

January 2012

The Comparative Turn: Accident, Coincidence or Fate

Katharine G. Young

Boston College Law School, katharine.young.3@bc.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lfsp>

 Part of the [Comparative and Foreign Law Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

Katharine G. Young. "The Comparative Turn: Accident, Coincidence or Fate." *Harvard Law Review Forum* 125, (2012): 236-245.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

PROVOCATION

THE COMPARATIVE TURN: ACCIDENT, COINCIDENCE, OR FATE?

*Katharine G. Young**

Why would a long-standing leader in the field of American constitutional law turn his intellectual attention to another constitutional system? And why choose South Africa? For almost two decades, Frank Michelman's contribution to the field of comparative constitutional law has been much like his contribution to constitutional theory and constitutional law in general: soaring, generous, always in dialogue with others, and yet always uniquely his own. In this Provocation, I examine: what accounts for the comparative turn?

I approach this matter not as one demanding historical explanation, but as inviting a comment on Frank's position in the comparative constitutional orbit. Since I am not South African, my perspective is one of a fellow comparativist, as well as one who was lucky enough to be Frank's student. I offer three hypotheses as to why he turned to South Africa: the hypotheses of accident, coincidence, and fate.

HYPOTHESIS I: ACCIDENT

The first hypothesis, accident, looks to the historical forces governing South Africa's emerging constitutionalism in the early 1990s; the same forces, in fact, that were expanding the field of comparative constitutional law. The end of the Cold War, itself key to the defeat of apartheid, freed up new ideas — and old ones — about the legal structuring of a modern constitutional democracy. The influence of the U.S. Constitution abroad was still at its zenith¹: at the same time, U.S. constitutional scholars — perhaps frustrated by the evolving practice of America's liberal democracy, if not its template — welcomed the chance to explore the paths not taken for future, foreign, constitutionalists. South Africans, charged with the task of bringing a post-apartheid country peacefully to democracy, and having chosen constitutionalism as the model to do so, welcomed interlocutors from abroad. It helped to speak English. Frank was one of these accidental

* Senior Lecturer of Law, Australian National University College of Law. S.J.D. 2009 Harvard Law School; BA/LL.B. (Hons) 2000 The University of Melbourne. 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 See, e.g., CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 13–14 (Louis Henkin & Albert Rosenthal eds., 1990).

comparativists. A few introductions here, a few conversations there, and his comparative work began. Instantly enamored with the people, their project, and their passion for that project, he stayed.

For the field, this explanation invites a story of modern constitutional convergence, or of circulating, migrating, transplanting, morphing ideas.² It also invites rumination on Cold War ricochet effects, as well as the impact of the internet, informal contacts, transnational professional communities, global rule-of-law projects and human rights funds, and American resources and prestige.³ It is also the modern story of constitutional framers becoming constitutional drafters, and of constitutional drafters becoming constitutional interpreters.⁴ Frank, always careful with constitutional text, but matching fidelity with probity, was well placed to take part. Empiricism, interviews, and fact-checking are needed to tell this story. But the hypothesis of accident is clearly not the only account of Frank's choice of comparison and of the influence that that choice would have.

HYPOTHESIS 2: COINCIDENCE

The second hypothesis is that of coincidence. On this account, Frank became involved because South Africa's peculiar needs met Frank's peculiar expertise. To a country ravaged by racism, inequality, and poverty, now committed to ending these harms by both constitutional and democratic means, Frank presented several approaches of profound subtlety.

Most obvious is his original work on economic and social rights (or, as termed in America, social welfare rights — this discrepancy in terminology revealing many of the contestations and category-disputes that inevitably accompany rights to food, health care, housing, and education, as well as social security and decent work). In 1969, Frank penned his famous justification for protecting the poor through the Fourteenth Amendment.⁵ Reading the existing equal protection jurisprudence outside of an equality paradigm, he suggested that an injunc-

² For an example of the attempt to conceptualize this movement, see, for example, Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 1, 16 (Sujit Choudhry ed., 2006). See also ALAN WATSON, *LEGAL TRANSPLANTS* (1974).

³ For related depictions, see, for example, YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS* (2002); RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2004); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

⁴ E.g., Arthur Chaskalson, *Reshaping the Structures of Justice for a Democratic South Africa*, in *RESHAPING THE STRUCTURES OF JUSTICE FOR A DEMOCRATIC SOUTH AFRICA* 13 (Michelle Norton ed., 1994).

⁵ Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 *HARV. L. REV.* 7 (1969).

tion not to deny “equal protection of the laws”⁶ could reasonably lead to an affirmative requirement that the state must act to provide it, and that that protection amounts to what is necessary to avoid severe deprivation.

Prophetically, he saw that economic and social rights would need both criteria for determinacy and a justiciable standard — which he saw as complex, but not impossible, endeavors. Writing for an American audience, he did not rely on the Universal Declaration of Human Rights of 1948, nor on the International Covenant on Economic, Social and Cultural Rights, opened recently for signature in 1966.⁷ Nor did he note the homegrown calls for a “freedom from want” heard in America since the 1940s.⁸ He used, simply, arguments about justice — careful, reflective, and painstakingly made.⁹ And he trained his eye (and hope) on a Supreme Court “commendably busy with the critically important task of charting some islands of haven from economic disaster in the ocean of (what continues to be known as) free enterprise.”¹⁰ Of course, that busyness ended abruptly with a newly constituted Court, established after Richard Nixon’s narrow win in the 1968 election, an election fought on other grounds.¹¹ Frank’s proposal for economic and social rights would have to wait for a different court, a quarter of a century later: the South African Constitutional Court.

And what of South Africa in 1969? South Africa’s apartheid regime was ever hardening. In that year, the Bureau of State Security (BOSS) was formed. Nelson Mandela had spent seven of his twenty-

⁶ U.S. CONST. amend. XIV, § 1.

⁷ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force 1976).

⁸ Franklin D. Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944), in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 32, 34 (Samuel I. Rosenman ed., 1950); see also Katharine G. Young, *Freedom, Want and Economic and Social Rights: Frame and Law*, 24 MD. J. INT’L L. 182 (2009). For current endorsements of freedom from want, see President Barack Obama, *Remarks by the President at the Acceptance of the Nobel Peace Prize*, Oslo, December 10, 2009, available at <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>, noting that freedom from want and freedom from fear ground the links between civil and political rights and economic security and opportunity; and Michael H. Posner, Assistant Secretary, Bureau of Democracy, Human Rights, and Labor, *The Four Freedoms Turn 70: Address to the American Society of International Law*, Mar. 24, 2011, available at <http://www.state.gov/j/drl/rls/rm/2011/159195.htm>, emphasizing the “time to move forward” for the U.S. to embrace economic, social, and cultural as well as civil and political rights.

⁹ See Michelman, *supra* note 5; Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. PA. L. REV. 962 (1973); see also JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

¹⁰ Michelman, *supra* note 5, at 33.

¹¹ Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 23 (2005).

seven years in prison.¹² Steve Biko's Black Consciousness Movement was gaining ground, and that year, the ANC opened its membership to non-Africans. The Freedom Charter of the ANC and its allies, now underground, had circulated its demands for freedom since 1955: alongside rights to vote, to association, to trade, and to equal status stood a right to education which would be "free, compulsory, universal and equal for all children"; a right to "be decently housed," that "no-one shall go hungry," "[a] preventive health scheme shall be run by the state," "[f]ree medical care and hospitalisation shall be provided for all, with special care for mothers and young children," and that there would be a "national minimum wage" and "unemployment benefits."¹³ The creation and ratification of the Freedom Charter were treated as grounds for high treason.

Three long decades later, much had changed. By 1996, after an interim first run, and a court certification, justiciable economic and social rights would become part of the new Constitution. The rights to access food, health care, housing, water, social security, and education¹⁴ would be entrenched alongside the rights to property,¹⁵ to equality,¹⁶ and the traditional civil and political rights of voting, association, and expression.¹⁷ The economic and social rights are now, in the main, to be "progressive[ly] realis[ed]" through "reasonable legislative and other measures, within . . . available resources."¹⁸ Criteria for meaning, and a justiciable standard, now demand attention.

Frank's seminal work on constitutional economic and social rights is a sufficient coincidence between him and the new South Africa. But there are many others. His work on constitutional property, equality, law and economics, and state action are all examples. His early collaboration on law and economics warned that the widespread assumptions about the efficiency of contract and property were just that: assumptions that were contingent on background laws of civil, political, economic, and social forms of protection.¹⁹ Such work can be seen as

¹² See generally NELSON MANDELA, *LONG WALK TO FREEDOM* (1994).

¹³ AFRICAN NATIONAL CONGRESS, *THE FREEDOM CHARTER* (1955), available at <http://www.anc.org.za/show.php?id=72>; see also MANDELA, *supra* note 12, at 170–76, 225 (describing the history and text of the Freedom Charter, and the treason charges that were directed against it).

¹⁴ S. AFR. CONST., 1996, §§ 26 (housing), 27 (health care, food, water, and social security), 29 (education).

¹⁵ *Id.* § 25.

¹⁶ *Id.* § 9.

¹⁷ *Id.* §§ 16 (freedom of expression), 17–18 (assembly and association), 19 (campaign and vote).

¹⁸ *Id.* §§ 26(2), 27(2). Cf. *id.* § 28(1)(c) (setting out the rights of children to basic nutrition, shelter, basic health care services and social services, without qualification by a standard of progressive realization, although subject to the limitations clause, *id.* § 36).

¹⁹ Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 712–14 (1980).

a prescient rejoinder to the so-called Washington Consensus and its blueprint for a constitutional political economy of market rights and economic growth,²⁰ as well as to the influential calls to end the problem of poverty by enhancing property rights.²¹ When South Africa replaced its early Reconstruction and Development Programme (RDP),²² (a program which would, inter alia, address the basic needs of the forty percent of the population living in absolute poverty) with the program for Growth, Employment and Redistribution (GEAR), a reading of Frank Michelman might have disturbed the faith in privatization, liberalization, and competition as a reliable formula for sustained growth or poverty reduction.²³

Similarly, Frank's work drew attention to state action as ever-present, active, and hence always open to inspection. We might see this as a legally sophisticated form of the argument that poverty is not the result of individual idleness or misfortune, but is structural. The structures of both public and private law are traceable to the state: in the very laws that are supposed to command legitimacy and respect. These laws affect private relations, bargaining power, and the distribution of (sometimes severe) economic risk. The South African doctrine of "horizontal effect" (also in operation in Germany and elsewhere), which requires the Constitution to regulate individual-to-individual legal relations, in addition to government-to-individual ones, would have a wise observer in Frank: of the paths through which the Constitution's rights radiate to the common-law private law; and of how all the branches of the state — including its judges — are bound to attend to its requirements.²⁴ Of course, Frank was not sanguine about *any* constitution's horizontal effect. But more about America later.

Finally, here was a scholar who'd spent decades resolving the so-called "paradoxes" between constitutionalism and democracy, of the rule of law and the self-rule of people, and of the necessary distance between the self and the government in the desire for self-government.²⁵ For a country establishing a new majoritarian democracy with a series of bold new fundamental rights, to be overseen by a

²⁰ See generally, JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

²¹ See, e.g., HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (2000) (prescribing formalization of property rights through land titling).

²² The African National Congress (ANC), Congress of South African Trade Unions (COSATU), and South African Communist Party (SACP) together released the RDP before the 1994 elections.

²³ For a different critique, see also Frank I. Michelman, *W(h)ither the Constitution?*, 21 *CARDOZO L. REV.* 1063 (2000).

²⁴ S. AFR. CONST., 1996, §§ 7(2), 8(1), 8(2), 8(3), 39(2).

²⁵ See FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* (1999); Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 *HARV. L. REV.* 4 (1986).

brave new Constitutional Court, Frank's thinking was entirely apposite. When is law not politics? Who guards the guardians? How is the judicial usurpation of legislative power prevented? How is the judicial abdication of judicial power avoided? Frank took these slogans and peeled them apart, testing them in theory and in practice. And key to this achievement, I suggest, is the way he did so without reaching for the easy answer. That is, he refused to give up on a conception of the state that could possibly lead to the slogans' most dangerous applications: a state protective of negative, but crucially also positive, liberty.

What did this happy coinciding of expertise and opportunity mean for the comparative constitutional law field? Frank brought to it a more cautious, more deliberative approach. He took comparative case law seriously: the new South African Constitutional Court's judgments were treated, not as doctrinal formula, nor, conversely, as politics by other means. They were the edifices (in-the-making) of a "respect-worthy governmental system."²⁶ They were worthy of careful study and criticism.

His pioneering comparative constitutional law courses involved the careful reading of cases, dissents, and orders, thematically and sometimes non-chronologically. The readings included local (often critical) and foreign (often effusive) commentary: the contrast itself could be enlightening. His seminar on U.S. and South African constitutional law was regularly co-taught with an eminent South African judge. He expanded this method to more general comparison, exploring the German, Canadian, Indian, and other constitutional universes, always carefully and never as a recitation or compilation of world trends. His courses were thought-heavy, not data-heavy: no small order in this field.

In the two decades after 1989, the field of comparative constitutional law could have gone purely in the direction of constitution-making, post-conflict transitions, comparative politics, or alternative governance structures. The lid had blown off so many dictatorships, communist, and/or badly decolonized states. What was able to resettle, in the short term, in each of those scenarios, is of enormous intellectual and humanist interest. But Frank Michelman understood the potential for comparative law to answer other questions as well. These are the questions of his scholarly career: of the institutions, requirements, and workings of modern, liberal, constitutional democracy. This brings me to my third hypothesis: fate.

²⁶ For this formulation, see Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 *FORDHAM L. REV.* 345 (2003).

HYPOTHESIS 3: FATE

By fate, I mean to suggest a kind of destiny: something predetermined that brought Frank to South Africa. As I see it, Frank's constitutional scholarship, despite its Americanisms and before his comparative turn, was never confined to its national boundaries. Hence, South Africa's gain is also America's; just as it is all of ours. This, I suggest, stems from Frank's consistent approach to scholarship. "I am more interested in ways of thinking about certain legal problems, and in ways of saying what the significant factors are, than I am in doctrinally formulated summaries or predictions of outcomes," he reported, in that same seminal Foreword from 1969.²⁷

It is fate that explains Frank's ability to fuse philosophy and practice with such simplicity; his talent for understanding the work of extraordinary judges, from Justice William J. Brennan, Jr., to the new bench of the South African Constitutional Court, and countless others; his capacity for deep thought, humanity, generosity, and modesty. His attention has been on the deep problems: the ones that may be easy for the moralist but difficult for the jurist²⁸ — and sometimes vice versa.

Thus, in South Africa, he was not merely content to let his seminal ideas fall and rest. He actively engaged, learning and modifying his views in the process. *Soobramoney*,²⁹ that "wrenching" first health rights case heard by the Constitutional Court, was commended (for its outcome), criticized (for "some loose language") and examined against its use of reason, and reasonableness, that would later become the crux of a justiciable standard in economic and social rights cases.³⁰ Whether reasonableness can perform the work expected of it remains to be seen. First, we know that disagreement can be reasonable. Is reasonableness review a recipe, then, for judicial disagreements and multiplying dissents? Will such discord disturb the legitimacy of adjudication? Second, in our globalizing communities, with growing intra- and inter-country disparities of wealth, with different cultural norms of social cooperation, with bureaucratic rationalities, economic orthodoxies, and veiled patriarchies feigning roots in reason, and with growing (and yet compartmentalized) transnational professional dialogues, to which sites are decision makers and judges reliably to look?³¹

²⁷ Michelman, *supra* note 5, at 10.

²⁸ The apology inherent in this phrase may rankle with South Africans, as with others, stemming as it does from the comments of Chief Justice Marshall in decisions affirming slavery statutes. DAVID ROBARGE, A CHIEF JUSTICE'S PROGRESS 276 (2000).

²⁹ *Soobramoney v. Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC).

³⁰ Frank Michelman, *The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik*, 14 S. AFR. J. ON HUM. RTS. 499, 499, 502, 505-06 (1998).

³¹ Cf. JOHN RAWLS, THE LAW OF PEOPLES 129-80 (1999) (extending the idea of public reason).

Kyalami Ridge,³² involving a complaint by property holders against the “unauthorized” relocation of destitute flood victims to neighboring public land, represented the Court’s use of “conventional judicial review.”³³ With this understated case, Frank delivered vital proof (to those in need of it) that economic and social rights could proceed with traditional remedies, involving dismissal of a case or other prohibitory remedy. Yet it is worth noting that such “negative” claims may often involve claimants already favored by other laws,³⁴ and are the easy tip of the very difficult iceberg in economic and social rights cases. I contend that proof of more case experiments, more creative remedies, and more linkages between courts and other branches, is perhaps even more critical.³⁵

In *Carmichele*,³⁶ the plaintiff claimed a duty of the police to protect her against a known perpetrator, bailed, violent, and at-large. This factual parallel to those of the terrible U.S. *DeShaney* case³⁷ had a very different outcome: the Court called for an examination of common law rules of police immunity against the new requirements of the (interim Constitution’s) Bill of Rights.³⁸ For Frank, *Carmichele* occasioned a thoughtful examination of the implications, both negative and positive, of a “horizontal” Constitution.³⁹ And he turned *DeShaney* upside down. Indeed, as he succinctly cautioned, for someone interested in human rights, one’s common law may be “fine” and one’s Bill of Rights may be “deadly.”⁴⁰ Other examples abound. South Africans responded to the dialogue, writing responses and challenges of their own, including a festschrift in his honor.⁴¹

In America, Frank’s comparative knowledge has been brought into his long-standing practice of subjecting Supreme Court cases to exam-

³² *Minister of Pub. Works v. Kyalami Ridge Envtl. Ass’n* 2001 (3) SA 1151 (CC).

³³ Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT’L J. CONST. L. 13, 17–19 (2003).

³⁴ For such a thesis, see András Sajó, *Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES 83 (Roberto Gargarella, Pilar Domingo & Theunis Roux. eds., 2006).

³⁵ See generally KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (forthcoming 2012).

³⁶ *Carmichele v. Minister for Safety & Sec.* 2001 (4) SA 938 (CC).

³⁷ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

³⁸ *Carmichele*, 2001 (4) SA at 953–71. The Court’s analysis included the Interim Constitution’s protection of equality, life, dignity, privacy, and freedom and security of the person. *Id.* at 957.

³⁹ See Frank I. Michelman, *The Bill of Rights, the Common Law, and the Freedom-Friendly State*, 58 U. MIAMI L. REV. 401 (2003).

⁴⁰ *Id.* at 426; see also Frank I. Michelman, *The Protective Function of the State in the United States and Europe: The Constitutional Question*, in EUROPEAN AND U.S. CONSTITUTIONALISM 156 (Georg Nolte ed., 2005).

⁴¹ *E.g.*, RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION (Henk Botha, André van der Walt & Johan van der Walt eds., 2003).

ination and critique. *Pretoria City Council v. Walker*,⁴² that infamous (perhaps inevitable) challenge by a white South African homeowner against his different, and higher, electricity charges, spurred a critical reflection on the implications of racial classifications and affirmative action in a reverse minority scenario. What South African judges felt free to do and say about their country's objective constitutional values revealed the "tenacious streak of self-reliant individualism" that belongs, conversely, within the American constitutional project.⁴³

In this reflective mode, comparison could fuel alternative imaginings, or else fertile warnings. When one scholar declared, in 1997, that Frank's 1969 defense of economic and social rights "simply doesn't live in this world anymore,"⁴⁴ others could point to where, in the world, it did. Doggedly proposing economic and social rights as part of the future liberal agenda of American constitutionalism, Frank noted that certain institutional conundrums had been resolved, using the South African example.⁴⁵ And he appealed to the transnational judicial dialogue as a critical step in getting America there.⁴⁶ Nevertheless, perhaps in more somber moments, he conceded the problematic dependency on judicial review, that chosen contingency that, combined with certain court-converted cultural commitments, provided "moral cover" for omitting economic and social rights from American constitutional law,⁴⁷ and perhaps for avoiding—in the present context, at least—other South African developments.

And what of the world? It would be a mistake to see Frank's destiny as wholly within this fruitful American/South African dialectic. His scholarship has been translated into Chinese, Czech, French, Ger-

⁴² 1998 (2) SA 363 (CC).

⁴³ Frank I. Michelman, *Reflection*, 82 TEX. L. REV. 1737, 1761 (2004); see also Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378 (2004).

⁴⁴ *Fidelity as Translation: Colloquy*, 65 FORDHAM L. REV. 1507, 1509 (1997) (remarks by Professor Lawrence Lessig). Noting the article's considerable influence in the 1960s, Lessig went on to state:

It is an odd piece — beautiful, and wonderful and we can dream about it. But still it is a piece that none of us would write anymore. That's a reflection of something about how our background has changed, about what these changes can bring up, and what they can suppress, to note that what was great then could not be imagined now.

Id. at 1510.

⁴⁵ See Frank Michelman, *Economic Power and the Constitution*, in THE CONSTITUTION IN 2020, at 45, 47, 52–53 (Jack M. Balkin & Reva B. Siegel eds., 2009). For the call for this chapter to be written, see William E. Forbath, *Not So Simple Justice: Frank Michelman on Social Rights, 1960–Present*, 39 TULSA L. REV. 597, 597–99 (2004).

⁴⁶ See Michelman, *supra* note 45, at 51–52; see also S. AFR. CONST., 1996, § 39(1); see generally Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005).

⁴⁷ Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663, 686 (2008).

man, Italian and Portuguese. His students are from all corners of the globe. As commentators in “old” constitutions are redirecting attention away from overloaded, hardened, strong, even “deadly” courts, and exploring legislative or private forums of principle,⁴⁸ Frank has explored what a “best efforts” obligation on all the branches of the state might look like. Ironically, it is commentators in “new” constitutions, often dealing with greater numbers of poor, and lesser overall resources, who are finding that courts may be a relatively more effective institution for protecting economic and social and other democratic rights,⁴⁹ (just as, for different reasons, foreign resources are being poured into their judicial systems).

CONCLUSION

Is Frank truly a comparativist, or is he really (just?) a serendipitous constitutional theorist? To answer this question, we must ask a prior one: what is constitutional comparison for? The answers in the field, predictably, differ. It is to universalize, to particularize, to make systems fairer, more functional, more efficient, more influential, more harmonized, more integrated, more global. Alternatively, the comparison is to help judges do any, or all, of the above. So, is it enough to place one’s normative premises against new institutional relief? For Frank, it is more than enough, and I suggest that this is because of the way that law runs through his normative inquiry. Law, and its demands for compliance by all, will always require a justification for that compliance, wherever one finds oneself.

Of course, if one looks sideways, accident, coincidence and fate all look pretty similar. World events do occur according to certain non-volitional or self-interested grooves. But sometimes ideas serve to switch that groove in one way or another.⁵⁰ I contend that Frank Michelman’s incredible body of work has been such a switch.

⁴⁸ See, e.g., MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* (2008); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004).

⁴⁹ See, e.g., *EXPLORING SOCIAL RIGHTS* (Daphne Barak-Erez & Aeyal M. Gross eds., 2007); *COURTING SOCIAL JUSTICE* (Varun Gauri & Daniel M. Brinks eds., 2008); *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES* (Roberto Gargarella, Pilar Domingo & Theunis Roux. eds., 2006).

⁵⁰ The metaphor of the switchman belongs, of course, to Weber. *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 280 (H.H. Gerth and C. Wright Mills eds. and trans., 1946).