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A Critique of the Presentist Turn in the Legitimacy of Constitutional Democracy

Ming-Sung Kuo

EUROPEAN UNIVERSITY INSTITUTE
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Abstract

"We the People" and the corresponding concept of constitutional authorship have gripped our imagination of the legitimacy of constitutional democracy since the American and French Revolutions. In contrast to this Big Bang scenario of constitution-making, the constitutionalization of the European Union (EU) as a supranational entity is the product of a decades-long process, departing from the Revolutionary tradition of constitutionalism. Whether this "presentist" project of constitutionalization without making a constitution, which is characterized by polyarchical everyday policy negotiations and apolitical judicial decisions in the normality of the constitutional order, will succeed in reconstructing our imagination of political order as an alternative to constitutional authorship remains to be seen. This paper aims to answer this question through a close inspection of Frank Michelman's critical engagement with theories of constitutional legitimacy. My investigation shows that Michelman arrives at a presentist view of constitutional democracy after pointing out the inadequacy of theories of constitutional legitimacy rooted in the Revolutionary tradition of constitutionalism. I argue, however, that Michelman's presentist view cannot fully account for the legitimacy of public institutions in constitutional democracy without presupposing a transtemporal view of identity, which is the reason why Michelman finds constitutional authorship in tension with liberalism, and thus unacceptable. By showing that Michelman's presentist view of constitutional democracy is coherent with, rather than being at odds with, constitutional authorship, I conclude that the latter will continue to play a central role in our concept of the legitimacy of constitutional democracy.

Keywords

Constitutional authorship, We the People, constitutional presentism, legitimacy, transtemporal identity, Frank Michelman

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MING-SUNG KUO

Max Weber Post-Doctoral Fellow (2007-2008)
European University Institute, Florence, Italy

I. Introduction: Why Frank I. Michleman?

"We the People" or its equivalent appears in numerous constitutions of states all over the world, so much so that 'constitution' seems to have become a literary genre.[1] While it may sound like anachronistic revolutionary rhetoric, or worse, an empty demagogic cliché,[2] it provides the discussion of the legitimacy of constitutional democracy with a substantial organizing principle. On the one hand, "We the People" seems to distinguish the state—the archetype of the body politic—from other political entities.[3] On the other hand, as French philosopher Étienne Balibar notes, "the functioning and use of 'we' [in 'We the People'] as a self-designation of the sovereign people in proclamations of democratic rights" bear greatly on the "spectral" existence of popular sovereignty in the functioning of contemporary democracies.[4]

However, the constitutionalization of the European Union (EU) as a supranational entity as a result of a decades-long process seems to depart from this Revolutionary tradition of constitutionalism in which the constitutional order is given

[1] *See* ÉTIENNE BALIBAR, WE, THE PEOPLE OF EUROPE? REFLECTIONS ON TRANSNATIONAL CITIZENSHIP 184-85 (James Swenson trans., 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* BALIBAR, *supra* note 1, 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 (2005) (discussing the relationship between two versions of "We the People" and genocides in history).

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

[4] *See* BALIBAR, *supra* note 1, at 184-85.

legitimacy by the popular will.[5] In contrast to the Big Bang scenario of constitution-making associated with the choice of "We the People" in the past, the EU process of constitutionalization without making a constitution is characterized by polyarchical everyday policy negotiations and apolitical judicial decisions within the normality of the constitutional order,[6] a process which I call "constitutional presentism."[7] Nevertheless, the notion of "We the People" has not disappeared from the construction of the EU but has rather been reconstructed in ways to give legitimacy to the EU as a supranational political entity[8], paralleling its traditional role in the nation-building of modern states.[9]

While it remains to be seen whether the "presentist" project will succeed or not, the constructivist approach to "We the People" does not seem to be of much help in rescuing Europe from the challenge of a legitimacy deficit.[10] Thus, accounting for why these three words have such a gripping power on our imagination of constitutional order—which I call the notion of enchantment with constitutional authorship—even in a completely distinctive context such as that of the EU[11]focuses our attention on how the "agency" aspect of the legitimacy problem plays out in our imagination of the rule of law:[12] "We the People" stands for the self-validating authority of the constitution. Moreover, an examination of how "We the People" works in relation to the legitimacy of constitutional democracy will shed light on whether the presentist turn in EU constitutionalization will reconstruct our imagination of the legitimacy of the political order as an alternative to constitutional authorship.

To show the centrality of constitutional authorship in our concept of the legitimacy of constitutional democracy despite the presentist turn, I critically examine Frank I. Michelman's prolific scholarship in this regard.[13] At the heart of Michelman's

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[5] *See generally* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

[6] *See*, *e.g.*, James Bohman, *Constitution Making and Democratic Innovation: The European Union and Transnational Governance*, 3 EUR. J. POL. THEORY 315 (2004).

[7] At the core of legal presentism is the obsession of legal regimes with calibrating the normal constitutional order to be able to fully cope with present issues. *Cf*. JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 29-44 (2001) (characterizing a "presentist" sense of time as "[t]he desire for a fully lived present moment").

[8] *See*, *e.g.*, 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., 2000) (equating "We the People" with the common good as the purpose of a democratic legal order). *But see* Jürgen Habermas, *Why Europe Needs a Constitution?*, *in* DEVELOPING A CONSTITUTION FOR EUROPE 19, 27 (Erik Oddvar Eriksen et al. eds., 2004).

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

[10] *Compare* MICHELLE EVERSON & JULIA EISNER, THE MAKING OF A EUROPEAN CONSTITUTION: JUDGES AND LAW BEYOND CONSTITUTIVE POWER (2007), *with* Rainer Schmalz-Bruns, *The Euro-Polity in Perspective: Some Normative Lessons from Deliberative Democracy*, *in* DEBATING THE DEMOCRATIC LEGITIMACY OF THE EUROPEAN UNION 281 (Beate Kohler-Koch & Berthold Rittberger eds., 2007).

[11] *See* BALIBAR, *supra* note 1, at 184-85.

[12] *See* Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDU. 167, 168 (1987) (noting that the idea of constitution is tied to humankind as a Marxian "species being" or Aristotelian "political animal," which has "[the] ordinary human capacity for creative action").

[13] Recently Michelman has critically and thoroughly revisited the concept of constitutional legitimacy in a series of articles. *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*

critical revisiting of the idea of constitutional legitimacy is his attempt to explain the centrality of "We the People" in the legitimacy of constitutional democracy via a theoretical odyssey engaging with alternative intellectual efforts to solve the legitimacy question. An exploration of how Michelman arrives at a presentist view of constitutional democracy but fails to present it as an alternative to "We the People" in his *Ida's Way*[14] provides insight into how "We the People", as the self-validating designation of the authority of a constitution, points to the attribution of the legitimacy of constitutional democracy to the idea of constitutional authorship.

My argument proceeds in the following order: Part II gives an outline of Michelman's framework of reference. This is crucial to understanding how he disputes competing theories of legitimacy and arrives at his *Ida's Way*. Part III critically examines how Michelman turns to a presentist view of the legitimacy of constitutional democracy, and shows why his presentist alternative to constitutional authorship falls short of his promise. Part IV summarizes my own argument and concludes that constitutional authorship still has a hold on our view of constitutional legitimacy.

II. Conceptions and Presumptions: Legitimacy as Conceived in Michelman's Constitutional Scholarship

According to Michelman, three theoretical accounts compete to explain the legitimacy of constitutional democracy—contract-centred, acceptance-oriented, and authorship-organized. The first is content-based; the latter two are content-independent.[15] Leaving aside their substantive positions, all three approaches centre on a particular view of the legitimacy of constitutional democracy, which Michelman terms "constitutional legitimation" or "constitutional legitimacy."[16] What characterizes this view is that the legitimacy of a particular exercise of political power in constitutional democracy is translated into a question of constitutionality: all forms of political power under constitutional democracy are legitimate to the extent that they conform to the constitution. The constitution stands as a "legitimacy contract" in constitutional

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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., 2002) [hereinafter Michelman, *Constitutional 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) [hereinafter Michelman, *Authorship by the People*]; 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., 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., 1997) [hereinafter Michelman, *Critique of 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).

[14] Michelman, *Ida's Way*, *supra* note 13.

[15] *See* Michelman, *Constitutional Legitimation*, *supra* note 13, at 14-15; Michelman, *Contract for Legitimacy*, *supra* note 13, at 126-27; Michelman, *Constitutional Authorship*, *supra* note 13, at 65-66.

[16] *See* Michelman, *Constitutional Legitimation*, *supra* note 13, at 4.

democracy.[17] In contrast, Michelman notes another view of the legitimacy of constitutional legitimacy: "full-merits legitimation."[18] According to him, through the prism of "full-merits legitimation," the legitimacy of a particular exercise of political power relates to the functioning of the constitutional regime as a whole. Instead of focusing on the conformity of the exercise of political power at issue to the constitution, as constitutional legitimation does, "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*."[19] Thus, 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.

Taking into account these two contrasting conceptions of the legitimacy of constitutional democracy and the major theoretical stands on this issue, Michelman identifies the central challenge to contemporary constitutional theorists: In today's complex society with reasonable disagreements among individuals on virtually all social issues, how can it be possible to regard the total performance of the entire legal system—a system in which force and violence are used as a final resort—as "worthy of respect," i.e. "legitimate," *insomuch as the use of force itself and the law it is aimed at enforcing are in accordance with the constitution as a legitimacy contract*?[20] Put differently, under what circumstances can the idea hold that "a political act fully gains or demonstrates deservingness of [legitimacy] by passing a test of consonance with a certain, special body of higher-level or 'framework' norms that we call the constitution[?]"[21]

Before examining the three conventional theoretical approaches to the legitimacy of constitutional democracy, Michelman sets up a framework of reference within which legitimacy theories can be examined. This framework consists of a philosophical-anthropological position and an epistemological observation of the modern legal system. Following Jürgen Habermas's heralding of the "post-metaphysical" age, Michelman argues that legitimacy—whether it is understood as the "justice-seeking capacity of the constitution" or the "moral supportability of a given constitutional regime"[22]—must be conceptualized from "a view of human individuals as severally possessed of capacities for rational agency, for taking some substantial degree of conscious charge of their own minds and lives, making and pursuing their own

[17] *See* Michelman, *Contract for Legitimacy*, *supra* note 13, at 120-21. *See also* Balkin, *supra* note 13, at 488-89 ('The Constitution creates a 'legitimacy contract' between the state and the people, or among the people themselves.").
[18] *See* Michelman, *Constitutional Legitimation*, *supra* note 13, at 4.
[19] *Id*. (emphasis added).
[20] Michelman construes the legitimacy of the political system as the respect-worthiness of its total performance. *See* Michelman, *Constitutional Legitimation*, *supra* note 13, at 4-5; Michelman, *Faith and Obligation*, *supra* note 13, at 653-56; Michelman, *Ida's Way*, *supra* note 13, at 346; Michelman, *Contract for Legitimacy*, *supra* note 13, at 105-07; Michelman, *Critique of Deliberative Democracy*, *supra* note 13, at 160.
[21] Michelman, *Constitutional Legitimation*, *supra* note 13, at 4. *See also* Michelman, *Contract for Legitimacy*, *supra* note 13, at 125 (noting the bestowal of legitimacy on every [constitution-]conforming legal act by the "[constitutional] presence").
[22] *See* Michelman, *Constitutional Authorship*, *supra* note 13, at 85. The importance of this distinction to Michelman's view of legitimacy is discussed *infra* Part III.A.

judgments about what is good and what is right."[23] Thus, the legitimacy question poses a "burden[] of judgment" on every citizen.[24]

Paralleling his philosophical-anthropological position, Michelman observes that a double duality is presupposed in the conceptual configuration of constitutional legitimacy.[25] The first is the epistemic duality regarding the *corpus juris*: the body of constitutional law and the residual body of "ordinary" legal acts.[26] The particular view of constitutional legitimation, as opposed to full-merits legitimation, cannot stand without the assumed distinction between these two legal bodies. At the heart of constitutional legitimation is the idea that a distinct part of the *corpus juris* called the constitution can be set apart from the rest of the legal body as the legitimacy contract, thus functioning as the criterion of legitimacy for the latter. If the *corpus juris* cannot be divided into the constitution and the non-constitutional body, a judgment of the legitimacy of a particular exercise of political power cannot be translated into a question of constitutionality as constitutional legitimation suggests. The second duality, evaluative duality, regards the standards for legitimacy judgments of the two separate bodies of law.[27] While the moral bindingness of ordinary legal acts hinges on their constitutionality, the constitution itself cannot be legitimized within the existing constitutional order. In other words, from the internal perspective of constitutional legitimacy, the respect-worthiness of the constitution itself is assumed and remains to be addressed. Taken together, Michelman notes that the legitimacy problem of constitutional democracy comes down to the issue of constitutional bindingness, i.e. why the constitution itself is worthy of respect.[28]

III. Constitutional Authorship vs. a Presentist View of Constitutional Legitimacy: Michelman's Journey to *Ida's Way* as a Case in Point

In *Ida's Way* and other recent essays,[29] Michelman critically accounts for why the idea of "constitutional authorship," a transfiguration of "We the People," prevails over those based on "contract" and "acceptance" in the theoretical debate on the legitimacy of the American constitutional order. Instead of subscribing to constitutional authorship, Michelman suggests a presentist system-oriented perspective of legitimacy, which I call *Ida's Way* here, as the alternative. Nevertheless, my analysis shows that Michelman's attempt to diverge from constitutional authorship fails. Rather, his turn to *Ida's Way* inadvertently strengthens the idea of constitutional authorship. My approach is thus to think both with and "against" Michelman.[30]

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[23] *Id*. at 87. Michelman notes that this philosophical-anthropological position is compatible with a "relational" view of human severalty, which needs to be distinguished from a philosophical-anthropological atomistic view. *See id*. at 97 n. 70.

[24] *See id*. at 88-89.

[25] *See also* Mariela Vargova, *Democratic Deficits of a Dualist Deliberative Constitutionalism: Bruce Ackerman and Jürgen Habermas*, 18 RATIO JURIS 365, 367 (2005) (noting Michelman's discussion on "dualist normative divisions" of liberal democratic constitutionalism).

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

[27] Michelman uses "moral bindingness," "respect-worthiness," and "legitimacy" interchangeably. *See* Michelman, *Constitutional Legitimation*, *supra* note 13, at 9.

[28] *See id*. at 8-9.

[29] *See supra* note 13.

[30] My engaged discussion on Michelman's analysis of contemporary theories of the legitimacy of constitutional democracy does not suggest that his theory is more convincing than others. Nor am I concerned about whether he treats other theoretical stands fairly. Still, through his discussion on

In this Section, I first examine the weaknesses that Michelman identifies in contractarianism and nonvolitionalism, based on contract and acceptance respectively, which, according to Michelman, constitute the first two major conventional approaches to the legitimacy of constitutional democracy. Next, I proceed to Michelman's critical analysis of the third approach, constitutional authorship. Granting that constitutional authorship prevails over contract and acceptance in explaining the legitimacy of the American constitutional order, Michelman's normative reservations pave the way for a fourth, Michelmanian approach to constitutional authorship: "*Ida's Way*." In the third part of this section, *Ida's Way*, Michelman's chosen account of constitutional legitimacy, is introduced and analyzed. After examining these four possible approaches to legitimacy, I then argue that the Michelmanian *Ida's Way* supports rather than rejects constitutional authorship.

A. Beyond Contract and Acceptance: Michleman 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 the social contract.[31] 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."[32] To function as a "legitimacy contract" that makes the entire legal system worthy of respect, the constitution must include only certain content, which grounds its moral bindingness.[33] In other words, the respect-worthiness of a constitution is contingent on whether citizens judge its contents to be validity-bestowing.[34] Not everything that is included in a constitution makes it worthy of respect. This is why a legitimacy theory built on the tradition of a social contract is content-based.[35]

Michelman points out that this contractarian view of constitutional legitimacy falters when it faces ethical pluralism 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.[36] Rather, Rawls based his contractarian view on a poorly thought through preunderstanding embedded in Western liberal democratic societies.

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contemporary theories of the legitimacy of constitutional democracy, which he divides into three schools, my engagement with Michelman will have implications for the theoretical issue of legitimacy in general.

[31] John Rawls has been the protagonist of Michelman's discussion on the issue of the legitimacy of constitutional democracy. *See supra* note 13. *See also* Balkin, *supra* note 13, at 489. In addition to Rawls, Michelman's list of constitutional contractarians includes Jürgen Habermas, Charles Larmore, and himself as well. *See* Michelman, *Constitutional Interpretive Disagreement*, *supra* note 13, at 113, 134 n.3; Michelman *Constitutional Patriotism*, *supra* note 13, at 1014 n. 9.

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

[33] *See* Michelman, *Constitutional Interpretive Disagreement*, *supra* note 13, at 117-18.

[34] Strictly speaking, what contractarians are concerned about is the contents of the contract rather than citizens' judgment of the contents. Rawls made a substantial contribution, however, to the contractarian tradition by virtually bringing citizens into the making of the social contract through the conceptual apparatus of "veil of ignorance." Nevertheless, this conceptual apparatus is only aimed at confirming a particular set of norms that Rawls identified with the functioning of constitutional democracy. My thanks go to Paul Kahn for bringing this delicate difference to my attention.

[35] *Cf.* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 336-42 (1980).

[36] Beginning with comments on the game theory difficulty of acting together, Jeremy Waldron argues that an irreducible element of reasonable disagreement exists not only in the non-ideal circumstances of real world politics but also in ideal theory. *See* JEREMY WALDRON, LAW AND DISAGREEMENT 102-06 (1999).

This is the most frequent criticism facing the content-based view of constitutional legitimacy.[37] Moreover, this is not just a question of logical coherence or theoretical rigidity, but rather, to the extent that reasonable disagreement exists on value choices in every aspect of today's social life, a consensus among individuals charged with "burdens of judgment" on the essential contents of a constitution appears to be impossible.[38] This is why the content-based theory of constitutional legitimacy is facing its own deep crisis of "legitimacy."[39]

Michelman also identifies the problem of interpretive disagreement of a constitution,[40] which I call *the second order of reasonable disagreement*. The first order of reasonable disagreement occurs when a draft constitution is under discussion and poses more an empirical than a conceptual challenge to contractarianism. In contrast, the second order of reasonable disagreement arises after an original constitutional consensus has been forged. Unlike the empirical challenge posed by the first order of reasonable disagreement, the central question concerning the second order of reasonable disagreement is: Even if the contents essential to securing a sufficient legitimating constitutional agreement, which Michelman calls "constitutional essentials," are agreed upon,[41] the practice of constitutional interpretation could lead to the collapse of the conceptual architecture of the content-based view of constitutional legitimacy. The second order of reasonable disagreement has greater impact on the conceptual architecture of contractarianism.

Due to the gap between norms and their application inherent in the practice of constitutional adjudication, interpretation is necessary to bridge the normative principles and their application.[42] For example, although the normative principle of equal protection is acknowledged in the Fourteenth Amendment of the U.S. Constitution, whether affirmative action executes or violates the equal protection clause is a matter of interpretation. What is contained in and meant by constitutional essentials is debated by

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[37] *See*, *e.g.*, JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 43-56; 81-82; 106-07 (1995); Richard Rorty, *Idealizations, Foundations, and Social Practice*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 333, 333 (Seyla Benhabib ed., 1996).

[38] *See* Michelman, *Constitutional Legitimation*, *supra* note 13, at 10-12; Michelman, *Ida's Way*, *supra* note 13, at 352; Michelman, *Contract for Legitimacy*, *supra* note 13, at 122-23; Michelman, *Judicial Supremacy*, *supra* note 13, at 586-87; Michelman, *Constitutional Interpretive Disagreement*, *supra* note 13, at 118-23; Michelman, *Constitutional Authorship*, *supra* note 13, at 88-89; Michelman, *Critique of Deliberative Democracy*, *supra* note 12, at 165. *But see* Jürgen Habermas, *Postscript: Some Concluding Remarks*, *in* HABERMAS AND PRAGMATISM, *supra* note 13, at 223, 224 (questioning why it is impossible to introduce and justify rules "in advance of their application to *further* cases" in the context of reasonable pluralism) (emphasis in original).

[39] *See* James Tully, *The Unfreedom of the Moderns in Comparisons to Their Ideals of Constitutional Democracy*, 65 MOD. L. REV. 204, 207-08 (2002). *See also* Neil Walker, *Europe's Constitutional Momentum and the Search for Polity Legitimacy*, 3 INT'L J. CONST. L. 211, 213-16 (2005) (identifying five orders of disagreement in building the constitutional polity).

[40] *See generally* Michelman, *Constitutional Interpretive Disagreement*, *supra* note 13.

[41] *See* Michelman, *Constitutional Authorship*, *supra* note 13, at 65 (listing the plan of political government and the list of personal rights and liberties as constitutional essentials). *See also* Michelman, *Ida's Way*, *supra* note 13, at 360; Michelman, *Constitutional Interpretive Disagreement*, *supra* note 13, at 117-18; Michelman, *Critique of Deliberative Democracy*, *supra* note 13, at 146.

[42] *See* Michelman, *Constitutional Interpretive Disagreement*, *supra* note 13, at 118-20.

those who adopt different interpretive attitudes.[43] Thus, post-constituent interpreters of the constitution face challenges of reaching interpretive consensus of the second order of reasonable disagreement.[44]

The "re-making" implication of constitutional interpretation for the idea of constitutional legitimacy is that the constitution itself becomes incomplete and unstable. As pointed out above, the idea of constitutional legitimacy includes 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. If interpretation is unavoidable and everything written in the constitution is potentially open to redefinition by future interpretation, nothing in the constitution is really settled. The constitution is in a state of constant uncertainty[45], and it is, accordingly, impracticable to judge the respect-worthiness of other public acts according to the agreed-upon constitutional essentials. Rather, every instance of constitutional interpretation amounts to re-problematizing the respect-worthiness of the constitution itself, thereby obliterating the distinction between the constitution and the non-constitutional, ordinary, body of law.[46] Thus, the practice of constitutional interpretation renders the so-called consensus on constitutional essentials as temporary at best and nominal at worst.[47] What was settled while drafting the constitution simply postpones rather than resolves the issue of constitutional bindingness. The proneness of constitutional essentials themselves to redefinition in the process of interpretation undoes the contractarian content-based view of legitimacy.[48]

Before moving on, Michelman turns to another strain of the liberal political position on legitimacy within the broad social-contract tradition: Habermas's proceduralism.[49] According to Michelman, Habermas's proceduralist theory of the legitimacy of constitutional democracy boils down to the following propositions: 1) "For a norm to be valid [meaning for the norm to be observable 'out of respect' for it], 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 freely"; 2) "[O]nly those norms of action are valid to which all possible affected persons could assent as participants in rational discourse."[50] Despite this seemingly procedural position, Michelman notes that it still "characterizes political justification in terms of *hypothetical* universal agreement." Michleman continues, "[H]ypothetical consent based on correct reasoning is a substantive, not a procedural test for the justified character of a set of fundamental laws." To conclude, "Habermas has no [proceduralist] argument yet for the requirement of an actual democratic-

[43] *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) ("There is always an alternative reading and interpretation of the text of a constitution.").
[44] *See* Michelman, *Constitutional Legitimation*, *supra* note 13, at 11-12.
[45] *See* Balkin, *supra* note 13, at 488.
[46] *See* Michelman, *Constitutional Patriotism*, *supra* note 13, at 1023.
[47] "[T]he proposed constitutional contractarian justification of politics cannot succeed if it turns out that the constitutional [essentials] to which every one…agrees are just forms of words papering over unresolved and deeply divisive political–moral disagreements among the reasonable." *Id*.
[48] *See* Michelman, *Constitutional Interpretive Disagreement*, *supra* note 13, at 120-23.
[49] *See* Michelman, *Constitutional Patriotism*, *supra* note 13, at 1023-28 (including Habermas in "the practitioners of constitutional contractarian justification). *See also* Michelman, *Constitutional Interpretive Disagreement*, *supra* note 13, at 132 (noting the contractarian character of Habermasian proceduralism).
[50] Michelman, *Constitutional Authorship*, *supra* note 13, at 87 (citation omitted).

procedural provenance for a set of fundamental laws."[51] In sum, if Habermasian proceduralism turns out to be content-based, proceduralism would face the same challenges that second-order reasonable disagreement poses to the Rawlsian strain of contractarianism.

To investigate the core of Habermas's proceduralism as an alternative successful account of constitutional legitimacy to contractarianism, Michelman paraphrases it by relating it to the moral supportability of the political regime conceived in the constitution. He distinguishes between the justice-seeking capacity and the moral supportability of the constitutional regime with respect to the legitimacy of constitutional democracy. This distinction results from different conceptions of the objectives of constitutional democracy: in the former, the constitution is conceived as the instrument for seeking justice;[52] in the latter, the focus of its legitimacy is on "the moral justifiability of supporting the [existing] coercive regime" as an effective mechanism of maintaining a peaceful social order.[53] Michelman notes that conceiving legitimacy in terms of the justice-seeking capacity of the constitution would unavoidably impinge on the substantive issue of justice, i.e. the content of constitutional essentials. In this view, Habermas's proceduralism remains substantive. In contrast, 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."[54] To the extent that a procedure in which everybody concerned is free and equal to make his or her own judgment on the moral supportability of government coercive measures might bring citizens closer to the constitutional regime under which he or she lives and thus help to support the legitimacy of the existing system, the procedure itself, not content or substance, delivers the "legitimacy surplus" to the existing constitutional regime.

For the sake of argument, Michelman argues that reframing Habermas's proceduralism this way would throw light on whether proceduralism really distinguishes itself from content-based contractarianism in conceiving the legitimacy of constitutional democracy. Even in terms of moral supportability, Michelman notes, however, that 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 contentious but reasonable disagreement."[55] "Arguing thus," Michelman points out, procedurlaists 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

[51] *See id*. at 88 (emphasis in original).
[52] This is the characteristic of modern constitutions. *See* ULRICH K. PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 25-37 (Deborah Lucas Schneider trans., 1995) (1990) [hereinafter PREUSS, CONSTITUTIONAL REVOLUTION].
[53] Michelman, *Constitutional Authorship*, *supra* note 13, at 88.
[54] *Id*. at 90.
[55] *See id*. at 91.

fulfilment of the 'democracy' that is capable of conferring respect-worthiness on a regime."[56]

Choosing the first option would drive proceduralists back to their point of departure, entrapping them within all the challenges of reasonable disagreement to which their Rawlsian, content-based counterparts have failed to respond. Alternatively, they abandon the whole project of liberal political positioning, accept the existing political regime without justification, and submit to the impossibility of legitimacy. Is this the end of Habermas's proceduralist answer to the legitimacy of constitutional democracy? Not quite.

Michelman notes that to escape the dilemma, Habermas turns to the idea of "reflexivity." By subjecting the discursive process at the centre of proceduralism itself to discursive reflection, Habermas argues, "[t]he idea of the rule of law sets in motion a spiralling self-application of law."[57] In other words, the "influential process of truly democratic critical re-examination" must be the object of the "influential process of truly democratic critical re-examination" itself. The problem is, as Michelman points out, that this "reflexivity failsafe" 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.[58] To resolve the concern of "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."[59]

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 regards Habermas's assertion of the constitution of reflexive democracy in a performatively self-referential manner, Michelman bluntly asserts that, "an originary use of a civic autonomy" [is evocative of the] founding act of citizens' authorship [in the] 'originary' constitutive moment."[60] It turns out that Habermas deviates from his proceduralist foundation by basing his "proceduralist contractarianism" and reflexive democracy on the idea of constitutional authorship rather than on proceduralism itself.[61]

Taken as a whole, Michelman argues that if the fair procedures at the core of proceduralism are to be divorced from a presumed authorship and based simply on the Habermasian discourse ideal without being plunged into infinite regress, those

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[56] Michelman, *Human Rights*, *supra* note 13, at 75.

[57] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 39 (William Rehg trans., 1996) (1992) [hereinafter HABERMAS, BETWEEN FACTS AND NORMS].

[58] *See* Michelman, *Constitutional Authorship*, *supra* note 13, at 91.

[59] HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 57, at 74, 128.

[60] Michelman, *Constitutional Authorship*, *supra* note 13, at 91. *See also* Michelman, *Constitutional Patriotism*, *supra* note 13, at 1026-28. *Cf.* Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POL. THEORY 766, 775 (2001) ("[W]ith this [concrete] act [of founding for the political community] the grounds for a world-historically new practice have been established.").

[61] *Cf.* HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 57, at 120 (arguing that "those subject to laws as its addressees can at the same time understand themselves as authors of law"). The role of reflexivity in constitutional authorship will be further explored *infra* Part III.B.

procedures turn out to be "very much a matter of what we…call *substance*."[62] Thus, the proceduralist turn escapes neither ethical pluralism nor the gap between norms and applications. Rather, it just returns to its point of departure: Rawlsian content-based contractarianism. Thus, both the content-based and procedure-based strains of constitutional contractualism fail to establish the respect-worthiness of the constitution.

The second attitude towards constitutional legitimacy Michelman considers is an acceptance-based, legal nonvolitionalism.[63] Legal nonvolitionalists are "a smaller camp" within "legal positivism,"[64] which is "a plastic and elusive term." Michelaman's working concept of legal positivism is defined against the question of "the relation…between the possibility of a norm's being made a valid legal one by social acceptance of it as such and the moral status of that norm." Centring on this relationship question, Michleman articulates legal nonvolitionalism in the light of legal positivism. While "[l]egal positivists deny that…the…moral status of a norm…has any necessary bearing on the possibility of the norm's being made a legal one by social acceptance of it as such," legal nonvolitionalists focus on the issue of "the foundations of legal orders." Characteristic of legal nonvolitionalism is 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." According to Michelman, legal nonvolitionalists regard an existing legal system as "an effectively regulative social practice of reference to an identifiable collection or system of norms."[65] Whether the moral status of the legal order bears on its acceptance is not a characteristic of legal nonvolitionalism. Thus, in contrast to the contractarian conception, the acceptance-based, nonvolitionalist conception of constitutional legitimacy is content-independent in the sense that neither the consent nor the object of consent bears on the legitimacy of the constitution itself.

In the nonvolitionalist perspective, the "fact" of *acceptance* is constitutive of the respect-worthiness of the constitution.[66] Evoking H.L.A. Hart's dichotomy of primary and secondary rules,[67] Michleman notes, legal positivism 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." Following this line of thought, however, nonvolitionalists, in distinction from Kelsenian positivists, further argue that the ultimate rule of recognition must reside outside the legal system and thus it "cannot

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[62] *See* Michelman, *Constitutional Patriotism*, *supra* note 13, at 1027-28 (emphasis added). *See also* Balkin, *supra* note 13, at 489 (pointing out that Michelman regards as content-based the "justifications for legitimacy based on a guarantee of fair procedures for changing and administering the law").

[63] *See* Michelman, *Contract for Legitimacy*, *supra* note 13, at 126; Michelman, *Constitutional Authorship*, *supra* note 13, at 68-74.

[64] *See* Michelman, *Constitutional Authorship*, *supra* note 13, at 69. For Michelman's exposition of legal positivism, see Frank I. Michelman, *Can Constitutional Democrats Be Legal Positivists? Or Why Constitutionalism?*, 2 CONSTELLATIONS 293, 293-98 (1996) [hereinafter Michelman, *Why Constitutionalism*].

[65] *See* Michelman, *Why Constitutionalism*, *supra* note 64, at 293. According to this view of legal nonvolitionalism, Michelman names Frederick Schauer, Hans Kelsen, and H.L.A. Hart as nonvolitionalists. *See id*. at 94 n.21.

[66] *See* Michelman, *Constitutional Interpretive Disagreement*, *supra* note 13, at 116; Michelman, *Constitutional Authorship*, *supra* note 13, 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 13, at 126.

[67] *See* H.L.A. HART, THE CONCEPT OF LAW 92, 96 (1961).

itself consist in the command of any sovereign."[68] The nonvolitionalist version of the ultimate rule of recognition is not a norm. Rather, it is an overdetermined social fact.[69] While the secondary rules that govern the process of law-making are purported to be stipulated in the constitution,[70] that which bestows legitimacy and controlling power on the positive constitution itself is an extralegal fact.[71] Take the United States Constitution as an example. In the legal nonvolitionalist perspective, its legitimacy rests on "the fact of social acceptance of the Constitution as the supreme law" among the American public instead of "the acceptance of someone's entitlement to make the Constitution be supreme law by legislating it as such."[72]

By attributing the legitimacy of the constitution to "organically grown facts of social practice," nonvolitionalists seem to solve the challenges facing contractarians. Take the United States constitutional order again. To nonvolitionalists, only three facts are crucial to the legitimacy of this constitutional order: first, a social consciousness that the Constitution stands out from the rest of the *corpus juris*; second, agreement that the legitimacy of ordinary legal acts is a function of their constitutionality; third, the Constitution itself is fully accepted. In this view, the contractarian failure to agree upon the essential contents of the Constitution as a legitimacy contract poses no challenge to constitutional legitimacy. For legal nonvolitionalists, the social consciousness 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 is "perfected" by excluding the fact of ethical pluralism from its theoretical purview and reducing the facts of social practice to a single question: Is the Constitution socially accepted?[73]

Regardless of its seeming theoretical perfection, Michelman notes the weakness of the nonvolitionalist strategy in theorizing the legitimacy of constitutional democracy. Legal nonvolitionalism attempts to banish the fact of ethical pluralism, together with the accompanying issues of the epistemic duality of the *corpus juris* and constitutional completeness, to the extralegal area of empirical contingency. Issues connected to ethical pluralism are the object of "empirical investigation" rather than normative analysis. 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?'"[74]

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[68] *See* Michelman, *Constitutional Authorship*, *supra* note 13, at 69-70. 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, 148-52 (Sanford Levinson ed., 1995).

[69] *See* Schauer, *supra* note 68, at 149-50. 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 150-51 (emphasis in original).

[70] *Cf*. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 57, at 189-90 (noting "the principles and conditions of the ineliminable…legislative process" provided by the constitution). *See*, *e.g.*, U.S. Const. art. I § 7.

[71] *See* Schauer, *supra* note 68, at 156-57, 160-61.

[72] Michelman, *Constitutional Authorship*, *supra* note 13, at 70 (emphasis omitted).

[73] *See id*.

[74] *See id*. at 71-73.

Once framed thus, the acceptance-based, nonvolitionalist conception faces a serious "identity" crisis. By extending its query to those issues originally and conceptually banished to the extralegal field of empirical contingency, legal nonvolitionalism turns out to be nothing more than a theoretical façade. To answer the question of how the Constitution is socially accepted, one needs the "[f]ull knowledge of a social practice of referring questions of legal validity to [the system's own ultimate standards of legal validation.]" The required knowledge includes "how participants in the practice experience it, 'from the inside.'"[75] Their experience may have little to do with the nonvolitionalist conception of legitimacy, however.

Take the United State constitutional order as an example. Michelman first points out that "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 character."[76] Specifically, in terms of American constitutional jurisprudence and culture,[77] Michelman indicates 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*."[78] While this attribution is a social practice, what matters to the legitimacy of the constitutional order is what this 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." 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."[79] Thus, acceptance-based legal nonvolitionalism amounts to another content-independent concept—the idea of constitutional authorship—at least in the constitutional regime and culture of the United States.

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[75] *See id*.

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

[77] 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 13, 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 143,143-44 (Michel Rosenfeld ed., 1994) (noting the prevalence and significance of the grounding of the constitution in men's will in the constitutional tradition of the European continent).

[78] Michelman, *Constitutional Authorship*, *supra* note 13, at 73 (emphasis added). 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. Specifically, while German "constitutional patriotism" indicates the fact that the German Constitution is popularly accepted by the Germany people, the trust that they have in the German Federal Constitutional Court turns out to be the reason why its constitutional jurisprudence commands nationwide respect-worthiness. *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.

[79] *See* Michelman, *Constitutional Authorship*, *supra* note 13, at 73-74.

B. Michleman's Engagement with Authorship

Constitutional authorship, or simply authorship, lies at the centre of Michelman's third conventional approach to the issue of constitutional legitimacy. He establishes the concept of constitutional authorship by asking this question: "Does the statement ['The United States has a good constitution']…carry praise of any *agent* for making our constitution a good one?" "Yes," Michelman answers, "because we incorrigibly think of good constitutional charters or regimes not as blessings that luckily befall us as strength and health befall animal [sic], 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." 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."[80] Essentially, the author-based conception of constitutional legitimacy holds that "we owe respect to a constitution having such-and-such prescriptive content just because of who that constitution's authors were."[81] This is what Michelman calls "the authority-authorship syndrome."[82]

As Michelman notes, the author-based conception that "[t]he Constitution…is an enacted law, a piece of legislation, the intentional production of a political will" is the "sheerest banality," "a common vernacular notion that cannot withstand critical examination." Nevertheless, he admits the authorial view of constitutional legitimacy is "inevitable."[83] The implications of "inevitable banality" or "banal inevitability" pose questions to Michleman's readers: do they suggest that belief in the legitimacy of the United States constitutional order is the result of a self-congratulatory, unreflected-upon 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 derogatory label of "banality"?

Michelman answers these questions by pointing to a presumed modern mentality: it is simply unimaginable, to us, as moderns, that a constitution is no more than "blessings that luckily befall us as strength and health befall animal [sic]."[84] At the core of the modern mentality is the belief that we are rational and reasonable; we make critical judgments, creating the difference between experience and expectation. Based on our critical view of what we have experienced, we project our ideals into the future.[85] Insomuch as the constitution is "a legally binding blueprint for constructing a rational society,"[86] it epitomizes "[the] modern social experience of the future as something

[80] *See id*. at 65(emphasis added).
[81] Michelman, *Contract for Legitimacy*, *supra* note 13, at 126. *See also* WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION 189 (1993).
[82] Michelman, *Constitutional Authorship*, *supra* note 13, at 67.
[83] *See id*. *See also* Alexander, *supra* note 78, at 6; Bert van Roermund, *Sovereignty: Unpopular and Popular*, *in* SOVEREIGNTY IN TRANSITION 33, 47-48 (Neil Walker ed., 2003).
[84] Michelman, *Constitutional Authorship*, *supra* note 13, at 65.
[85] For a cultural study of how the concept of history changed with the coming of the modern age and its implications for the relationship between experience and expectation, see REINHART KOSELLECK, THE PRACTICE OF CONCEPTUAL HISTORY: TIMING HISTORY, SPACING CONCEPTS 45-147 (Todd Samuel Presner et al. trans., 2002).
[86] PREUSS, CONSTITUTIONAL REVOLUTION, *supra* note 52, at 31.

designed."[87] 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.[88]

At the centre of constitutional authorship is the idea that the legitimacy of the constitution is built on the character 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."[89] Addressing whether the allegiance relationship he identifies is in harmony with his philosophical-anthropological position,[90] he revisits his observation that "we *incorrigibly* think of good constitutional charters…as laws…whose expressly legislated character is a part, at least, of what gives them their claim on our allegiance and support."[91]

Michelman elaborates on the subject "we" in the preceding quote, which I call the "incorrigibility proposition," as the key to constitutional authorship. The "we" is not simply 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.[92] 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 work, the constitution?[93] To be clear, the allegiance of observant citizen-readers to the constitutional authors concerning the constitution is based on who the constitutional authors are, not on what they have authored, i.e. the constitution. Thus, to conceive a relationship of allegiance based only on the identity of the constitutional authors and in the meantime to take the "burden [] of judgment" on the legitimacy of the constitutional order seriously, the author-based conception of constitutional legitimacy centres on the attribute that we, the observant citizen-readers, are identical to them, the constitutional authors. Yet, the question is: How is it possible for us to identify with the constitutional authors from the philosophical-anthropological point of view Michel man assumes in setting up his framework of analysis?

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[87] Přibáň, *supra* note 43, at 472.

[88] This attachment to constitutional authorship may arguably turn out to be to the actual design of the constitutional architecture rather than to the agency of constitutional architects. Still, situated in the presumed modern mentality 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. I owe this distinction to Paul Kahn's critical interrogation.

[89] *See* Michelman, *Contract for Legitimacy*, *supra* note 13, at 126. In addition to allegiance, Michelman also denotes descent and affiliation. *See id*. Nevertheless, in the very last analysis, both descent and affiliation boil down to reasons for allegiance.

[90] *See supra* text accompanied by notes 22-24.

[91] Michelman, *Contract for Legitimacy*, *supra* note 13, at 126 (emphasis added).

[92] *See* Michelman, *Constitutional Authorship*, *supra* note 13, at 65.

[93] *Cf.* PAUL W. KAHN, THE REIGN OF LAW: *Marbury v. Madison* AND THE CONSTRUCTION OF AMERICA 184 (1997) ("The relation of representation to an authoritative source is a relation brought to the text by the reader.").

This question lies at the heart of theories of the rule of law as self-government epitomized by Rousseau's concept of "general will."[94] 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."[95] Rousseau employed the notion of "general will" to bridge the one (the ruler) and the many (the ruled), making the idea of the rule of law as self-government possible.[96]

From Michleman's philosophical-anthropological point of view, however, the idea of "general will" does not shed much light on how the collective sense/construct of "we" would emerge. Rather, it sounds like "a romantic dream of universal participation."[97] To implement universal participation, plebiscites are considered to be the institutional replacement of representative democracy, channelling opinions into a "general will," which is revealed through universal balloting. 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 shouting assembled people, the acclaimed ruler and the acclaiming ruled people are seen to become practically identical.[98] Thus, when put into action, the ethereal idea of "general will" does not always go with democracy or self-government. Instead, Rousseau has been drawn upon as the inspirational source for plebiscitary democratic dictatorship.[99] Worse yet, Carl Schmitt in the early 1930s even fancied the Führer pronouncing the law in a society with racial homogeneity to be the realization of the dream of the "actual identity between the ruler and the ruled."[100] Taken

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[94] *See also* Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 Mich. L. Rev. 2677, 2690 (2003) ("The relationship of part to whole, which Rousseau theorized, rests at the foundation of American belief in the rule of law.").

[95] JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 81 (Maurice Cranston trans., Penguin 1968) (1762). Dutch legal theorist Bert van Roermund calls this the "rule of recognition for law in modernity." *See* van Roermund, *supra* note 83, at 42 (citation omitted).

[96] *See* ROUSSEAU, *supra* note 95, at 81-83.

[97] van Roermund, *supra* note 83, at 42.

[98] *See* CARL SCHMITT, CONSTITUTIONAL THEORY 131-35, 272-79 (Jeffrey Seitzer ed. & trans., 2008) (1928). *See also* CARL SCHMITT, THE CRISIS OF PARLIAMENTARY DEMOCRACY 16-17 (Ellen Kennedy trans., 1985). For a critique of Schmitt's idea of democracy by acclamation, see HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 57, at 184-85.

[99] *See* Melvin Richter, *Toward a Concept of Political Illegitimacy: Bonapartist Dictatorship and Democratic Legitimacy*, 10 POL. THEORY 185 (1982) (noting the relationship between Rousseau's theory and Bonapartist (Napoleon III) dictatorship by plebiscites); William Henry Chamberlin, *The Jacobin Ancestry of Soviet Communism*, 17 RUSSIAN REV. 251 (1958) (tracing Soviet Communism to the Rousseauite Jacobin anarchy).

[100] *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., 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. My point 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

together, once understood as actual sameness, identification between the ruler and the ruled can imaginatively exist only in the instantaneous "immanence" in which the ruler speaks his will into the law, while the ruled mass acclaims what he mouths.[101]

In view of these historical lessons, does the proposition that "the people as a whole makes the rule for the people as a whole" amount to a myth, and a tragic one, at that? Or, how can we possibly make sense of this Rousseauian myth? To what does the identity between the ruler and the ruled point other than actual sameness? While Michleman does not explore these issues, his "incorrigibility proposition" suggests the conceptual structure within which the Rousseauian proposition would function. Putting forth the "incorrigibility proposition," Michleman 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.]"[102] The fact that Michleman 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,"[103] suggests an understanding of identity as constructive reflexivity instead of actual sameness.[104]

To illustrate the difference between actual sameness and constructive reflexivity in relation to the construction of identity, let me focus first on the situation of the first-person singular. Understood as actual sameness, the identity of the first-person singular centres on the question "What am I?" Individual characters that can be objectively observed 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?"[105] This question cannot be answered by pointing to objective characteristics. Instead, we can only get a sense of "who I am" by entering into the inner dialogue between the different selves in various aspects of personal life, and furthermore in the process of "narrating" personal experiences map out the identity of the first-person singular.[106] 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.[107]

Rosenfeld eds., 2002) (noting the link between Rousseau and Hitler). Thanks go to Paul Kahn for bringing the role of President Lincoln as a democratic dictator to my attention.

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

[102] Michelman, *Constitutional Authorship*, *supra* note 13, at 65 (emphasis added).

[103] *See id*.

[104] These two distinct understandings of identity are derived from the distinction that French philosopher Paul Ricoeur made between *idem* and *ipse*. *See* PAUL RICOEUR, MEMORY, HISTORY, FORGETTING 80-82 (Kathleen Blamey & David Pellauer trans., 2004). *See also* van Roermund, *supra* note 83, 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., 2007).

[105] *See* Lindahl, *supra* note 104, at 14.

[106] *See*, *e.g.*, TZVETAN TODOROV, THE POETICS OF PROSE 74 (Richard Howard trans., 1977) ("narrative equals life; absence of narrative, death."). Essayist and literature scholar Reynolds Price suggests that since time immemorial, stories have been concerned about "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 (1978). *See also* Gerald J. Postema, *Melody and Law's Mindfulness of Time*, 17 RATIO JURIS 203, 211 (2004).

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

Bearing in mind the distinction between these two meanings of identity, I move 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 momentarily forgotten in the instance of immanence.[108] 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 involved share with one another.[109] While this shared project may be traced to particular minds,[110] to hold individuals together as a first-person plural "we," it needs to be open to deliberation and reflection among the individuals involved.[111] If the particular project is forced upon and closed to individuals, it may still succeed in bundling them together but falls short of brining 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?"[112] This "project" constituting the identity of the first-person plural "we" is to be narrated and co-determined through the dialogues that take place among the component individuals of the "we."[113]

The reflexive relationship that individual participants partake of in a shared constitutional project is the conceptual structure in which Michleman 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

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[108] *See* SCHMITT, POLITICAL THEOLOGY, *supra* note 101, at 49. *Cf.* Emilos Christodoulis, *Against Substitution: The Constitutional Thinking of Dissensus*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM, *supra* note 104, at 189, 195-97, 202 (asserting "no first-person-plural *speaker*" and noting that "the essence of mass democracy yields a mass sovereignty," which is, in turn, "a sovereignty of immediacy, thus of a gathering itself") (emphasis in original).

[109] *See* Lindahl, *supra* note 104, at 15.

[110] This is "the performative element" in any invocation of "we." *See* Christodoulis, *supra* note 108, at 202.

[111] German constitutional scholar Ulrich Preuss points out that, although from the historico-sociological point of view constitutional revolutions were launched by organized active "minorities," the process of drawing up a new constitutional project is open to other individual participants. Through their entering into the constitutional project, individual participants view themselves as constituents of "the people" and simultaneously reflect upon their existence, i.e. who they are, thereby reflexively constructing the existence of "the people." Thus, "the people" is no empirical entity but rather a "social construct[] which embod[ies] the aspirations, the ideals and the unity of the society and which [is] purified from all traces of its more trivial and disuniting attributes." *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 104, at 211, 215-16 [hereinafter Preuss, *Exercise of Constituent Power*]. *See* Postema, *supra* note 106, at 209-13.

[112] To constitute human life as ordered against chaos, political theorist 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 centres on the particular story of a particular political community. *See* HARRIS, *supra* note 81, at 48-50 (citation omitted).

[113] *See* Preuss, *Exercise of Constituent Power*, *supra* note 111, at 216. *See also* Lindahl, *supra* note 104, at 14-16. *Cf.* Christodoulis, *supra* note 108, at 200-06.

around the idea of "an incorrigible constitution."[114] It is through this dialogic reflection that the collective identity of "we" in the sense of constructive reflexivity emerges in Michelman's "incorrigibility proposition," which is constitutive of us, the observant citizen-readers, and them, the constitutional authors.[115]

Taken together, the identification of us citizens with the constitutional authors that 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.[116] Moreover, at the foundation 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."[117] Thus, the first-person plural subject of "we" in the idea of constitutional authorship, which consists of us citizens and constitutional initiator-revolutionaries, always acts in the name of "the people."[118] 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 in some form of constitutional authorship one way or another. Understood as constructive reflexivity, the idea of constitutional authorship and the identity of "We the People" can be made sense of from Michelman's philosophical-anthropological point of view without reducing constitutional authorship to democratic dictatorship as history has suggested. 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."[119] Yet, whether Michelman would be thus enchanted remains unclear. To answer that question, we move to the next section.

C. Michelman's Systematic Proceduralism in **Ida's Way***: A Presentist View of Constitutional Legitimacy*

Despite the "gain[ing] currency [of the author-based conception of constitutional bindingness] in American constitutional debates and discussions,"[120] Michelman decides to distance himself from it and takes 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.[121] Michelman chooses "full-merits legitimation" over

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[114] *Cf.* Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U.L. REV. 893 (1990).
[115] *See* Michelman, *Constitutional Authorship*, *supra* note 13, at 65.
[116] As von Roermund notes, 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 95, at 81. Roermund points out that Rousseau's foregoing statement suggested a reflexive view of identity and an alternative understanding of the Rousseauian proposition: "Both normativity and the validity of law lie with its legislators ruling over themselves." *See* van Roermund, *supra* note 83, at 42 (citation omitted).
[117] *See* ROUSSEAU, *supra* note 95, at 81.
[118] *See* Preuss, *Exercise of Constituent Power*, *supra* note 111, at 213.
[119] *See supra* text accompanied by notes 11-12.
[120] *See* Michelman, *Contract for Legitimacy*, *supra* note 13, at 126-27 & n.109.
[121] *See* Michelman, *Ida's Way*, *supra* note 13, at 347-52; Michelman, *Judicial Supremacy*, *supra* note 13, 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*

"constitutional legitimation."[122] Why? This is not due to the fact that understanding constitutional authorship as a function of constructive reflexivity ignores the empirical issues of constitutional legitimacy as legal nonvolitionalism attempts to do.[123] Bruce Ackerman's account of American political history and constitutional change, for example, provides empirical evidence in support of the possibility that 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.[124] If not the empirical issue,[125] what sets Michelman on his *Ida's Way*?[126] I take up this question by way of introducing Michelman's *Ida's Way* view of legitimacy to show that he fails to escape from the enchantment of constitutional authorship. Instead, his journey not only testifies to the inevitability of constitutional authorship but also sheds light on the transtemporal character of political identity.

As indicated above, Michelman notes two positions concerning the legitimacy of constitutional democracy: "constitutional legitimation" and "full-merits legitimation."[127] Michelman distances himself from the three major theoretical strands, all of which centre on the idea of "constitutional legitimation," and takes the position of "full-merits legitimation." He identifies three deviations in "full-merits legitimation" from the idea of "constitutional legitimacy." First, it deviates from the notion of "constitutional legitimacy," according to which the legitimacy of ordinary legal acts is translated into the issue of "constitutionality," while the constitution serves as the "legitimacy contract" for ordinary legal acts. In contrast, "full-merits legitimation" leans toward "an all-things-considered, full-merits judgment."[128] According to this *Ida's Way* view, the legitimacy of constitutional democracy must be judged in the light of "the governmental totality" of the system in which the constitution operates. Judgment of its legitimacy centres on "whether [its] total performance is good enough, on the whole, to be accepted [by individual citizens] considering the practical, imaginable alternatives."[129]

Michelman, *Reply*, *supra* note 13, at 54-57 (agreeing with Edwin Baker's rejection of constitution-as-contract).

[122] For "full-merits legitimation" and "constitutional legitimation," see *supra* text accompanying notes 16-19.

[123] 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 13, at 73.

[124] *See* ACKERMAN, FOUNDATIONS, *supra* note 9, at 230-49.

[125] 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 collectively reach a consensus on normative principles, but rather puts stress on the phenomenon of reasonable disagreement. *See supra* text accompanying notes 36-44. 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.'" *But cf.* Michelman, *Why Constitutionalism*, *supra* note 64, at 301, 306 ("In asking how people think about government, we must leave open the possibility that they think about it in ways that are themselves counterfactual—idealizing, imaginative, utopian—much more so than they usually notice or admit."). *See also* Ciaran Cronin, *On the Possibility of a Democratic Constitutional Founding: Habermas and Michelman in Dialogue*, 19 RATIO JURIS 343, 360-61 (2006).

[126] *See* Michelman, *Ida's Way*, *supra* note 13.

[127] *See supra* text accompanying notes 16-19.

[128] *See supra* text accompanying notes 18-19.

[129] *See* Michelman, *Ida's Way*, *supra* note 13, at 347-48 (emphasis added).

Second, full-merits judgment deviates in the completeness of the constitution assumed by the concept of constitutional legitimacy. To the extent that "judgments of constitutional bindingness [are] strictly a function of sundry full-merits judgments," "the constitution is incomplete." Unlike the constitution as the complete legitimacy contract under which ordinary statutes and their enforcement are evaluated, Michelman explains, "The 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."[130] In this line of thought, the constitution, or rather, the entire contents of the constitution, consisting of substantive stipulations as well as procedural requirements, are 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." Emerging from this understanding of the constitution is a procedural view of it: 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 are obdurately and divisively controversial in society," the constitution is procedural.[131] While the constitution functions as the institutional procedure through which controversies concerning public authority are settled, it does not provide the complete criteria under which acts of public authority are to be judged.

The third deviation of "full-merits legitimation" from "constitutional legitimation" is concerned with the subjectivity of Ida herself. Since "constitutional legitimation" requires that controversies concerning public authority be judged completely under criteria within the constitution, constitutional interpretation becomes the pivotal activity in assessing the legitimacy of constitutional legitimacy and the ideal image of a judge tends to occupy the central position in that regard. Nevertheless, Michelman emphasizes that through the lens of "full-merits legitimation," Ida, who makes judgments on the total performance of the political system, is in stark contrast to Dworkin's Hercules, who is a super-judge, although the governmental totality is seemingly evocative of Ronald Dworkin's idea of "integrity."[132] 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."[133] Specifically, Ida, "[a] non-official personage," refers to any single 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."[134] From Michleman's point of view, when every single Ida is expected to be able to "accommodate the pull each reasonable [co-]participant will feel, for good reason toward finding [the governmental system] respect-worthy," the political institutions of constitutional democracy at issue are legitimate.[135]

Overall, Michelman's theory of the legitimacy of "constitutionalism as practice" centres on a "contract-independent, holistic-presentist assessment of the practice of [the

[130] *See* Michelman, *Constitutional Legitimation*, *supra* note 13, at 14 (emphasis added).
[131] *See* Michleman, *Reply*, *supra* note 13, at 658.
[132] *See* Michelman, *Ida's Way*, *supra* note 13, at 348.
[133] Balkin, *supra* note 13, at 490.
[134] Michelman, *Ida's Way*, *supra* note 13, at 348.
[135] *See id*. at 365.

existing constitutional regime.]"[136] By virtue of his substitution of a holistic view of the constitutional system or the totality of governing practice for the constitution itself, Michelman resolves the problem of the completeness of the constitution over which constitutional contractarianism stumbles in the face of constitutional 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 in force is a part. Legitimacy or "respect-worthiness," Michelman writes, "is not a fact, it is a judgment" at the present moment. That judgment is located in the consciousness of the "first person—I." Thus, "[l]egitimacy…is, from the standpoint of a reciprocity-minded liberal, an insuperably and irreducibly decentralized, personal judgment."[137]

As a corollary, the origin of the current constitutional regime is not the central concern of the legitimacy query, but instead constitutes only a part of the systematic appraisal of the totality of governing practice. In other words, the presentist concern centres on whether the existing governmental system under which Idas live should be considered legitimate and thus deserving of respect and observance, i.e. the "moral supportability" of the existing political system.[138] Thus, the constitution as well as the whole constitutional system is regarded not as containing substantive judgments, but instead as a functional procedure for institutionally settling controversies concerning public authority. To sum up, Michelman sets forth 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," as opposed to the "justice-seeking capacity of the constitution" in conception, 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."[139]

D. Toward Constitutional Authorship

While the presentist first-person standpoint of the legitimacy of constitutionalism as practice embodies Michleman's philosophical-anthropological position, 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."[140] The legitimacy of the constitutional order must be a completely personal judgment, which has no bearings on a collective "we" apart from individuals. In contrast, the conceptual matrix from which the first-person-plural "we" in the idea of constitutional authorship emerges already presupposes "some sort of unity" in the formation of identity, which is not merely contingent on personal judgment.[141]

While considering whether to incorporate a notion of identity in theorizing the justification of politics, i.e. its legitimacy, Michelman considers the activity of constitutional interpretation. According to him, there are two alternative ways of

[136] *See* Michelman, *Reply*, *supra* note 13, at 658.
[137] *See id*. at 660-61.
[138] For the relationship between different objectives of constitutional democracy and conceptions of legitimacy—justice-seeking capacity v. moral supportability, see *supra* text accompanying notes 52-54.
[139] Michelman, *Reply*, *supra* note 13, at 660 (emphasis in original).
[140] Michelman, *Constitutional Patriotism*, *supra* note 13, at 1028.
[141] *See* van Roermund, *supra* note 83, at 44-45.

characterizing debates over constitutional interpretation.[142] First, these debates can be taken as "over the meanings or applications of a set canonical items [sic], already securely certified as acceptable to everyone as reasonable, come what may in dispute over how to apply them." Of this view Michelman notes, "a nominal constitutional essentials' [sic] rational acceptability to the reasonable can somehow be independent of what that nominal essential is going to turn out in practice to mean." Prior to the conclusion of the interpretive activity, the acceptability of constitutional essentials that constitute the object of interpretation has been assumed. Accordingly, 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."[143]

From Michelman's perspective, this characterization of constitutional interpretation rests on constitutional authorship and contradicts his philosophical-anthropological position. As noted above, at the centre 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 centring on the constitution, or rather, the set of constitutional essentials, as a common project. While an intentional action such as a project is prospectively oriented and temporally extended, an initial, or rather *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 pre-existing structure that would organize the deliberations. Correspondingly, it is at that moment that the identity of the first-person plural "we" centring on this "project" emerges dialogically as the identitarian model of constructive reflexivity projects.[144] Yet, a constitutional project is not only temporally extended but also conceived to extend down the generations.[145] Those living in subsequent generations to that initial exceptional moment cannot enter into the dialogue concerning the deliberative development of a constitutional project, part of which is constitutional interpretation, without walking the path taken by the preceding generations of "We the People."[146] This does not mean that those following the initial generation of "We the People" cannot change the course. To decide on the future direction of a constitutional project and partake of "We the People," however, they are required first to take up the constitutional project set out by their forebears.[147] Emerging from this cross-generational relationship is a transtemporal constitutional identity.[148] Constitutional authorship is transtemporal. Under this view is Michelman's first characterization of constitutional interpretation: Constitutional interpretation is the undertaking of uncovering the meaning of given constitutional provisions, which are assumed to be "acceptable to the reasonable," although their contents are not yet fully known to the interpreting generation.[149] The

[142] *See* Michelman, *Constitutional Patriotism*, *supra* note 13, at 1024. *See also* Michelman, *Why Constitutionalism*, *supra* note 64, at 305.
[143] *See* Michelman, *Constitutional Patriotism*, *supra* note 13, at 1024 (emphasis added).
[144] *See* Postema, *supra* note 106, at 211-12.
[145] *See* RUBENFELD, *supra* note 7. *See also* Richard S. Kay, *Constitutional Chrononomy*, 13 RATIO JURIS 31, 33-37 (2000).
[146] *See also* Postema, *supra* note 106, at 211-12.
[147] *See id*. at 224-25. *See also* RUBENFELD, *supra* note 7.
[148] *See generally* Paul W. Kahn, *Political Time: Sovereignty and the Transtemporal Community*, 28 CARDOZO L. REV. 259 (2006).
[149] *See* Michelman, *Constitutional Patriotism*, *supra* note 13, at 1024-25.

problem, however, is that acceptance without knowledge is not acceptable to Michelman.

Alternatively, Michelman characterizes the same debates concerning constitutional interpretation as "over which of the contesting meanings or applications [of essential constitutional items] will render these items acceptable to everyone as reasonable."[150] 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.[151] In contrast to the first characterization as discussed above, under the second view constitutional interpretation seems to Michelman to presuppose neither the transtemporal character of a constitutional project nor the acceptability of constitutional essentials. To a presentist Ida, the point of undertaking constitutional interpretation is not to identify the meaning of given constitutional provisions but to discover an acceptable rendering of these provisions to the particular controversy facing her. Centring on a particular constitutional provision does not mean that that provision is already "acceptable to everyone as reasonable." Rather, the provision at the centre of interpretation functions merely as the horizon on which different views on a particular issue happen to engage with each other. The legitimacy of the constitutional system as a whole, including the constitutional provisions that serve as the "engaging horizon," is a function of the all-things-considered judgment resulting from the debate over which of the contesting meanings of essential constitutional items will be adopted by the interpreting institution under this constitutional system to "render these items acceptable to everyone as reasonable."[152] Thus, the second view of contentions over constitutional essentials is the only position that would correspond to *Ida's Way*.

Does Michelman really succeed in providing *Ida's Way* as a theoretical alternative to the concept of constitutional authorship that is rooted in a presupposed structure of identity? 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, i.e. the second, attitude toward constitutional interpretation, is her indifference to the character of the essential constitutional items at issue.[153] Instead, those disputed constitutional provisions are functionally reconstructed: together with the institutions and procedures in the constitutional system, they constitute a functional mechanism in which controversies concerning public authority are settled.[154] From Michelman's point of view, Ida's resorting to this functional mechanism results not from historical necessity but instead from a contingent fact: it exists and is accessible to Ida.[155] 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 other existing mechanisms for settlement?

Based on what John Rawls called "Hobbes's thesis" to the effect that a government's readiness to enforce legal ordering is the necessary condition for the

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[150] *Id*. at 1025.
[151] *See* Michelman, *Ida's Way*, *supra* note 13, at 358, 362.
[152] *See* Michelman, *Constitutional Patriotism*, *supra* note 13, at 1025.
[153] *See supra* text accompanying notes 150-52.
[154] 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* Michleman, *Reply*, *supra* note 13, at 658.
[155] *See id*.

production of "goods of union,"[156] Michleman acknowledges that "[a] judgment regarding legitimacy refers…to a judgment regarding stability."[157] This does not mean that legitimacy is equated with stability in Ida's judgment on legitimacy.[158] Rather, Ida's presumption of the existing institution as the functional mechanism to settle controversies concerning public authority is based on her leaning toward stability. Concern over stability is not irrational or unreasonable. To a critically-minded Ida as portrayed by Michelman, however, stability is only one of the factors in weighing which existing institutions she should turn to. Thus, stability alone does not account for the existing institution as Ida's presumptive controversy-resolving mechanism. To illustrate this point, suppose that the existing institution in charge is tarnished with its prejudices against, say, political speech in the past and Ida is sued by the Secretary of Defense for defamation concerning her criticism of his defense policies. While, as a presentist, Ida bases her judgment of legitimacy only on how her case would be decided by that institution, she is not ignorant of the institution's reputation. Under such circumstances, the presumption of her resorting to the tarnished existing institution cannot be fully explained by her leaning toward stability, considering her critical thinking ability and disposition. Instead of trading freedom for stability, Ida's critical decision to stick to this institution suggests that she holds that her odds of winning the case are good.[159] How does she strike a balance between her leaning toward stability and her love of freedom in the face of an institution with a repressive record?

Ida's decision suggests that this balance is premised on her three positions toward the existing institution, which have been lumped together and obscured under the umbrella of "stability." First, she holds an empathetic attitude toward the existing system, despite its past failure to live up to the protection of political speech. Related to the first position, Ida's weighing of freedom against stability also indicates that in her view the repressive past is regarded as a "mistake" rather than characteristic of the current governmental system. Third, it implies a "moral optimism" in Ida's attitude toward the existing institution. Taken together, to Ida, the past decisions of the existing institution in favour of the restriction of political speech are merely mistakes, and the tarnished institution can correct itself and thus be trusted to adjudicate her case.[160]

Thus, under the guise of "stability" in the Michlemanian *Ida's Way* version of the legitimacy of constitutional democracy is Ida's "faith" in the self-correctability of the existing system. Crucial but implicit in Ida's tolerant attitude toward "the system-in-place," which is characterized by "writing off [moral mishaps in the systemic history] as

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[156] *See* Michelman, *Ida's Way*, *supra* note 13, at 346 (citing JOHN RAWLS POLITICAL LIBERALISM 211 (1996)). Michelman substitutes "goods of 'union'" for Rawls' political good. *See id*.

[157] Michelman, *Reply*, *supra* note 13, at 661.

[158] 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.

[159] *Cf*. Balkin, *supra* note 13, at 495 (noting that Ida's faith in the future of the governmental system-in-place cannot be reduced to "probable belief").

[160] Jack Balkin characterizes Ida's three positions as "interpretive charity," which, he argues, is the premise of Michelman's presentist view of legitimacy. *See id*. at 490. In this regard, the "interpretive charity" that Balkin identifies with Michelman's *Ida's Way* is similar to constitutional patriotism, which, as political theorist Jan-Werner Müller points out, "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 (2007).

'mistakes,'" is more than a confidence in the future.[161] Ida believes that all that has gone wrong will eventually be corrected by mechanisms within the existing system.[162]

Although the preceding diagnosis 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 legitimacy "by being a common project of interpretation by different members of the political community,"[163] Michelman does not agree and speaks of being "nervous" about the attributes of a common-project constitution.[164] To Michelman, justification of constitutionalism as practice must reside within presentist first-person judgment. He, accordingly, resists the idea of the constitution as a set object of the common project of interpretation. He does not accept a conception of the constitution and its legitimacy that can be justified "[only] by faith and not by works or by reason." Ida's choice of the existing institution, Michelman emphasizes, rests on her belief in the common need for security, which stands apart from the historical type of faith in a transtemporal collective subject.[165] 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,[166] from Michelman's perspective, this belief in an existing institution is simply "a faith in the efficacy of reason in history."[167]

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 rather than 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 thus be accomplished at a cost. The price is the very idea that legitimacy is a public matter at the centre of a democratic society. The presentist, first-person standpoint of *Ida's Way* seems to suggest a tendency toward treating the judgment of legitimacy as "a private matter of each individual with his or her own conscience."[168] To maintain the public character of the legitimacy query, however, Michelman believes that an intersubjective "we" will materialize in the judgment of legitimacy.[169] Is the "we" conceived in Michelman's presentist, first-person standpoint of legitimacy ahistorical and thus distinct from "We the People" of constitutional authorship?

While in *Ida's Way* judgment on legitimacy is considered personal, the decision on the choice of controversy-resolving mechanism is not made by any single Ida. Whether an existing institution with a dark history of repressing political speech is reliable to Ida as an impartial adjudicatory mechanism regarding her present case depends on Ida's calculation of different variables. This calculation is her personal judgment.[170] Yet, in a controversy or a case, it is not a single Ida that is involved. To

[161] *See* Michelman, *Ida's Way*, *supra* note 13, at 364.
[162] *Cf.* Balkin, *supra* note 13, at 490-91.
[163] *See id*. at 492.
[164] *See* Michelman, *Reply*, *supra* note 13, at 659.
[165] *See id*. at 659-61. *Cf.* Balkin, *supra* note 13, at 492-97.
[166] *See* Michelman, *Faith and Obligation*, *supra* note 13, at 656-59. *See also* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 72-74 (2008).
[167] *See* Cronin, *supra* note 125, at 367 (noting Michelman "in the same boat as Habermas," who holds "faith in the efficacy of reason in history").
[168] *See id*. at 361. *See also* Michelman, *Reply*, *supra* note 13, at 660-61; Michelman, *Ida's Way*, *supra* note 13, at 364-65.
[169] *See* Michelman, *Reply*, *supra* note 13, at 660.
[170] *See id*. at 660-61.

have a controversy resolved by an institutional mechanism that is accepted by the parties concerned requires more than personal judgment. Rather, the personal judgments of the two parties to a controversy must converge on the choice of controversy-resolving institution.[171] To find this common ground, Idas as parties to a controversy are involved in a multiparty or two-party "intended action."[172] To justify the decision to choose a particular institution over others 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."[173] From a presentist, critically-minded Ida's perspective, the decision on the choice of the controversy-resolving mechanism 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 Michleman conceives in *Ida's Way* consistently comes to the same conclusion. In other words, once justified, the chosen institution is assumed by subsequent interpreters, carrying over into the future. Doesn't this suggest that a transtemporal framework is still implicated in Michelman's *Ida's Way* of constitutional interpretation, at least in regard to the part concerning the choice of the controversy-resolving mechanism?

On the contrary, Michelman might assert, "To Ida, every moment is seen as if it had no past and thus as a kind of new beginning."[174] 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."[175] In this picture, choosing a particular institution every time would not be part of a transtemporal project but rather result from "normative coherence as an ideal property of legal system *at a given moment in time*, of a momentary legal system."[176] 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,"[177] 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 outside the controversy. Moreover, once adopted by the deciding institution, Ida's interpretive position would become part of the record of the chosen institutional mechanism in charge of resolving the controversy, which would impinge on the rational decision of future generations concerning the controversy-resolving institution. Taken together, the rational adherence to a particular chosen institution in *Ida's Way* reflects the fact that the justificatory reason 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 chose the institution over other mechanisms in the past, they already took into account the impact of their decision on the future.

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[171] *See* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 2-11 (2000).
[172] *See* Postema, *supra* note 106, at 209-10.
[173] *Cf.* Michleman, *Constitutional Patriotism*, *supra* note 13, at 1025.
[174] I owe this perceptive observation to Paul Kahn.
[175] Postema, *supra* note 106, at 211.
[176] *See id*. at 222 (emphasis in original).
[177] *See* Michleman, *Constitutional Patriotism*, *supra* note 13, at 1024.

This does not mean that present 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."[178] 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 instead 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 will accept. Keeping the initial institutional choice as the default mechanism to decide controversies becomes the common purpose of every instance of constitutional interpretation.

Moreover, if the time frame conceived of in each instance of constitutional interpretation is temporally extended, a transtemporal project will be necessary to include all temporally extended positions on the meaning of the constitution and connect them together.[179] Without this transtemporal purpose, the choice of default controversy-solving institution will lose normative coherence. If this choice of the institutional controversy-solving mechanism is an integral part of Michleman's conception of constitutional interpretation and is undertaken within a transtemporal framework, the whole enterprise of constitutional interpretation remains within the same time frame. Each constitutional interpretation seems to be presentist because it is not commanded by the past. Still, under the transtemporal framework, instances of constitutional interpretation constitute a common project.[180] Without hope for a future on which a present interpretive position will have influence, the present decision would be emptied of significance and taken lightly for it can be decided *de novo* in the next instance of interpretation.[181] In sum, the conception of the legitimacy of government in *Ida's Way* still suggests a projection forward to the future and backward to the past.[182]

As discussed above, at the centre of constitutional authorship in the vein of constructive reflexivity is the identity of the first-person plural "we," which emerges from the process of deliberation on the constitution as a transtemporal common project. In this view, constitutional interpretation is an undertaking of uncovering the meaning of given constitutional provisions.[183] My analysis shows that it takes place within a transtemporal framework preceding Ida's holistic, presentist, first-person judgment of legitimacy that materializes from Michelman's intersubjective "we" of Idas interpreting the constitution.[184] Thus, in *Ida's Way*, the notion of "constitutional identity" is transtemporal. At the core of the constitutional system lies something deeper and richer than the existing political regime, transcending the institutional performances of particular periods.[185] 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 ground Ida's judgment regarding legitimacy, it is self-contradictory that Michelman refutes the presupposed identitarian sense of "we" in

[178] *See* Postema, *supra* note 106, at 211-12, 222.
[179] *Cf. id*. at 222.
[180] *See* RUBENFELD, *supra* note 7.
[181] *See* Postema, *supra* note 106, at 209.
[182] For the relationship between the legal melodic temporality and legitimate public actions, see *id*. at 219-25. *See also* Balkin, *supra* note 13, at 494.
[183] *See* Michelman, *Constitutional Patriotism*, *supra* note 13, at 1025.
[184] *See* Michelman, *Reply*, *supra* note 13, at 660.
[185] *See also* Balkin, *supra* note 13, at 500.

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. Thus, the notion of constitutional authorship is not obliterated but supported by Michleman's turn to *Ida's Way*. Identification with the past and past deeds implicit in Ida's leaning toward the existing system and her general interpretive position not only 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.[186] Thus, the Michelmanian Ida's view of legitimacy is not so much an alternative to constitutional authorship as it is an account of it.

IV. Conclusion

The constitutionalization of the EU as a supranational entity has been praised by globalization pundits as a prototype for the re-legitimization of constitutional democracies in the global era. What is characteristic of the constitutionalization of the EU has been portrayed as a departure from the Revolutionary tradition of constitutionalism.[187] Without the constitutional moment in which popular sovereignty delivers a constitution, the European experience of constitutionalization is embedded in the process of the interagency dialogues between the EU level and the member states, and the involvement of intermediary groups of citizens in European policy-making with the backing of the European Court of Justice.[188] Following the rejection of the draft "Constitutional Treaty" in France's and the Netherlands' referenda in 2005, whether such a project of constitutionalization without making a constitution will give legitimacy to the political order by addressing social needs at present remains to be further explored.[189]

I have tried to cast light on this issue by engaging with Michelman's scholarship on the legitimacy of constitutional democracy. Despite the defects he perceptively identifies in the contract-based and acceptance-oriented conceptions of the legitimacy of constitutional democracy, constitutional authorship, the remaining third of the Big Three theories of constitutional legitimacy, does not win Michelman's approval. Rather, he distances himself from constitutional authorship, turning to a seemingly presentist view of constitutional legitimacy in order to address various reasonable disagreements in modern society without assuming an illiberal transtemporal identity. Holding no particular normative position toward how to conceive of the legitimacy of constitutional democracy, however, my investigation shows that Michelman's presentist view cannot fully account for the legitimacy of public institutions in constitutional democracy

[186] *Cf*. MÜLLER, *supra* note 160, at 60-66 (suggesting that a "shared history" is needed to account for "attachment and agency" in constitutional patriotism).
[187] *See*, *e.g*., EVERSON & EISNER, *supra* note 10.
[188] *See*, *e.g.*, TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM (Joerges, Christian et al. eds., 2004); EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (J.H.H. Weiler & Marlene Wind eds., 2003).
[189] *See*, *e.g*., Neil Walker, *A Constitutional Reckoning*, 13 CONSTELLATIONS 140 (2006).

without presupposing a transtemporal view of identity. In sum, the fact that Michelman's partial presentist view of constitutional democracy bears out, instead of wiping out, constitutional authorship as shown above only suggests that the legitimacy of constitutional democracy is embedded in the presuppositions concerning constitutional democracy in our "thick" political culture, rather than being built on pure theoretical meditation.[190]

[190] This points to a cultural study of or an aesthetics of law. *See generally* PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999); Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1050 (2002). *See also* Ulrich Haltern, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination*, 9 EUR. L.J. 14, 19-20 (2003). For a similar theoretical critique of European integration and current legal studies of European constitutionalism, see Ulrich Haltern, *A Comment on Von Bogdandy*, *in Debating the Democratic Legitimacy of the European Union*, *supra* note 10, at 45.