumped together and obscured under the umbrella of "stability." First, she has a sympathetic attitude toward the existing system, despite its past failure to live up to the principle of protecting political speech. Related to the first position above, Ida's weighing of freedom against stability indicates, as well, that she regards the institution's repressive past as aberrant rather than characteristic of the current governmental system. Third, it implies what Jack Balkin calls a "moral optimism" in Ida's attitude toward the existing institution.[166] From Ida's

---

[165] *Cf*. Balkin, *supra* note 10, at 495 (observing, in his discussion of Michelman's legitimacy theory, that Ida's faith in the future of the governmental system-in-place cannot be reduced to "probable belief").

[166] Jack Balkin characterizes Ida's three positions as "interpretive charity." *See id*. at 490. In this regard, the "interpretive charity" that Balkin identifies with Michelman's *Ida's Way* is similar to constitutional patriotism. *See* Michelman, *Constitutional Patriotism*, *supra* note 10, at 1022-28. As Jan-Werner Müller

perspective, the existing institution's past decisions in favor of restricting political speech were mere mistakes; the institution can correct itself and thus be trusted to adjudicate her case.

Thus, in the version of constitutional legitimacy portrayed in "Ida's way," we find, disguised as an inclination toward stability, Ida's "faith" in the self-correctability of the existing system. Implicit in her tolerant attitude, characterized by "writing off [moral mishaps in the systemic history] as 'mistakes,'"[167] is not merely a confidence in the future but a belief that the existing system contains mechanisms that will eventually correct all that has gone wrong.[168]

Although the preceding account of Ida's attitude toward the existing system seems to suggest that the constitution or, rather, the whole constitutional system-in-place is capable of promoting its own legitimacy "by being a common project of interpretation by different members of the political community,"[169] Michelman does not agree. He speaks of being "nervous" about the attributes of a common-project constitution.[170] According to him, any justification of constitutionalism as practice must be based on presentist first-person judgment; thus, he resists the notion of the constitution as a set object of the common project of interpretation. He does not accept a conception that can

---

points out, "constitutional patriotism exerts *additional* moral pressure to uphold the [governmental] system [as a whole]" when citizens "find themselves in a minority" and "feel that they have lost out on what for them is an important issue." *See* JAN-WERNER MÜLLER, CONSTITUTIONAL PATRIOTISM 55–56 (Princeton Univ. Press 2007).

[167] *See* Michelman, *Ida's Way*, *supra* note 10, at 364.

[168] *Cf*. Balkin, *supra* note 10, at 490–491.

[169] *See id*. at 492.

[170] *See* Michelman, *Reply*, *supra* note 10, at 659.

be justified "[only] by faith and not by works or by reason."[171] Ida's choice of the existing institution, Michelman emphasizes, rests on her belief in the common need for security, which stands apart from the historically oriented type of faith in a cross-generational common project and its corresponding transtemporal collective subject.[172] In other words, while Ida's belief that the existing institution under the constitutional system-in-place will get her case right sounds like "constitutional patriotism" or "constitutional faith" that connotes a common-project constitution,[173] from Michelman's perspective, her belief is simply "a faith in the efficacy of reason in history."[174]

In sum, the idea of "faith" in Michelman's presentist, holistic view of legitimacy plays a role in each of Ida's singular acts of reasoning and has less to do than with who Ida is. So construed, the Michelmanian "Ida's way" might hold up without being tarnished with the traces of constitutional authorship. Yet, this mission would be accomplished at a cost. The price is the very idea that legitimacy is a public matter at the center of a democratic society. The presentist, first-person standpoint of "Ida's way" suggests a tendency to treat the appraisal of legitimacy as "a private matter of each individual with his or her own conscience."[175] To maintain the query as a public matter,

---

[171] *See* Michelman, *Faith and Obligation*, *supra* note 10, at 659–660.
[172] *See id.* at 659–664; Michelman, *Reply*, *supra* note 10, at 659–661. *Cf.* Balkin, *supra* note 10, at 492–497.
[173] *See* Michelman, *Faith and Obligation*, *supra* note 10, at 656–659. *See also* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 72–74 (Princeton Univ. Press 2008).
[174] *See* Cronin, *supra* note 117, at 367 (noting Michelman "in the same boat as Habermas," who holds "faith in the efficacy of reason in history").
[175] *See id*. at 361. *See also* Michelman, *Reply*, *supra* note 10, at 660–661; Michelman, *Ida's Way*, *supra* note 10, at 364–365.

Michelman believes that an intersubjective "we" will materialize in the judgment of legitimacy.[176] Is the "we" that is understood here, from Michelman's presentist, first-person standpoint of legitimacy, ahistorical and thus distinct from "We the People" of constitutional authorship?

In "Ida's way," the assessment of legitimacy is considered personal; however, the choice of controversy-resolving mechanism is not made by any single Ida. Whether an existing institution with a history of repressing political speech appears reliable to Ida, as an impartial mechanism for adjudicating her present case, depends on Ida's calculation of several variables, based on her personal judgment.[177] However, in a controversy or a case, the personal judgments of two or more parties are involved; these judgments must converge on the choice of a resolution mechanism.[178] Thus, as parties to a controversy, a number of Idas are involved in a two- or multiparty "intended action."[179] Justifying the choice of a particular institution as the mechanism to resolve the controversy is an integral part of constitutional interpretation, which aims to "render [essential constitutional] items acceptable to everyone as reasonable."[180] From the perspective of a presentist, critically minded Ida, the decision must be justified every time a controversy concerning public authority seeks resolution through constitutional interpretation. In the name of stability, however, the part of constitutional interpretation regarding the choice of institutional mechanism as conceived in "Ida's way" consistently comes to the same

---

[176] *See* Michelman, *Reply*, *supra* note 10, at 660.
[177] *See id*. at 660–661.
[178] *See* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 2–11 (Oxford Univ. Press 2000).
[179] *See* Postema, *supra* note 98, at 209–210.

conclusion. In other words, once justified, the institution becomes the presumptive institution of choice for subsequent interpreters, carrying over into the future. Does this not suggest that constitutional interpretation as envisaged in "Ida's way" is subject to a transtemporal framework, at least in regard to the choice of the controversy-resolving mechanism?

Michelman might assert to the contrary that "[t]o Ida, every moment is seen as if it had no past and thus as a kind of new beginning."[181] As a presentist, in each instance of constitutional interpretation, Ida may act like a revolutionary who "resolutely turn[s] [her] back on [her] past in order to build a radically new future."[182] In this picture, choosing a particular institution every time would not be part of a transtemporal project but, rather, would result from "normative coherence as an ideal property of legal system *at a given moment in time*, of a momentary legal system."[183] Yet, Michelman's Ida does not interpret the constitutional system-in-place at a given moment in time without bearing in mind the impact of her present interpretation on her future position. As noted above, even if the conception of legitimacy in "Ida's way" is a personal judgment on whether the existing institution will "render [essential constitutional] items acceptable to everyone as reasonable,"[184] it must involve more than a single Ida. Ida A's presentist judgment on the institution-in-place and her interpretive position on the disputed essential constitutional item will be assessed by her contemporary fellow Idas within and

---

[180] *Cf*. Michelman, *Constitutional Patriotism*, *supra* note 10, at 1025.
[181] The author owes this perceptive observation to Paul Kahn.
[182] Postema, *supra* note 98, at 211.
[183] *See id*. at 222 (emphasis in original).
[184] *See* Michelman, *Constitutional Patriotism*, *supra* note 10, at 1024.

outside the controversy. Moreover, once adopted by the deciding institution, Ida's interpretive position would become part of the record of the institutional mechanism in charge of resolving the controversy, which would impinge, in turn, on the rational decision of future generations concerning that institution. Thus, the assumed rational adherence to a particular chosen institution in "Ida's way" reflects the fact that the justification for choosing the particular controversy-resolving mechanism in the past must be accepted by contemporary Idas and can be carried over. In other words, when Idas in the past chose the institution in preference over others, they already took into account the impact of their decision on the future.

This does not mean that present-day Idas are bound by the decision of Idas of past generations. Moreover, Ida herself may "resolutely turn [her] back on [her] past" in every instance of constitutional interpretation and thus make her position "momentary."[185] Nevertheless, her constant adherence to a particular institution, as an integral part of constitutional interpretation in Ida's "presentist, full-merits" view of legitimacy, indicates that the time frame conceived in Ida's interpretation of the constitution is not momentary but extends beyond the present instance. Without any concern for the future, the present generation would not make an institutional choice that critically minded future generations would accept. Retaining the initial institutional choice as the default mechanism for deciding controversies becomes the common purpose of every instance of constitutional interpretation.

---

[185] *See* Postema, *supra* note 98, at 211–212, 222.

Moreover, if the time frame conceived of in each instance of constitutional interpretation is temporally extended, a transtemporal project will be necessary to include and connect all temporally extended positions on the meaning of the constitution.[186] Without this transtemporal purpose, the choice of a default controversy-solving institution will lose normative coherence. If this choice is an integral part of Michelman's conception of constitutional interpretation, and if it is undertaken within a transtemporal framework, the whole enterprise of constitutional interpretation remains within the same time frame. Each constitutional interpretation may seem to be presentist because it is not commanded by the past. Nonetheless, under the transtemporal framework, instances of constitutional interpretation constitute a common project.[187] Without the expectation of a future on which a present interpretive position will have influence, the present decision is emptied of significance and taken lightly, to be decided *de novo* in the next instance of interpretation.[188] Thus, the legitimacy described in "Ida's way" still suggests a projection forward to the future and backward to the past.[189]

As discussed above, at the center of constitutional authorship in the vein of constructive reflexivity is the identity of the first-person plural "we," which emerges from the process of constitutional deliberation as a transtemporal common project. In this view, interpretation undertakes to uncover the meaning of given constitutional

---

[186] *Cf*. *id*. at 222.
[187] *See* RUBENFELD, *supra* note 150.
[188] *See* Postema, *supra* note 98, at 209.
[189] *See id*. at 219–225. *See also* Balkin, *supra* note 10, at 494.

provisions.[190] The analysis herein shows that the holistic, presentist, first-person judgment of legitimacy in the form of constitutional interpretation takes place within a transtemporal framework under which an intersubjective "we" would form among Michelman's Idas interpreting the constitution.[191] Thus, in "Ida's way," the notion of "constitutional identity" is transtemporal as well. At the core of the constitutional system lies something deeper and richer than the existing political regime, transcending the institutional performances of particular periods.[192] This makes Ida's interpretive activity part of the unfolding of the core of the constitutional system. If this presumed common frame of mind and transtemporal constitutional identity grounds Ida's judgment regarding legitimacy, it is self-contradictory that Michelman refutes the presupposed identitarian sense of "we" in the formation of a first-person plural authorial subject of the constitution "We the People." Michelman's expressly presentist position notwithstanding, his presumption of the existing institution as the controversy-resolving mechanism among Idas points to the structure of constitutional authorship.

To sum up, to avoid the incompleteness of both legal nonvolitionalism and contractarianism as well as the risk of reducing legitimacy to a private matter, Michelman needs to base his theory of the legitimacy of constitutional democracy on what he characterizes as constitutional authorship, which, as shown above, is supported by his turn in "Ida's way." Identification with the past and past deeds, implicit in Ida's inclination toward the existing system and her general interpretive position, not only

---

[190] *See* Michelman, *Constitutional Patriotism*, *supra* note 10, at 1025.
[191] *See* Michelman, *Reply*, *supra* note 10, at 660.
[192] *See also* Balkin, *supra* note 10, at 500.

makes "Ida's way" possible, as a public view of legitimacy, but also bears out the presupposed transtemporal identitarian sense of "we" in the formation of a first-person plural, constitutional selfhood.[193] Thus, Ida's view of legitimacy is not so much an alternative to constitutional authorship as it is an account of it.

5. Conclusion

While constitutional scholars cannot settle on a theory of legitimacy, and the specter of a legitimacy deficit continues to haunt those who envision future constitutional projects, constitutional authorship occupies a pivotal place in debates on the legitimacy of constitutional democracy, including the debate on constitutionalization in the EU.[194] This article has sought to shed light on why constitutional authorship occupies center stage by engaging with Michelman's scholarship on legitimacy.

The foregoing analysis shows that Michelman's careful examination of the three major schools of thought on constitutional legitimacy suggests that both the contract-based and acceptance-oriented conceptions of that legitimacy boil down to reconfigurations of constitutional authorship. Nonetheless, Michelman persists in distancing himself from the scholarly camp that espouses constitutional authorship because it presupposes a transtemporal concept of constitutional authorship, pointing to a presumed conceptual structure of identity formation. Countering this uncritical

---

[193] *Cf.* MÜLLER, *supra* note 166, at 60–66 (suggesting that a "shared history" is needed to account for "attachment and agency" in constitutional patriotism).
[194] *See*, *e.g.*, Eriksen, *supra* note 6, at 49.

position, Michelman proposes a presentist alternative theoretical approach to the question of legitimacy.

By dissecting Michelman's theoretical engagement, this investigation has shown that his presentist alternative is unsuccessful. He cannot fully account for the commonly chosen, authoritative dispute-settling public institutions whose legitimacy lies at the core of his presentist view of legitimacy, without presupposing a transtemporal view of identity. In this way, Michelman's partial presentist view of constitutional democracy actually bolsters constitutional authorship, which remains the Gordian knot of legitimacy theory.