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Provocation: Law's Republics

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PROVOCATION

LAW'S REPUBLICS

*Vlad Perju**

I begin with three premises: First, the relevance for any polity of the exercises in self-government of other political communities, as encoded in their constitutional laws and cultures, is not self evident and must therefore be justified. Second, that justification must place domestic and foreign law within a unitary framework by reference to which the comparativist's choices can be defended. Third, no project of comparative constitutional law, and perhaps comparative law generally, can withstand scrutiny unless it articulates, or it signs on to some articulation, of such a framework. By placing comparative constitutional law within the larger constitutional democratic project of government by law, Professor Frank Michelman's work gives us a framework for how the constitutional mind can approach — or “go visiting,”¹ as Hannah Arendt put it — the experiments in collective self-determination of other free communities of equals. My Provocation explores that framework. It finds in it a model for one possible future of comparative constitutional law, a future that, at least in the view of this grateful student, is far more appealing than all others.

I. THE CHALLENGES OF COMPARATIVE CONSTITUTIONALISM

The experience of approaching a plurality of constitutional systems is like observing the vast constitutional sky through a magnifying glass. How to construct a lens that shows the details of constitutional doctrine without obscuring the larger constitutional architecture of collective self-determination? The task of mastering any one system seems daunting enough. How, then, to think about law's republics — in the plural?²

Consider some of the most urgent challenges. Comparison by definition involves looking at more than one jurisdiction. But how to choose where to look, what jurisdictions to compare (why this and not

* Associate Professor, Boston College Law School. This “provocation” is a revised version of a paper that was presented at the Symposium in Honor of Professor Frank Michelman, hosted by Harvard Law School on February 10–11, 2012.

¹ HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY 43 (Ronald Beiner ed., 1989).

² Of course, with this formulation I wish to call to mind Frank's famed 1988 article. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

that jurisdiction)? As the world's constitutional landscape has changed in the past six decades or so, with the spread of the idea of constitution as law (and not merely as pamphlet or declaration), as well as the practice of judicial review, whether in its centralized or decentralized forms, the choice of jurisdictions has accordingly diversified. This debate about selection is familiar, perhaps too much so, in the American legal culture in the context of citations to foreign law.³ It has been said in that context that where one looks depends partly on why one is looking — and what one hopes to find. But does it? Must selection be purely instrumental? Or could comparison be different — can anything about it change us?

Furthermore, what is the object of comparison? Whether one seeks to understand constitutional structure, institutional design, or the interpretation of rights, the question will be: where to look? Constitutional text is important but likely insufficient — and if one needs to look beyond it, how far beyond? Should one consider doctrine, institutional structure, political culture, or historical context? And when one stops, why stop there? Presumably, a more complete understanding requires pushing on — and on one can push, since there is no reason to believe that other legal systems or political cultures are less complex and intricate than we know our own to be.

Then comes the problem of translation. Constitutional systems are combinations of contingency and principle so that even when the latter sound similar (equality, autonomy), aspects of those principles' meanings will have been shaped by a community's unique history. Can we fully understand the struggles of others? And, if not, how can we avoid the dangers of "nominalism"?⁴ As Bernard Williams wrote in the preface to his book on Descartes, even if one could play old music on old instruments, one would not be able to hear the music with old ears.⁵ Understanding requires translation and some dimensions of constitutional meaning almost always get lost in translation.

These are all formidable challenges. And there is more.

Is the project of constitutional comparison itself legitimate? That depends, of course, on many factors, including who undertakes the comparison — scholars, judges, legislators — and when the compari-

³ See, e.g., Roger Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); Jeremy Waldron, *The Supreme Court, 2004 Term — Comment: Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005). For the larger context of this debate, see generally VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2010).

⁴ The nominalist fallacy assumes identity of content (for example, the value of privacy) from similarity in form (for example, the right to privacy). This danger is mentioned in Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 794 (1997); and Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

⁵ BERNARD WILLIAMS, *DESCARTES* 9 (1978).

son occurs in the life cycle of a constitution. Challenges to legitimacy have been particularly forceful at the interpretative stages. Constitutions are commonly understood as self-referential systems of secondary rules that structure political power and enable processes of self-determination of a presumably prespecified collective “self.” What traction can constitutional practices or ideas have outside the political community for which they were first devised?

Finally, even assuming that the above questions can be answered, are the risks of comparison worth taking, particularly in societies that are already by and large well-ordered? If the comparative project is taken seriously and done well, if its relevance is not marginal, won't the risk of constitutional destabilization be very high? The experience of traveling can change how we argue law, how we write and think about it. But what if law is what keeps society together?⁶ The goods of social ordering are fragile, and the respect-worthiness of a constitutional system cannot be taken for granted; why risk them?

Frank's work makes it possible to answer these questions. I don't mean that the work itself offers a set of definitive answers — saying that wouldn't do justice to its importance. Frank does much more than just give us answers. He shows how to go about searching for them — what answers look like. He teaches us the importance of asking the right questions, and the spirit in which to do it: that spirit of looking at law's republics “simply and directly, having only in mind our intention of finding out what they really are, not the prestige of our great intellectual act of looking at them.”⁷ Frank's work shows how to learn from the world without losing ourselves in it; how to train our minds to travel the world remembering still the home we left behind. Frank shows how to do comparative law as a full jurist and how to be a jurist as a whole human being.

II. THE JURISPRUDENCE OF COMPARATIVE ANALYSIS

Comparative law was not Frank's initial intellectual home — yet his generous visits have changed the field. Writing about the state of this field, one noted comparative lawyer recently remarked that “the business of comparatists is fundamentally no different from the business of any other type of legal scholar. All good legal scholars are interested in carefully working out normative justifications for human action and for the exercise of human authority.”⁸ Unsurprisingly, there

⁶ ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY* 47 (1976) (“Each society reveals through its law the innermost secrets of the manner in which it holds men together.”).

⁷ Lionel Trilling, *Introduction* to GEORGE ORWELL, *HOMAGE TO CATALONIA*, at v, xi (1952).

⁸ James Q. Whitman, *The neo-Romantic turn*, in *COMPARATIVE LEGAL STUDIES* 312, 344 (Pierre Legrand & Roderick Munday eds., 2003). Past abuses of “grand theory” explain why com-

is continuity between law's republics, between how one thinks about one's own constitutional system and how one thinks about others'. Frank's approach to the constitutional laws of other peoples shares some of the jurisprudential pedigree of his take on the laws of the American republic. They are of one piece. The project of comparative constitutional law is a part of the project of law, or, to be specific, of the project of government by law.

Frank's work shows how comparative analysis — for, lest we forget, comparative constitutional law is comparative law — is multi-layered: the doctrinal emphasis of the functionalist marketplace of ideas is indefensible without supplementing it with an account of constitutional culture, which itself rings hollow unless justified by a conception of political morality. There is an internal push in the argument — in the comparative argument — that forces the doctrinal and cultural constitutional analysis to go up. Up where?

Up, perhaps, in the normative cloud that transcends jurisdictional boundaries and connects us and them, the self and the world, inside and outside. Up toward “a sense of internal moral commonality and ethical fellowship”⁹ among members of a political community and maybe beyond. Comparative experience helps us see the world, and ourselves in it, from the perspective of other peoples — of those people we have not become — and unveils dimensions of constitutional identity that routine and thoughtlessness would otherwise have continued to conceal. Enhanced reflectivity is not just good to have — rather, it is an essential part of how citizens shape the social spaces they inhabit. Comparative analysis becomes an epistemological and normative tool for the jurist who interrogates how the terms of collective life can reinforce the standing of law's subjects as its free and equal authors.

This approach raises intriguing questions. Praising comparative law for enhancing constitutional reflectiveness shows that the comparative experience is helpful, but is it necessary? Reflectiveness can be enhanced in many ways, of which comparison is presumably only one. What has the comparative experience added to Frank's understanding of constitutionalism that couldn't be found in his work already? Furthermore, does it matter *how* the comparative experience enhances reflectiveness? Comparative scholars have argued that mistaken understandings of foreign law can be fruitful.¹⁰ If this is so, why do we admire Frank's scholarship for getting things right? Finally, how does

parative law suffers from a normative deficit. For a discussion, see William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945 (1986).

⁹ Frank I. Michelman, *Integrity-Anxiety?*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 241, 274 (Michael Ignatieff ed., 2005).

¹⁰ ALAN WATSON, LEGAL TRANSPLANTS 99 (1974) (arguing that “foreign law can be influential even when it is totally misunderstood”).

comparative analysis shape one's understanding of the possibilities of constitutional democracy? I will suggest that their relationship is one of reflective equilibrium where changes in each project trigger recalibrations in the other. Specifically, in the context of Frank's work, is there a connection between his befriending South Africa and his work on constitutional legitimacy, for instance, his (family?) quarrel with contractualist¹¹ or "post-metaphysical" approaches to constitutionalism?

III. FRAMING THE COMPARATIVE QUESTION

Constitutional doctrine, culture and political morality are interwoven in Frank's comparative approach to law's republics. To explore this approach, let us return to the question: what relevance, if any, do the laws of other republics have for how a society orders its political affairs in light of pre-established terms as inscribed in a written document that has the status of higher law? Framed at this general level, and assuming that the higher law itself does not settle the matter,¹² the answer is context dependent. For instance, the reasons for the influence of American law in nineteenth-century Argentina will be different from the reasons why French law has been influential in post-communist Romania. History, institutional structure, legal culture or culture *tout court*, accident, and reputational considerations come to mind as some of the many relevant factors. But suppose we further specify the question to concern the possible relevance of the constitutional practice of a legal system that finds itself in the early stages of development, and whose long term stability depends on its success in establishing the legitimacy of its institutions, for a mature constitutional system that has developed an intricate web of legal doctrine and whose political institutions, including courts, are already established.

Take, for instance, South Africa and the United States, and consider the possible relevance of contrasting approaches to the permissibility of the state's use of remedial racial classifications.¹³ In proper comparative fashion, we must first identify differences and similarities between the two constitutional systems. In fact, one finds differences and similarities at all levels. At the level of political and historical context, similarities of racial hatred and discrimination are painfully apparent, as are the differences in terms of the two societies' majorities/minorities. At the level of constitutional text, the two constitutions are similar in that they include equality provisions and dissimilar in

¹¹ See Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 REV. CONST. STUD. 101 (2003).

¹² Sometimes it does. See, e.g., S. AFR. CONST. ch. 1(c), § 39(1)(c) (1996) ("When interpreting the Bill of Rights, a court, tribunal or forum . . . may consider foreign law.").

¹³ See Frank I. Michelman, *Reflection*, 82 TEX. L. REV. 1737 (2004).

their specific, if underdetermined, wording. At the level of institutional structure, both legal systems have a practice of judicial review of legislation, even though the respective structures reflect their different stages of development. As to constitutional commitment, the legacies of both societies leave no one guessing that the treatment of race plays an essential part in their constitutional trajectories. But the actual constitutional expressions of that commitment — and now we are getting closer to the object of the comparison — diverge. On the one hand, American doctrine treats all racial classifications, regardless of aim, as acts that are intrinsically wrong and therefore subjects them to categorical, side-constraint limitations in the form of strict judicial scrutiny.¹⁴ By contrast, South African doctrine treats racial discrimination as a dignitary, rather than an expressive, harm and interprets that harm as possibly congruent with race-conscious state action whose purpose is remedial.¹⁵ There are many wrinkles and nuances to the different doctrinal constructs, for example regarding the actual application of the categorical rule in the American context and the objective versus subjective interpretations of dignitary harm in South African law.¹⁶ Awareness of the fine print of constitutional doctrine, of the dangers of nominalism, and of the interplay of specific provisions with the larger structure — what Mark Tushnet calls modularity¹⁷ — act as cautionary signs for the comparativist. But suppose the comparativist has done the homework. The question about the relevance of South Africa's doctrine on the validity of race-conscious state action to the American interpretation of affirmative action in this context remains.¹⁸

Before proceeding further, it is noteworthy how, from the standpoint of Frank's ethics of comparative inquiry, the question of relevance is not one-directional. The comparative question can be asked both ways, about the relevance of each system to the other's laws. The existence of more established constitutional traditions in the United States neither negates nor downplays the possible relevance of South Africa's constitutional experiments to American law. In this sense, the comparative encounter resembles a Habermasian ideal constitutional speech community where raw power gives way to the force of the better argument. But what can the "better" argument mean in this context?

¹⁴ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

¹⁵ *City Council of Pretoria v. Walker* 1998 (3) BCLR 257 (CC) (S. Afr.).

¹⁶ Michelman, *supra* note 13, at 1754–58.

¹⁷ Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325, 331 (1998). See also generally JACKSON, *supra* note 3.

¹⁸ See Michelman, *supra* note 13, at 1759.

IV. CONSTITUTIONAL DOCTRINE: THE MARKETPLACE OF CONSTITUTIONAL IDEAS

Suppose the “better” argument is the best answer available on the marketplace of constitutional ideas to problems that all or most liberal constitutional systems must face. From this perspective, the laws of other republics form a repertoire of solutions to similar legal problems. We find here echoes of the functionalist tradition in comparative law that sees the migration of legal norms, typically understood as legal rules, as answering a need to solve similar problems across jurisdictions. While initially devised to explain the evolution of private law, functionalism applies, *mutatis mutandis*, to the constitutional realm.¹⁹

Presented as a tool for “solving similar problems”, the shortcomings of this approach are apparent. Solving similar “problems” assumes the existence of a problem that needs to be solved. But why look for solutions abroad if one believes the question has already been answered? For instance, if all racial classifications are deemed harmful, why use comparative law to revisit the decision to subject them to strict judicial scrutiny? Furthermore, labeling problems as “similar”, or “common”, requires a comprehensive framework that connects domestic and foreign constitutional experiences. The historical experiences of racial subordination in the United States and South Africa are important but, without more, arguably insufficient to establish commonality for the purpose of the constitutional treatment of racial classifications. And without establishing that commonality, which a mere focus on the marketplace of ideas does not provide, it is virtually impossible to defend the selection, methods and conclusions of comparative work.

Progress can, however, be made by focusing on how the “solution” itself is defined. If the solution is the same as the outcome itself (“Look, South African constitutional law has endorsed the benign/invidious dichotomy”), then that outcome can be dismissed on the ground that such an answer was proposed, considered and rejected by American constitutional law.²⁰ Unless foreign law is said to have precedential authority, which is not a claim that functionalism makes, then the mere existence of different answers somewhere in the constitutional world will not matter much. But if the “solution” is more finely tuned as part of the justification of the outcome, for instance as a claim that one system’s application of different standards of review to remedial and invidious racial classifications does not violate formal equality,

¹⁹ See Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1304, 1309–13 (Michel Rosenfeld & András Sajó eds., forthcoming 2012).

²⁰ See generally Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378 (2004).

and if such a violation was the ground for rejecting the said dichotomy in the first place, then the South African interpretation might indeed be relevant in solving a common problem. Indeed, this is Frank's subtle claim about the relevance of South African equality jurisprudence.²¹

One finds in the intricacies of constitutional doctrine the primary appeal of functionalism. It is an intuitive appeal rooted in that, whatever else law might be, it is primarily and inescapably a tool for solving practical problems of social ordering. As we shall see, constitutional democracies strive to secure a certain type of social ordering, one well captured by Rawls as stability for the right reasons.²² But however that lofty goal is defined, solving practical problems remains essential to the task of delivering social order. Since constitutional systems will sometimes experience similar problems of ordering, foreign law can have practical relevance as a repertoire of possible solutions. Our question about the cross-jurisdictional relevance can be answered by digging deep within constitutional doctrine. Such comparative analysis is no doubt demanding since it requires judicial craft as well as intimate knowledge of the constitutional systems that form the object of comparison. Frank's work is an exemplary model for how to undergo such analysis. This is the virtue of functionalism.

It is also, however, its limitation. The appeal of functionalism is narrow and deep. It is narrow because, as we have seen, the solution is defensible only when defined narrowly. But a narrow definition confines the repository of ideas and accordingly limits the trade in comparative law. This appeal of functionalism is Pyrrhic in another way too. The comparativist needs to dig (too?) deep into other legal systems to find answers to questions that set him traveling in the first place. In our example, Frank's careful doctrinal analysis leads him to reconstruct the dynamic of the constitutional argument in South African doctrine from discrimination-as-harm through harm-as-impairment-of-dignity to impairment-as-objective.²³ Doctrinal translation becomes the comparativist's challenge. Not only has discrimination-as-harm been rejected in American law, but the very idea of dignity (not to mention "objective dignity") has little equivalent in the corpus of American constitutional law and even less in the equal protection jurisprudence. The more specific the comparative analysis becomes, the greater the difficulties of translation given cross-constitutional differences.

This is a critical moment in the comparative experience and Frank's work shows us how to overcome it. Even as careful doctrinal

²¹ See generally Michelman, *supra* note 13.

²² See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1996).

²³ See generally Michelman, *supra* note 13.

analysis is a staple of his work, Frank Michelman's overall approach to comparative law is not functionalist. In fact, his vision of comparative law is grander and bolder than what defensible functionalism commends. Comparative work must internalize the virtues of functionalism but ultimately it must — somehow — transcend it. Functionalism helpfully brings to the forefront the necessities of positive legal ordering but, in that very process, it raises questions that the functionalist framework itself cannot answer.

The path to overcoming functionalism, after having internalized its lessons, becomes clear once we revisit a premise that the above analysis took for granted. Describing comparative law as a repository of constitutional ideas assumes that “novelty” is the takeaway of comparative analysis. In this view, the comparative approach would be helpful to bolster one's imagination. But what if one's constitutional imagination does not need further bolstering? One finds in Frank's work elements of the critique of the American “fusion” of racial classification and maltreatment in scholarship reacting to the fusion's first doctrinal manifestations. In the context of social and economic interests, Frank's work does not gloss over justiciability concerns in arguing that such interests can be protected under the Fourteenth Amendment.²⁴ The same is true of his work on the state action doctrine and the Constitution's radiating power into the common law. If “novelty” were all, then comparative law would at most bring added support to the work of a scholar who has already looked skeptically from within, so to speak, at his republic's constitutional architecture.

So, perhaps the relevance of comparison will not be found in the novelty of constitutional constructs as much as in their possibility or practicality: the road not taken remains somewhere in the horizon of constitutional possibility. The justification of past constitutional choice can be revisited in light of the experience of other republics whose laws chose that alternative. This goes beyond the problem-solving approach of functionalism, for what makes a constitutional choice more or less promising is no mere efficiency consideration. Constitutional promise is a matter at the intersection of constitutional doctrine, culture and, as we shall see, political morality. The comparative constitutional experiences push, epistemologically and normatively, the horizon of constitutional possibility.

But do all constitutional systems share the same horizon of constitutional possibility? The larger context — cultural, political, historical — has typically been a blind spot of functionalism, yet context does shape perceptions of legal possibility. What is the proper context for

²⁴ See generally Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

comparisons? Frank's work speaks wisely and generously to this question.

V. CONSTITUTIONAL CULTURE: ON IMPRESSIONISM IN CONSTITUTIONAL ANALYSIS

If the legal landscape were populated by rules that could be disenfranchised at will from their surrounding environment, then comparative analysis might perhaps result in pushing the 'restart' button and building the doctrinal edifice afresh. But alas, reality is more complicated. A standard critique of functionalism in comparative law points to the cultural meanings of legal norms. The practical relevance of a foreign law is limited by its embeddedness in the broader culture. That does not leave comparative law without any purpose — it just leaves it without an immediate, functional purpose. In this view, the proper aim of comparative analysis is not to study how systems change but rather to understand why their rootedness makes them unchangeable at will.

At some level, it seems right to point to the role of culture as part of law's complex environment. Legal doctrines ossify, subsequent doctrine builds on, and the behavior, expectations and intuitions of constitutional actors eventually become entrenched. Using comparative law to reverse-engineer constitutional doctrine will be unsuccessful because collective self-government through law isn't an engineering project in the first place. What, then, can be the point of reflecting on the constitutional arrangements of other republics?

Frank answers, teasingly: "mirror."²⁵ By reflecting on others, we gain a better understanding of ourselves. The experiences in self-government of other political communities offer a standpoint from which to become more objective, perhaps more lucid, about one's own constitutional system. Comparative analysis is "dialogical."²⁶ Dialogue with others helps us become aware of how we talk, funny accents and all. It draws our attention to what we say and what we leave unsaid. Herta Müller, a novelist who chronicles life under totalitarianism, once wrote that a language is what people talk about in that language.²⁷ Constitutional dialects are probably no different.

To be sure, we cannot entirely step outside of our culture, just as we cannot entirely step outside of our language. But if there is no Archimedean standpoint, no place outside from which to look back at

²⁵ Michelman, *supra* note 13, at 1737.

²⁶ "Dialogical" is defined as "facilitating a greater understanding of one's own legal system." Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1, 52 (2004). Choudhry drew inspiration from Michelman, *supra* note 2.

²⁷ HERTA MÜLLER, *THE APPOINTMENT* (2001).

everything — or at least not at everything at the same time — then the challenge becomes how to construct the situated objectivity of the comparativist's standpoint from which to unveil dimensions of the constitutional realm that would otherwise remain obscured. Whether they reveal greater complexity or rather help to recover some of law's polyphonic simplicity,²⁸ the comparative perspective enhances constitutional reflectiveness and self-understanding.

One of the many reasons for celebrating Frank's works is his description, from afar looking back, of the American constitutional culture: the disposition of mind, the shared lifeworld(s) of its participants, why the same argument always wins. Why does the South African approach to benign racial classifications not push the horizon of possibility in American constitutional law? What in American constitutional culture is the source of resisting the dichotomy between invidious and benign racial classifications? Frank shows that "American jurists treat proposals for a dichotomous doctrine so cautiously."²⁹ They perceive racial classifications as "repugnant."³⁰ But again, why? Perhaps this has to do in part with how analytical jurisprudence has colonized the political argument in the United States.³¹ Still, what are the origins of this constitutional/cultural phenomenon? "[A]nti-classification," Frank writes, "is a current commitment of American constitutional culture."³² Interestingly, this is a "current" commitment. The revulsion against racial classification is not built into the DNA of the American Equal Protection Clause. It must come from somewhere, from a series of interpretative choices that have erased the doctrinal and normative residue of an imperfect translation of antisubordination into anticlassification.³³ Doctrinal deconstruction shows how, when those interpretive choices were made, they were just that: choices.

Frank's approach to constitutional culture is similar to his approach to constitutional function. The analysis gives culture its due but no more. For all the centrality of constitutional culture(s), Frank's reader is not subjected to *Volkgeist* or *Völkerpsychologie*. Understanding culture is not tantamount to extolling it; the reader does not

²⁸ On the latter, see, for example, FRANK I. MICHELMAN, *Epilogue*, in BRENNAN AND DEMOCRACY (1999). See also, e.g., Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

²⁹ Michelman, *supra* note 13, at 1741.

³⁰ Michelman, *supra* note 20, at 1383.

³¹ See Frank I. Michelman, *A Constitutional Conversation with Professor Frank Michelman*, in (1995) S. AFR. J. HUM. RTS. 477, 481 (1995).

³² Michelman, *supra* note 13, at 1745.

³³ See generally Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

awaken in the “neo-Romantic jungles.”³⁴ The subtle insights of constitutional culture are internalized and then transcended. Since culture itself is dynamic, doesn't understanding have any instrumental value? Whence the normative push to pursue dialogue with others, to reflect lucidly on the cultural dimension of doctrine, to seek understanding? In an essay titled “The Loneliness of the Comparative Lawyer,” Professor John Henry Merryman noted that “comparative law . . . is not really about comparison, at least not very much.”³⁵ What else is it about? Perhaps the answer has to do with a disposition of mind — for all the loneliness, one needn't be fatalistic. Understanding how and what we are, we might dislike it — what if we decide to change? There is something subversive about having knowledge and about tools like comparative law that help acquiring it.³⁶

The importance of enhanced reflectiveness takes us back to the idea of function, only that this time the focus is at a more general level on the function of the constitution itself and of legal ordering more generally. The project of comparative constitutional law is part of the project of government by law.

VI. CONSTITUTIONAL MORALITY: THE COMPARATIVE PROJECT REVISITED

What is a Constitution? We are lucky, once again, in our guide. Suppose it is, or should be, a “publicly binding statement of the terms of a political association that citizens are morally justified in supporting, using whatever force those terms permit to secure compliance with laws enacted in accordance with them.”³⁷ Suppose the constitution is, or should be, “the core of a social pact to keep our political divisions at bay and to maintain political co-operation in spite of them.”³⁸ For liberals aware that the goods of social ordering depend on the fact of coercing free and equal persons whose disagreements in matters of justice can be as deep as they are reasonable, the constitution is — or should be — the instrument “suppl[y]ing, or codif[y]ing” officially, a publicly acknowledged standard for gauging the respect-worthiness of government in [a] country.³⁹

This is a tall order. Can constitutions deliver on that promise? The provocations on Frank's contributions to Law and Philosophy

³⁴ Whitman, *supra* note 8, at 336.

³⁵ JOHN HENRY MERRYMAN, *THE LONELINESS OF THE COMPARATIVE LAWYER* 1 (1999).

³⁶ See generally George Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683 (1998).

³⁷ Michelman, *supra* note 11, at 103–04.

³⁸ *Id.* at 109.

³⁹ *Id.* at 106–07.

take up some of those issues.⁴⁰ For us, it matters more that we get to ask these questions and to understand why we are asking them. We ask because the comparative inquiry has brought us to them. There is something in the argument — in the comparative argument — that pushes the argument up, from constitutional doctrine to considerations of broader constitutional and political culture to questions of constitutional morality.

As Frank's work shows, questions of constitutional morality are themselves not entirely detached from the social world as the legal rules have already structured it. In an essay discussing the American "anti-conversationalist" stance on the use of foreign law in constitutional interpretation, even as persuasive authority, Frank traced the roots of that approach to an anxiety that joining the global conversation could undermine the objectivity of constitutional discourse and ultimately its integrity.⁴¹ He acknowledged that changes in the discourse might indeed occur.⁴² But, he argued, such changes would not necessarily erode the integrity of the discourse. In fact, just the opposite can happen. Openness to the experiences in self-government of other political communities can help (re)build the constitution's promise of objectivity and integrity. It could, for instance, enable judges to understand better the claims that individuals bring forward and answer them in ways that recognize and reinforce their social standing.⁴³

By emphasizing the connections among doctrine, culture, and morality, Frank Michelman's work teaches essential lessons about comparative constitutional studies. One lesson is that the project of comparative constitutional law is intimately related to the project of constitutional law — and of government by law. That latter project places domestic and foreign law within a unitary framework without which the comparativist's choices cannot be defended. But the nature of the framework matters greatly. A mere continuity between domestic and foreign law is by itself insufficient since history is filled with bad continuities, so to speak.⁴⁴ In fact, the project of government by law — or, more specifically, of liberal constitutionalism — not only informs the comparative enterprise but also is shaped by comparative experiences. These projects are in a relation of reflective equilibrium where

⁴⁰ See Robert Post, *Provocation: Frank's Way*, 125 HARV. L. REV. F. 218 (2012); T.M. Scanlon, *Provocation: Everyone is a Philosopher*, 125 HARV. L. REV. F. 228 (2012).

⁴¹ Michelman, *supra* note 9.

⁴² For a similar position, see generally Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807 (2000).

⁴³ For a study of foreign law as a self-correcting mechanism in constitutional doctrine and discourse, see Vlad Perju, *Cosmopolitanism and Constitutional Self-Government*, 8 INT'L J. CONST. L. 326 (2010).

⁴⁴ See, e.g., Upendra Baxi, *The Colonialist Heritage*, in COMPARATIVE LEGAL STUDIES, *supra* note 8.

changes in each can lead to recalibration in how the other project is formulated. In the context of Frank's work, this relationship leads to important questions. What can comparative constitutional law teach about constitutional contractualism? What do the constitutional experiences of law's republics teach about the convergence of individuals' "common human reason" on judgments about the respect-worthiness of a constitutional system? Does it matter, from the standpoint of constitutional legitimacy, whether constitutional objectivity is grounded solely in a form of discourse or in a shared substantive vision of the values of the Constitution?

These are only some of the many questions to be answered, and it is perhaps fitting to conclude on this dialogical note. Asking the right questions is one of the great many lessons to learn from Frank Michelman's extraordinary body of work. On how we answer them depends the future of comparative constitutional law as well as our journey ahead. And what a journey this is.