

# Contents

‘Legitimation by Constitution’: An Introduction <i>Alessandro Ferrara and Frank I. Michelman</i>	1
1. A Constitution-Centred ‘Liberal Principle of Legitimacy’	3
2. Some Related Ideas: Ackerman, Dworkin, Habermas	5
3. Plan of the Book	9

## PART I. POPULAR SOVEREIGNTY VERSUS HIGHER (AND HIGHER) LAW?

1. ‘Always Under Law?’ <i>Frank I. Michelman</i>	17
1. ‘Always Under Law?’ A Question of How in Fact we Think	17
2. ‘Justification by Constitution’ A Division of Justificatory Labour (The Constitution as Justificatory Platform)	18
The Requisite Character as ‘Law’ of the Higher-Regulatory Platform	19
Why ‘Always Under Law’?	20
3. Popular Sovereignty	21
4. Democracy in Depth A Problem of Deliberative Democracy	23
Sourcing the Problem: The Claim for Deep Democracy	25
A Residue of Regress	27
5. Alleviations	28
First Ending: Luckily Thrown? ( <i>In Medias Res</i> )	28
Second Ending: Sovereignty as Jurisdiction?	29
2. On the Paradox of Deliberative Democracy <i>Alessandro Ferrara</i>	32
1. ‘Legitimation by Constitution’ and the Paradox of Deliberative Democracy	32
2. On the People as Charterers Being the Same as the People as Chartered The People as <i>Demos</i> and as <i>Ethnos</i>	42
The Making of a Demos: A ‘Commitment to Make Commitments’ and the Constitution	44
The ‘Sameness of the Charterers and the Chartered’ Reconsidered	45
3. Defusing the Problem of Infinite Regress	47
	51

3. The Challenge of 'Most Reasonable for Us' <i>Frank I. Michelman</i>	55
4. The 'Most Reasonable for Us', or 'Irrecusability' as Preserving Authenticity <i>Alessandro Ferrara</i>	61
1. Habermas's Reconstruction of Two Flawed Versions of the Linguistic Turn	62
2. Habermas's 'Pragmatic' Third Way	63
3. Michelman's Interpretation of Habermas on the Linguistic Turn	66
4. Another Solution: Rethinking 'Irrecusability' as Preserving Authenticity	67

## PART II. A DEMOCRATIC HORIZON

5. Constitutional Interpretation: A Dualist Democrat's Dilemma <i>Frank I. Michelman</i>	81
1. Constitutional Democracy Under Stress	81
2. Two Kinds of Inhospitable Conditions: Three Texts On Legitimacy	82
3. A Programme of Comparison Rawls and Shortfall of Agreement	84
Ferrara and Occlusion of Authorship	85
4. Dualist Democracy and Judicial Review: Ferrara Versus Rawls?	87
6. On Reconciling the Two Understandings of Judicial Review <i>Alessandro Ferrara</i>	90
7. Judicial Constitutional Application: A Rejoinder <i>Frank I. Michelman</i>	96
1. The Debate up to Here	96
2. Towards Common Ground: Intertemporal Fixation of Meaning	100
8. Backgrounding the Debate: Judicial Occlusion and Remedial Strategies <i>Alessandro Ferrara</i>	104
1. Judicial Occlusion of Democratic Authorship?	106
2. Three Remedial Strategies	113

## PART III. GLOBAL ORDERS AND LIMITS OF LIBERALISM

9. Hyperpluralized Constituencies: The Challenge for Political Liberalism <i>Frank I. Michelman</i>	123
1. A 'Realistic Utopia'	123

2. Reasonable Pluralism	124
3. Oppression	125
4. Six Pre-constitutional Commitments of Political Liberalism	126
5. Expectations and Assumptions in the Liberal Principle of Legitimacy	129
6. A Constitution for a Multivariate Polity?	130
7. Constitution for a Law of Peoples?	132
8. 'Peoples', not 'Citizens'	136
10. Can Legitimation by Constitution Apply Beyond the State? <i>Alessandro Ferrara</i>	138
1. On Preserving the Basic Political-Liberal Commitments at the Global Level	138
2. The Debate Concerning Supranational Governance: Perfectionism Redux?	140
3. Extending Political Liberalism Beyond the Nation-State: Three Difficulties	142
4. The Status of the Eight Principles	145
5. Humanity's Flourishing, the Dual Concept of Humanity, and Global Public Reason	148
6. Conclusion	151
11. A Political Conception of a People (and its Consequence) <i>Frank I. Michelman</i>	153
12. From Decency to Democracy: Leading by Example <i>Alessandro Ferrara</i>	158

### AFTERWORD TO PART III

Concluding Reflections	165
A Glance Back and the Road Ahead	165
<i>Alessandro Ferrara</i>	
A Liberal Limit to Constitutional Thinness	170
<i>Frank I. Michelman</i>	
<i>Bibliography</i>	175
<i>Index</i>	181