Pluralist Justice and Liberal Constitutionalism: A Reply to Critics

By

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Abstract

In my book, *A Pluralist Theory of Constitutional Justice: Assessing Liberal Democracy in Times of Rising Populism and Illiberalism* (OUP 2022) I advance the thesis that liberal constitutionalism must satisfy a minimum of distributive justice in its three dimensions of material welfare, identitarian recognition, and democratic representation. I label this minimum the "justice essentials" drawing on Rawls's concept of "constitutional essentials", and defend it within the ambit of my theory of comprehensive pluralism. In this writing, I reply to the comments and criticisms of five scholars and further clarify and elaborate my theory. Specifically, I clarify how my theory impacts on the dichotomy between constituent and constituted powero and on that between political and constitutional theology. I defend the justice essentials as not amounting to one competing conception of justice against others. I stress that the dialectical dimension of comprehensive pluralism clearly distinguishes my theory from that of Rawls's in his *Political Liberalism.* I respond to the claim that my theory does not properly account for constitutionalism in the Global South. And finally, I grapple with the way my theory is suited to handle the inherently inclusionary and exclusionary dimensions of all universals.

Keywords: comprehensive pluralism; constituent and constituted power; distributive justice; Global North and Global South; Hegel; justice essentials; liberal

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constitutionalism; political liberalism; political theology; Rawls; Carl Schmitt; the universal as it relates to the singular and the plural.

Introduction

An author is privileged to have his work seriously considered and evaluated by a group of preeminent scholars from different disciplines and parts of the world. This is even much more the case with respect to my book, *A Pluralist Theory of Constitutional Justice: Assessing Liberal Democracy in Times of Rising Populism and Illiberalism,* which was written in times of self-isolation due to the Covid-19 pandemic, thus lacking the input of the customary testing of ideas in conversations with colleagues with whom one habitually interacts while on campus. I am grateful for the live symposium on my book which took place on October 16, 2023,[2] and for this opportunity to reply in writing to the thoughtful, incisive, critical, and challenging contributions published in this issue of the *Cardozo Law Review* by Professors Bonilla, Martinico, Michelman, Saada, and Schlink.[3]

Articulating a worthy reply to critics who raise key questions that go to the heart of the argument made in the book and who level thoughtful, incisive, and thoroughly reasoned critiques of some of the book's main theses certainly presents

[2] I wish to thank the Floersheimer Center for Constitutional Democracy at the Cardozo School of Law for sponsoring and organizing the October 16, 2023, symposium. I am particularly grateful to the Center's Co-Directors, my colleagues Rebecca Ingber and Michael Pollack, for their committed involvement and invaluable help in the organization and effectuation of the symposium. Special thanks are also due to Hui Yang, the Program Administrator for Academic Centers at Cardozo, for her tireless, always effective, and unfailingly upbeat and friendly handling of all pertinent organizational details which highly contributed to the symposium's success.

[3] I wish to thank the *Cardozo Law Review,* and in particular its Editor-in -Chief, Ryen Lim, and Symposia Editor, Jeremy Lamstein, for inviting me to write this reply.

a daunting challenge. Such a reply obviously calls on the author to defend and clarify his work as best he can, but it also affords him an opportunity to broaden and deepen the horizons of the project that resulted in the book. With this in mind, I will first address the crucial question posed by Giuseppe Martinico concerning the absence of discussion in the book of the constituent power which he persuasively argues plays a crucial role in differentiating liberal constitutionalism from its populist counterparts.[4] As Martinico elaborates—and on this point his observations are fully consistent with those advanced in the book—populist constitutionalism is in harmony with Schmittian political theology.[5] This, as Martinico aptly emphasizes, raises the further salient question of whether liberal constitutionalism generates a *constitutional* theology that counters Schmitt's and populism's political one.[6] In other words, does liberal constitutionalism depend on a moral creed that takes the place of the political creed that sorts out friend from foe for Schmitt and for populist constitutionalists?

By confronting Martinico's challenges concerning the issues of constituent power and of constitutional theology in Part I below, I concentrate on two main objectives. First, I grapple with these two issues from the standpoint of my understanding of liberal constitutionalism and of its nexus with what I have referred to in the book as the "justice essentials"[7]. I undertake this not only to defend and clarify my comprehensive pluralist approach, but also to further underscore the full scope of its potential virtues. Second, I intend to set up comprehensive pluralism's approach to the two above mentioned issues as a perspectival platform from which I believe I can best handle the arguments advanced by three of my other critics.

In Part II, I tackle Bernhard Schlink's systematic, eloquent, evocative, and largely persuasive inquiry into what may qualify as a minimum of justice or, to use his own terminology, as the "justice minima".[8] Schlink makes the case for justice minima

[4] Cite to Martinico
[5] Id., at--.
[6] Id., at--.
[7] *See* Michel Rosenfeld, *A Pluralist Theory of Constitutional Justice* (New York: Oxford University Press, 2022), 20-21.
[8] Cite to Schlink.

that differ significantly from the lines I draw based on my justice essentials. From within the ambit of theories of justice, arguably Schlink and I ultimately embrace different contestable conceptions of distributive justice with varying consequences for the constitutional, moral, and political spheres. As I endeavor to clarify and elaborate below, however, my aim is not to defend one contestable conception of justice against others, but to decipher justice essentials that may guide liberal constitutionalism in its struggle against both internal threats and external ones such as those posed by illiberalism and populism.

In Part III, I respond to Frank Michelman who concludes that my comprehensive pluralism, when it is all said and done, comes very close to the theoretical position developed by Rawls in his *Political Liberalism.*[9] Providing an adequate response to Michelman is a steep challenge given that he is the preeminent Rawls scholar among legal academics and that he has articulated the most thorough and convincing account of the implications of Rawls' political liberalism for constitutional theory in his magisterial recent book *Constitutional Essentials.*[10] On the one hand, my task is somewhat facilitated since I have already addressed Michelman's likening my theory to Rawls's in the context of one of my previous books, *Just Interpretations*[11], in a long ago exchange also published by the *Cardozo Law Review*.[12] On the other hand, however, my task this time is more arduous as I have drawn on Rawls and on his theory of "constitutional essentials" in order to develop my conception of the constitution's "justice essentials".[13] I do rely on the Rawls of *A Theory of Justice,*[14] in which he articulated a comprehensive theory of justice that is liberal egalitarian in nature and that, as I emphasize in my book, is

[9] *See* John Rawls, *Political Liberalism (Expanded Edition)* (New York: Columbia University Press, 2005).
[10] *See* Frank I. Michelman, *Constitutional Essentials: On the Constitutional Theory of Political Liberalism* (New York: Oxford University Press, 2022).
[11] *See* Michel Rosenfeld, *Just Interpretations: Law Between Ethics and Politics* (Berkeley, CA: University of California Press, 1998).
[12] *See* Frank I Michelman, "Modus Vivendi Postmodernus? On Just Interpretations and the Thinning of Justice," *Cardozo L. Rev*. 21 (2000): 1945; Michel Rosenfeld, "Comprehensive Pluralism is Neither an Overlapping Consensus nor a Modus Vivendi: A Reply to Professors Arato, Avineri, and Michelman," *Cardozo L. Rev*. 21 (2000): 1971.
[13] *See* note 7, *supra.*
[14] *See* John Rawls, *A Theory of Justice,* (Cambridge, MA: Harvard University Press 1971).

clearly distinct from the minimum of justice that liberal constitutionalism ought to guarantee. But in *Political Liberalism* Rawls retreats from comprehensive to political justice thus opening the door to a plurality of comprehensive views. Michelman seizes on that retreat to liken the consequences of my justice essentials to those following from Rawls's political justice. Whereas there is unquestionably some congruence between the two theories—they would clearly align, as would many others such as civic republicanism, value pluralism, and liberal communitarianism, in the struggle against illiberal populism—I will draw on what I believe are two key distinctions between my theory and Rawls's. Although Rawls's pluralism is expanded in his *Political Liberalism* it still remains significantly confined whereas mine aims to be comprehensive all the way up and all the way down. Furthermore, even as restricted to the political sphere, Rawls's conception of justice privileges the individual over the group whereas comprehensive pluralism seeks to harmonize the two as best as possible without prioritizing either of them.

In Part IV, I turn to Daniel Bonilla's systematic critique of comprehensive pluralism based on his assessment that my approach is factually, methodologically, and theoretically flawed with the consequence that my conception of pluralism turns out to be, at best, inconsistent or, at worse, self-contradictory.[15] On a cursory reading, Bonilla accuses me of ignoring or misunderstanding the Global South; of methodologically modelling my approach as if a valid constitutional theory could be exclusively based on the experience and concerns of the Global North—and even worse, with respect to my discussion of social and economic rights in Chapter 2 of the book, on the parochial perspective informed by America exceptionalism[16]; and of theoretically embracing the allure of pluralism to vindicate yet another iteration of liberal individualism.[17] If I were to respond to Bonilla cursorily, I would stress that I explicitly insist throughout the book that comprehensive pluralism refuses to

[15] Cite to Bonilla.
[16] Id., at--.
[17] Id., at--.

prioritize the individual over the group; that my methodology is functional[18] and contextual and that I repeat throughout the book that what the justice essentials require in any given constitutional setting differs based on the unique relationship between the actual *ethnos* and *demos* in play; and that from the standpoint of liberal constitutionalism, Bonilla's sharp dichotomy between the Global North and the Global South is vastly overdrawn. However, such a cursory response would be inadequate and would constitute an injustice to Bonilla, a leading constitutional theorist from and of the Global South, who has seriously read, considered, and evaluated the book's discussion of comprehensive pluralism and who has presented his various criticisms in a reasoned scholarly fashion. Accordingly, whereas this acknowledgement will not significantly alter the disagreement between the two of us, it will prompt me to seriously address whether my approach is suited to properly extend to constitutional democracies within the Global South, and whether in spite of my insistence that comprehensive pluralism purports to place the individual and group on the same footing Bonilla's criticism requires some clarification or adjustment on my part.

Finally, in Part V, I will address the key philosophical questions that Julie Saada raises concerning my comprehensive pluralism based on her rigorous and thorough account of the two contradictions inherent in the dialectics of the universal. The first of these contradictions is an internal one and it follows from the conclusion that any conception of the universal necessitates setting correlated inclusions and exclusions.[19] At the same time, any iteration of the universal results in an external contradiction to the extent that it makes it unavoidable to reject all other competing plausible elaborations of the universal.[20] What logically follows from this, is that the universal's internal contradiction seemingly culminates in monism rather than pluralism whereas its external contradiction apparently results in relativism thus also negating the viability of pluralism. Saada concludes her philosophical inquiry

[18] *See* Ruti Teitel, "Comparative Constitutional Law in a Global Age*," Harvard L. Rev*. 117 (2004): 2750, 2754, (describing the approach of a casebook I co-authored as "functionalist").
[19] Cite to Saada
[20] Id., at--.

by posing the question of whether comprehensive pluralism could avoid the twin traps of monism and relativism by recourse to a "meta-universal" predicated on equality.[21] In her appraisal of the conflicts inherent to universals Saada draws on the distinctions between universals that purport *to institute* and those that *are instituted*.[22] As I understand that distinction, it mirrors at a higher level of abstraction that raised by Martinico in his discussion of the constituent power in constitutional theory and in the latter's correlation to the constituted power. More generally, Saada philosophically challenges comprehensive pluralism's claim that it can cogently aspire to pluralism all the way up and all the way down. And in my response to this challenge, I attempt to buttress my replies to the other critics who cast me in essence as either a monist grounded in liberal individualism or as a relativist adhering to a contestable conception of justice among many.

Part I. The Constituent Power and Political versus Constitutional Theology

Martinico accurately notes that my book does not address the constituent power question and asks whether comprehensive pluralism does away with the concept altogether or whether it would be compatible with a discursive conception of it.[23] A short answer to Martinico would be that the book is centered on how the *constituted* power of a working constitution is, or could be, oriented toward the justice essentials as understood by proponents of comprehensive pluralism. Accordingly, I can characterize the book's inquiry as having bracketed out the question of the constituent power at the constitution making moment or at that of a systemic constitutional change effectuated through constitutional amendments. I have written about the constituent power and constitution making elsewhere,[24]

[21] Id., at--.
[22] Id., at--.
[23] Cite to Martinico.
[24] *See* Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community.* (London: Routledge, 2009), Chs. 4 and 6.

and regardless of whether a constitution emerges as the product of a revolution, a war, a pacted transition to democracy, or an internationally supervised constitution making process, the resulting constitutional arrangement can be assessed in its own right from the standpoint of the justice essentials and of comprehensive pluralism.

That said, however, comprehensive pluralism is well suited to guide a counterfactual inquiry into what kind of conception and use of the constituent power would best accord with its normative objectives. To a large degree, the *how* the constituent power is deployed is of much less concern than the *what* it manages to institute. Indeed, a constitution issued from a revolution may plausibly satisfy the justice essentials whereas a pacted constitution may equally plausibly fall short. What is crucial, is what Martinico underscores in his discussion of the contrast between the constituent power as an unbound and limitless one and its counterpart which is supposed to proceed through a discursive constituent process.[25] The unbound version emerges as unconstrained by the *ancient regime* legal order it sets out to replace while, at the same time, not being yet constrained by the legal order to be delimited by the constitution it is about to craft. The discursive version, on the other hand, is meant to deploy within certain normative constraints and on the basis of an ongoing dialogue among all those who are intended to be subjected to its prescriptions.

I agree with Martinico that the discursive version of the constituent power is more consistent with comprehensive pluralism in as much as it allows for inclusiveness and dialogue with respect to the three dimensions of distributive justice that must be harmonized so as to best approximate the justice essentials. What is even more important for my purposes is Martinico's stress on the association between the unbound version of the constituent power and populism and on the seemingly purely political –in the Schmittian sense—thrust of its deployment.[26] In short, as I note in the book, populism designates only part of the people as *the* people and

[25] Cite to Martinico.
[26] Id., at--.

strongly privileges direct democracy—albeit as filtered and orchestrated by the charismatic leader—over its representative counterpart. Consistent with this, the populist constituent power amounts to an exercise of the raw political power of a part of the polity's population that has been invested with the attributes of peoplehood to the exclusion of those who had previously shared that attribute. Furthermore, direct democracy by the same group that has obtained exclusive possession of the attributes of peoplehood amounts to exercises in political power that are in substance indistinguishable from that group's undertakings pursuant to their unbound constituent power. Therefore, because of the perceived equivalence between constituent power and direct democracy rule, populist constitutional democracy operates through what amount to incessant and uninterrupted iterations of the constituent power. As Martinico's critical analysis underscores, populism, Schmittian friend versus foe politics, unbound constituent power, and (*ethnos* based) political theology ultimately in an important sense reduce all constitutional making and constitutional democratic rule into sheer politics. And, to paraphrase Martinico, how does comprehensive pluralism and its now avowed affinity for discursive constituent power fare in comparison? Is comprehensive pluralism bound to embrace a political theology albeit one that differs from the one propounded by Schmitt and populists? Or must comprehensive pluralism instead commit to what Martinico refers to as a "constitutional theology"[27]? In other words, Martinico's comments and question to me call for further inquiry into whether comprehensive pluralism is at bottom predicated on a particular political faith, a distinct constitutional faith, or a reasoned conception of the good that yields a superior normative framework for liberal constitutionalism and its call for the justice essentials.

As Martinico asserts, populism combines "extreme majoritarianism, the politics of immediacy, and identity politics".[28] This aligns well with a conception of an unbound constituent power unleashed in permanence without prospect of

[27] Id., at--.
[28] Id., at--.

stabilization into a settled constituted power before the eradication or withdrawal of all those the populism in place casts as enemies of the people. Liberal constitutionalists and populists who rely on constitutions agree on the convergence of peoplehood, sovereignty, and democratic validation of the constitutional order. As made ubiquitous by the American example, liberal constitutions are made in the name of "We the People" who figure as the sovereign entitled to set their own course of self-government. Factually, no constitution is crafted or ratified by all those bound by it. Notably, the "We the People" that gave itself a constitution in 1789 was only composed by a fraction of the US population as all African-American slaves and all women were excluded from the constitution making process and from the subsequent ratification conventions that sealed its coming into force.[29] Eventually, however, after the abolition of slavery[30], the granting of the vote to women[31], and the absorption of waves of immigrants into peoplehood, the present day American version of "We the People" can be regarded as progressively inclusionary. In contrast, the populist version, as perhaps best illustrated by Orban's constitution making in Hungary, reformulates the "We the People" in a thoroughly exclusionary manner. Indeed, whereas the Hungarian Constitution that Orban replaced with the one he had crafted in 2011 was made in the name of the "People of Hungary", the new populist Hungarian 2011 Constitution was made in the name of "Hungarian nationals"[32]. This left out or reduced to second class citizenship all those who previously had been full fledged citizens without being ethnic Hungarians.[33] Moreover, since Orban's political party and its allies in the Hungarian Parliament have maintained the two thirds majority required for constitution making and for amending the constitution, Orban can switch at will between constitution making (or amending) and ordinary law making. For all practical purposes, therefore, so long as he maintains his two third majority in Hungary's

[29] *See* U.S. Constitution, art. 1, sec. 2, cl. 3.
[30] *See* U.S. Constitution, amend 15.
[31] *See* U.S. Constitution, amend 19.
[32] Venice Commission, *Hungary: Fundamental Law* (Strasbourg: Council of Europe, 2022), 2.
[33] *See* European Commission for Democracy Through Law (Venice Commission) Opinion 720/2013.

unicameral legislature, *functionally* Orban can rule continuously through deployment of an unbound constituent power.

In contrast, the normatively bound constitutional process highlighted by Martinico[34] is not only inclusive of all those traditionally or plausibly entitled to peoplehood, but also subjects their legitimate exercise of the constituent power to a relevant set of normative criteria. Adherence to these criteria can lead to the invalidation of certain exercises of the constituent power whether in relation to constitution making or to amending the constitution.[35] Thus, for example, constitution making that inadequately limits the powers of government, that falls short of the minimum requirements of the rule of law, that fails to safeguard a sufficient bundle of fundamental rights, or that does not guarantee the essential elements of a workable democracy, would figure as illegitimate and would call for corrective action.[36]

Whether we are dealing with an unbound populist constituent power or a discursive principled constituent process, the supposed link between the relevant people, sovereignty, and democracy is clearly fictitious. Constitution making is usually entrusted to a limited number of framers and ratifications are hardly ever near unanimous. The fiction involved is not gratuitous, however, as Martinico stresses, because it serves to impose a counterfactual measure of legitimacy and accountability between those the constitution empowers to rule and those subjected to their leadership.[37]

From the standpoint of comprehensive pluralism, *counterfactually* the criteria applicable to the discursive constituent process are the same as those in force relating to already established working constitutional arrangements. As discussed

[34] Cite to Martinico.
[35] Id., at--.
[36] This is what happened in South Africa when the constitution crafted to overcome the apartheid regime was submitted to that country's Constitutional Court for review regarding conformity with a set of agreed upon constitutional principles. *See Certification of the Constitution of the Republic of South Africa,* 1996 (4) SALR 744 (CC) (Constitutional Court of South Africa).
[37] Cite to Martinico.

throughout the book, comprehensive pluralism's justice essentials require proportionate accommodation of the singular, the plural, and the universal combined with a workable harmonization between the relevant *ethnos* and *demos.* Moreover, the criteria of distributive justice resulting in the justice essentials for any particular polity are normative in nature. These criteria are predicated on an assumption that the political unit at stake is pluralistic-in-fact—individuals and groups are divided along adherence to competing conceptions of the good—and on the moral conviction that comprehensive pluralism is preferable to competing plausible alternatives compatible with liberal constitutionalism. In essence, therefore, comprehensive pluralism competes in the normative sphere with libertarianism, liberal egalitarianism, republicanism, and certain more liberal versions of communitarianism. That said, the competition in question is above all a normative one conducted within the language game of philosophy and that of political theory, and it is thus clearly removed from any Schmittian conception of politics or of political theology based on the dynamic between friends and enemies.

Does comprehensive pluralism nevertheless rely on, or lead to, a constitutional theology as Martinico aptly inquires? In this case, the answer cannot be as univocal as it was in the context of political theology. On the one hand, to the extent that comprehensive pluralism prescribes a set of fixed minima,[38] it clearly operates within the bounds of the discourses of philosophy and political theory. On the other hand, however, to the extent that the particular set of justice essentials for a historically situated constitutional unit depends on contextual factors it is not as clear that legitimate outcomes can always be devised without any leap of faith. For example, what *ethnos* ought to be harmonized with what kind of *demos* to assure a constitutional order that qualifies as sufficiently just under comprehensive pluralism? In cases in which the *ethnos* is very thin and widely encompasses all or most of humanity, arguably the optimal solution depends on reason rather than faith. In case the climate crisis becomes dire in the present for all of humanity, the

[38] *See* Rosenfeld, *A Pluralist Theory of Constitutional Justice,* Ch. 8.

quest for survival seems to confront four essential choices: war, competition, contract (in the form of treaties) or limited constitutional association that spreads worldwide. At least counterfactually and theoretically recourse to the constitutional alternative can be plausibly rationally and convincingly argued for. Contrast that to cases where much thicker iterations of *ethnos-based* concerns result in conflicts, such those that have pitted Catalans against Castilians or the Quebecois against Anglo-Canadians. In these latter cases, are there any obvious plausible and legitimate solutions without recourse to some measure of leap in faith? More generally, given the challenges posed by populism and illiberalism to liberal constitutionalism, it is ultimately impossible to determine with certainty whether the best course would be to reinforce liberal constitutions or to search for altogether different and seemingly revolutionary alternatives. Consistent with this, the book's plea for pursuit of the justice essentials contains a touch of constitutional theology, but the latter is limited and constrained. Such constitutional faith is at best provisional and subject to revision and abandonment based on history and experience.

Part II. Competing Conceptions of the Justice Minima Confront the Justice Essentials

Bernhard Schlink provides an excellent account of the impossibility to achieve full distributive justice and of the difficulties of arriving at a consensus on what ought to count as a legitimate and satisfactory compromise within a present-day polity.[39] Schlink also rightfully draws our attention to the important difference between clashes over interests and divisions over claims to justice in working democracies. Whereas the former are supposed to be well tolerated within the ambit of day-to-day politics, the latter are prone to lead to pain and resentment, thus risking

[39] Cite to Schlink

instability and disruption.[40] Moreover, Schlink underscores the recent spread of what amounts to an inflation in justice claims as certain inequalities historically accepted as matters of fate are currently recast as claims of victimhood based on suffering from unacknowledged or unremedied injustices.[41] For example, whereas in the past someone living in poverty might have attributed his predicament to an unfortunate twist of fate, at present a similarly situated individual might well find the lack of wealth redistribution to guarantee a decent minimum of material welfare a manifest injustice. Given these changes, pursuing full justice in the socio-political sphere is futile, but settling on a minimum to preserve a workable level of social cohesion looms as essential.

Both Schlink and I agree that settling on certain justice minima would be beneficial if not essential for contemporary polities. The two of us disagree, however, over what an acceptable legitimate minimum ought to be. I argue throughout the book that a constitutionalized guarantee of the justice essentials in the three dimensions of material redistribution, identity-based recognition, and democratic representation, ought to be maintained or pursued. Beyond that, I consider that all further distributive justice claims ought to be left to ordinary politics and confined to the domain of infra-constitutional lawmaking. Schlink disagrees and characterizes my justice essentials as "justice maxima".[42] As against this, Schlink proposes the following: " Minimal justice…requires that the state treat people equally and fairly in all areas in which the state *encounters pre-existent equality* rather than needing to define an area and ensure equality within it".[43] Noting correctly that most all pursuits of equality necessarily entail creating corresponding inequalities—giving to all according to need requires producing inequalities regarding rewards for contributions to increases in wealth, and vice versa—Schlink's minima seems designed to tame justice claims inflation and the socially disruptive

[40] Id., at--.
[41] Id., at--.
[42] Id., at--.
[43] Id,. At---(emphasis added).

tendencies fueled by the exacerbation of demands for justice and the inevitable disappointments that will ensue.

Schlink's minima are primarily conservative in the literal sense of the term. To some extent, the disagreement between Schlink and me can be said to reflect a difference in substantive conceptions of justice. Schlink posits, for example, that taking care of the needs of the poor may be regarded by some as acts of mercy and by others as compliance with the demands of justice.[44] Mercy would be the appropriate designation for a strict libertarian who opposes all taxation and wealth redistribution. In contrast, for a Rawlsian liberal egalitarian societal responsibility for fulfilling the basic material needs of the least well off would be a requirement of justice.

Whatever the differences between Schlink and me on substantive justice, his minima like my just essentials aspire to rise above disputes concerning competing conceptions of distributive justice. For Schlink inflation of claims and dangerous lingering confrontations as a result of repeated disappointments of exponentially increasing demands for justice strongly counsel prudence and constraint. My minimum, in contrast aims for a workable degree of harmony and perception of fairness and equity for all concerned in a political unit committed to liberal constitutionalism. Although Schlink does not say so explicitly, his critique of my position may be understood as a warning against falling into the excesses of identity politics. The more recognition-based concerns are hardened into demands of justice and equality instead of being viewed as being subject to proper handling through liberty-based rights, the more it would appear that liberal constitutional units would be in danger of unraveling. Indeed, intensified identity politics tend to veer into the kinds of tribalization that become fertile grounds for transitions to illiberal populism. Accordingly, my insistence on inscribing a significant measure of recognition-based distributive justice within the constitution arguably may

[44] Id., at--.

precipitate transitions to populism rather providing any added protection against such fate.

One must concede that sometimes departures from the *status quo* to better conform to the cannons of liberal constitutionalism may lead to violence, as long ago evinced by the US Civil War that preceded the country's constitutional abolition of slavery.[45] Nevertheless, recourse to the justice essentials as circumscribed by comprehensive pluralism is well suited to avoid undue inflation of justice claims or exacerbations of identity politics. Indeed, all claims to justice in all its dimensions are to be processed through comprehensive pluralism's criterion of justice as "reversible reciprocity."[46] This criterion requires more than mere reciprocity and calls for everyone with a claim to exchange positions with others with competing claims, and to consider the other's claim as if it were one's own with a view to best accommodate as much as possible all claims involved. Thus, for example, instead of dwelling constantly on how my religion is not sufficiently recognized and accommodated, justice as reversibility requires me to consider the needs for recognition of other religions within the polity and to try to find an institutional arrangement that equally or proportionately accommodates all religions involved.

Besides possessing the means to avoid the pitfalls associated with Schlink's critique, comprehensive pluralism can also overcome the shortcomings created by his justice minima's dependence on the *status quo.* Although what satisfies the justice essentials is in part contextual and dependent on the dynamic between *ethnos* and *demos* in the relevant constitutional unit involved, pressing material, recognitional, and representational inequities often call for departures from the *status quo.* For example, as conceptions of equality between the sexes evolve, what was formerly grudgingly accepted as a bare minimum may require further equalization. As I understand Schlink, daughters that find the kind of equality accorded their mothers to be presently manifestly inequitable would lack

[45] *See* US Constitution, amend 13.
[46] *See* Michel Rosenfeld, *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry* (New Haven: Yale University Press, 1991) 249-258.

justification to demand changes under his justice minima. Comprehensive pluralism's justice essentials, in contrast, could well require departures from the *status quo.* Again, in this case the requirements of justice as reversibility would militate against unnecessarily creating or exacerbating other inequalities in the course of proportionately improving equality between the sexes.

Part III. Disentangling Comprehensive Pluralism from Rawls's Political Liberalism

Frank Michelman undertakes a thorough analysis of how comprehensive pluralism links the justice essentials—which I readily admit are indebted to Rawls's concept of "constitutional essentials"[47]—to liberal democratic constitutionalism, and concludes that ultimately my theory is largely equivalent to that articulated by Rawls in his *Political Liberalism.*[48] As noted above, Michelman and I have already differed on how my theory should be understood in comparison to Rawls's.[49] Although in the end I still disagree with Michelman, his current critique differs in some important respects from his prior one and hence requires further consideration. On my end, besides my present book relying in part directly on Rawls, it also differs in scope with *Just Interpretations,* the book considered in Michelman's prior critique. The latter book tackled comprehensive pluralism comprehensively in the sense that it considered it in the context of the normative sphere taken as a whole and thus spreading through law, morals, ethics, and politics. The present book, in contrast, more narrowly focuses on the realm of politics and for the most part on the even more restricted realm of constitutional politics. As far as Michelman is concerned, on the other hand, unlike his prior critique his current one addresses my claim that comprehensive pluralism is

[47] *See* Rosenfeld, *A Pluralist Theory of Constitutional Justice,* 4.
[48] Cite to Michelman
[49] *See* note 12, *supra.*

dialectical whereas Rawls's liberalism is not,[50] and my assertion that my theory is teleological in nature contrary to Rawls's which is deontological.[51]

Overall, the core disagreement between Michelman and me remains the same: Rawls's "reasonable pluralism"[52] is a limited pluralism consistent with liberal individualism while comprehensive pluralism requires consideration of all conceptions of the good whether "reasonable" or not; and Rawls's liberal theory privileges the individual over the group while my pluralist one does not. In short, both Rawls and I confront a plurality of competing normatively based positions and aim to accommodate them in a just and equitable way. Furthermore, on the input side Rawls denies entry to proponents of "unreasonable" ideologies while I do not. And on the output side, Rawls always choses the individual over the group whereas I am open to prioritizing either of them over the other depending on the circumstances and with a view to proportionately accommodating the singular, the plural, and the universal.

As Michelman aptly notes, I draw my "justice essentials" from the Rawls of *A Theory of Justice* whereas he specifies, and I concede, that my theory enjoys greater points of convergence with the Rawls of *Political Liberalism.*[53] Looking at the matter more closely, however, my book's inspiration based on Rawls is both limited and mitigated by criticism of his main theory carrying through his two books discussed here. In *A Theory of Justice* Rawls deploys a comprehensive theory of justice which he labels "justice as fairness"[54] and which extends to all normative realms. Because his theory is deontological and thus considers criteria of justice and of rights as entirely independent from criteria of the good, Rawls's comprehensive theory allows for a limited plurality of conceptions of the good so long as the latter do not conflict with the liberal egalitarian prescriptions inscribed in justice as fairness. Justice as fairness requires that certain institutional arrangements become

[50] Cite to Michelman.
[51] Id., at--.
[52] *See* Rawls, *Political Liberalism,* 144.
[53] Cite to Michelman
[54] John Rawls, "Justice as Fairness: Political not Metaphysical," *Philosophy and Public Affairs* 14 (1985): 223–51.

integrated in the basic structure of society, and these include what Rawls calls the "constitutional essentials" which happen to mesh well with the four pillars of liberal constitutionalism.[55] As I explain in the book, I start from the institution of liberal democratic constitutionalism and set to explore its normative implications and ideals from the standpoint of comprehensive pluralism. That leads me to the compelling need for the constitution institutionalizing a minimum of (distributive) justice to maintain legitimacy and to be normatively defensible in a principled way against its fiercest current opponents such as the diverse groups of illiberal authoritarians and populists having proliferated in recent times. It is in this context that I found a propitious analogy between Rawls's nexus between justice as fairness and constitutional essentials and my nexus between liberal constitutionalism and the requisite minimum of justice it commands, and I thus opted to label the latter as the "justice essentials". Beyond that, I have not drawn from Rawls, and more specifically the justice essentials in no way incorporate or emulate justice as fairness. What would count as an acceptable minimum of justice in a given constitutional setting depends in part on the particular context at stake. And whereas it may well be that in some settings justice as fairness would do, in many others it would not, and in any event, it would not be appropriate to give it any *ex-ante* preference. For example, in a case in which there are no glaring material inequities, but in which many group-based recognition disparities prevail, justice as fairness and its liberal individualist biases would seem inconsistent with the aims of comprehensive pluralism. Furthermore, beyond the just mentioned limited nexus to Rawls's *A Theory of Justice* my book criticizes his comprehensive theory as deficient regarding the plural and as providing a de-singularized conception of the individual. [56]

Rawls, however, retreats from comprehensive justice to political justice in his *Political Liberalism,* and, as Michelman stresses, this opens the way for greater

[55] Strictly speaking, Rawls's constitutional essentials align with the first three pillars, limitation of the powers of government, adherence to the rule of law, and protection of fundamental rights while at worst remaining silent or neutral regarding the fourth pillar pertaining to democratic representation.
[56] *See* Rosenfeld, *A Pluralist Theory of Constitutional Justice,* 167-73.

tolerance of a far more extensive pluralism.[57] By confining justice to the political sphere Rawls carves out a domain for justice that much more resembles the one that I confine to the constitutional sphere. What is allowed into that domain differs significantly between Rawls and me for two major reasons: the already alluded to restriction imposed by Rawls's requirement regarding "reasonable" pluralism; and his adherence to justice as fairness as the criterion of distributive justice applicable to the political sphere.[58] As I have already detailed elsewhere the concept of reasonable pluralism is problematic not only because it excludes *ex ante* many conceptions of the good promoted by large cohorts within the citizenry, but also because what qualifies as "reasonable" is highly contestable.[59] For example, Rawls maintains that Catholicism, Protestantism, Judaism, and Islam but not religious fundamentalism are comprehensive conceptions of the good consistent with justice as fairness in the political sphere.[60] To take but one example, Catholicism certainly qualifies as "reasonable" to the extent that it calls for social solidarity and for concern for the welfare of the poor. But should a religiously and morally based Catholic initiative constitutionally to flatly ban abortion and same-sex marriage also be deemed "reasonable" from the standpoint of a politically liberal conception of fundamental rights? Arguably, good faith liberals can muster a well-grounded support for the conclusion that such bans would be "unreasonable" and contrary to the spirit of the constitutional essentials.

Whatever one may think of my critique of Rawls's conception of reasonable pluralism, what is new and more challenging in Michelman's assessment of my present book are his claims that comprehensive pluralism is ultimately not as

[57] Cite to Michelman.

[58] *See* John Rawls, *Political Liberalism* (New York, Columbia University Press, 1996), 28. In his very last revision of his theory, Rawls declared that political justice could still prevail if justice as fairness were replaced by certain other criteria such as that advanced by Habermas in his discourse theory of legitimacy. *See* Rawls, *Political Liberalism* (*Expanded Edition)*, 451-52. As I have argued elsewhere, as Habermas's theory also embraces limited pluralism, it is roughly equivalent to Rawls's from the standpoint of comprehensive pluralism. *See* Michel Rosenfeld, *Law, Justice, Democracy, and the Clash of Cultures: A Pluralist Account,* (Cambridge, Cambridge University Press, 2011), 63-64. Accordingly, I shall assume that Rawls sticks exclusively to justice as fairness for purposes of the following discussion.

[59] *See* Rosenfeld, *Law, Justice, Democracy, and the Clash of Cultures*, 63-65.

[60] *See* Rawls, *Political Liberalism (Expanded Edition),* 438.

teleological as I argue it to be and that the very deployment of the dialectic that I associate with comprehensive pluralism leads me in the end to a limited pluralism that closely resembles Rawls's.[61] As I understand it, Michelman's critique on these two last points boils down to a claim that no matter how thoroughly pluralistic comprehensive pluralism may be on the input side—given that all conceptions of the good are entitled to consideration for accommodation within the relevant constitutional unit—on the output side, the conceptions actually accommodated yield a Rawlsian configuration. And that because my supposedly teleological approach conceals certain rights that prevail regardless of the good and because my dialectic yields a fixed set of second-order norms that also amount to rights transcending the good. In short, my theory sets up some fixed filters that transform the unrestricted pluralism at the point of entry of my dialectic into a limited one, much resembling Rawls's limited pluralism, at the point of exit into the actual life within the relevant constitutional order. In what follows, I explain why I disagree with Michelman's conclusions on both the teleological and the dialectical aspects of my theory.

My theory is thoroughly teleological as it affirms the priority of the good over the right without exception whereas deontological theories grant priority to the right even if it conflicts with the good.[62] Comprehensive pluralism deploys its own conception of the good which it claims is superior to all other conceptions of the good. That latter claim is of course contestable, but a unique feature of comprehensive pluralism is that it necessarily depends on accommodation of other conceptions of the good in order to maintain its coherence. In the absence of any plurality of conceptions of the good, normative pluralism would be completely superfluous. For example, if all adhered to the same religion and agreed on the same interpretation of all its precepts, it would make no sense to argue for

[61] Cite to Michelman.

[62] I leave aside Michelman's reliance on Rawls's definition of what qualifies as a teleological theory, *see* Michelman, at--, as it has little, if any, impact on the disagreement between Michelman and me. I also focus on the contrast between the two theories without dwelling on certain details such as that the right can be good even if ultimately independent and that the good can happen to coincide with the right under either of the two competing theories.

pluralism. In contrast, liberal individualism prioritizes equal freedom for all individuals and implies a certain amount of pluralism to the extent that individuals ought to be free to embrace different paths to self-fulfillment. But even if all individuals chose the same path to self-fulfillment, liberal individualism would remain meaningful without remaining tied to pluralism. And this because liberal individualism would insist that the common path in question be adopted voluntarily as matter of choice rather than being imposed.

Turning now to the key question, in view of Michelman's critique, of how justice can remain inextricably dependent on the good within the ambit comprehensive pluralism, it is useful to refer to utilitarianism. While a monist rather than a pluralist theory, utilitarianism is a thoroughly teleological one.[63] For utilitarians, the good consists in the greatest happiness of the greatest possible number of people or, in short, in maximizing happiness with each person's increase or decrease in happiness figuring in the relevant calculus. Consistent with this, for utilitarians whether something is right or just depends on whether or not it increases or decreases overall happiness. Accordingly, neither rights nor justice have any utilitarian normative legitimacy independently of their contribution to the good. That said, however, a utilitarian can justify relying on certain rights instead of relying on the consequences of every action,[64] and this is relevant from the standpoint of comprehensive pluralism. For example, a utilitarian may insist that granting individual fundamental rights to individuals regardless of how any individual uses them within legally sanctioned limits is better than any other alternative for purposes of maximizing happiness given that the individual is the best judge of what would add to, or detract from, her own happiness. But even if a utilitarian asserted that strict adherence to rights would be justified in all circumstances, that claim

[63] *See* Rosenfeld, *Law, Justice, Democracy, and the Clash of Cultures*, 35-37. The discussion that follows draws on that in the just cited passage.

[64] Utilitarians distinguish between "act-utilitarianism" and "rule-utilitarianism" with the former relying on the consequences of every act while the latter relying on the assumption that adoption of certain rules will better assure the overall maximization of happiness. *See* J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against,* (Cambridge: Cambridge University Press, 1985), 9-11.

would only garner utilitarian legitimacy so long as it could be plausibly envisioned as overall leading to a maximization of happiness.

In short, for utilitarians, rights are never justified in their own right and so it is with justice. Utilitarian recourse to justice may be prompted by individual increased unhappiness when treated in a way perceived as unjust and by individual increased happiness when another with whom that individual empathizes is granted justice. Based on this, what amounts to justice is unexceptionally ultimately linked to what leads to greater or lesser happiness in situations in which matters of justice are relevant. The exact same is also true in the case of comprehensive pluralism, with the one key difference that the good for pluralism is different than that for utilitarianism. Accordingly, for comprehensive pluralism rights are justified so long as they maximize accommodation of the greatest possible number of competing conceptions of the good as best as possible; and justice is met so long as it proves to have those same consequences.

Turning now to Michelman's critique of my dialectic's second-order norms as establishing fixed overriding rights much like does Rawls, my response is that Michelman fails to grasp the full scope and import of the rights at stake. And that is because, as I see it, Michelman approaches my dialectic undialectically. Comprehensive pluralism's dialectic has two distinct logical moments, one negative and the other positive. In the negative moment, which taken by itself is relativist, every competing conception of the good is included on its own terms and that is meant to produce equalization. Thus, for instance, in a given polity the majority religion has all the advantages and minority religions are disadvantaged and discriminated against. In that situation, comprehensive pluralism calls for equal consideration of all the religions involved and for counterfactually imagining full inclusiveness of each of them. Factually, however, full inclusiveness of all concerned is for the most part impossible. Suppose for example two opposing religions with each commanding the most aggressive implementation of proselytism. Since both of these religions cannot be equally accommodated, comprehensive pluralism

transitions to its second positive moment which seeks for the best possible accommodation of the two religions involved in a way that allows for their peaceful coexistence within the same constitutional unit. For this purpose, in the second dialectical moment, comprehensive pluralism casts all the norms respectively embraced by these two religions as first-order norms and its own norms as second-order norms that are entitled to priority over their first-order counterparts. In our example, application of the second-order norms would accommodate both religions not on their own terms, but by forbidding all proselytizing while otherwise according to each of them full recognition and freedom.

Subjecting first-order norms to comprehensive pluralism's second-order norms is, taken by itself, an instance of monism. Indeed, to subject all normative matters to the dictates of comprehensive pluralism's second-order norms seems as much an exercise of monism as subjecting such matters to the equal liberty individual oriented norms inherent to political liberalism. Accordingly, taken in isolation comprehensive pluralism's second-order norms share much in common with Rawls's liberal pluralistic ones, and Michelman's critique of my position appears to be warranted. What Michelman misses, however, is that the dialectic unleashed by comprehensive pluralism does not culminate in its second positive moment, but that it requires constant repetition as resolving one set of contradictions inevitably leads to new ones that call for renewed recourse to the two successive moments of the dialectic. In short, all pluralist accommodations of competing conceptions of the good result in new inequities that call for further accommodations. And by combining relativistic moments with monistic ones in a truly dialectical ongoing process is what makes the deployment of comprehensive pluralism thoroughly pluralistic all the way up and all the way down.

Even conceding that my position is clearly theoretically distinct from Rawls's contrary to Michelman's assessment, one may still wonder what that implies, if anything, from a practical standpoint. Whereas I cannot go into this in any great detail here, suffice for now to address the issue in question through a salient

example. Michelman concedes that Rawls's political liberalism enshrines individual-regarding fundamental rights, but that contrary to my interpretation of Rawls, these rights allow for promotion of the plural and of collective interests and pursuits.[65] Michelman specifically mentions the rights to freedom of association and to freedom of conscience for this purpose.[66] Tellingly, these rights are strongly individually rooted, and their plural and collective potentials are rather limited. For example, freedom to learn in a language of one's choosing and freedom to associate with those who are similarly inclined differs materially from a recognized collective right to instruction in a particular language.[67] In other words, the Rawlsian rights mentioned by Michelman pertain to individuals and make room for certain aggregations of individuals but they are ill fitted to extend to groups viewed as cohesive units with more organic than mere associational internal bonds among those who belong.

Because of comprehensive pluralism's concern for proportionate accommodation between the individual and collective units with their own distinct identity without conceding any *ex-ante* priority to either of them, depending on particular circumstances in some situations group-regarding interests may prevail over individual-regarding ones or proportionately require greater accommodation where conflicts pit a group against one of its own individual members.

These latter conflicts are well illustrated by reference to the confrontation between an individual and the group she belonged to at stake in the *Santa Clara Pueblo v. Martinez* case.[68] The Santa Clara Pueblo Indian tribe, in existence since many centuries before the independence of the United States,[69] had a patriarchal rule whereby the children of a woman member who had married someone outside

[65] Cite to Michelman, at__.
[66] Id., at--.
[67] *See Mahe v. Alberta,* [1990] 1 S.C.R. 342 (S. Ct. of Canada) (consistent with the Canadian Constitution, the French speaking minority in an English-speaking Canadian province and the English speaking minority in a French speaking province are entitled to state provided education in their native language). Such a right, however, does not extend to other linguistic groups with significant numbers in Canada. See Sec. 23 of the 1982 Canadian Charter of Rights.
[68] 436 U.S. 49 (1978).
[69] 436 U.S., 51.

the tribe were denied tribal membership whereas the children of a similarly situated male member were entitled to such membership.[70] Julia Martinez, a full fledged member of the tribe, sued to obtain a declaratory judgment that would grant priority to her individual right to equality based on sex over the collective patriarchal rule in question.[71] Notably, the lower federal courts split with the District Court holding for the tribe and the Tenth Circuit Court of Appeals ruling in favor of Martinez.[72] Then, the US Supreme Court refused to issue a judgment on the merits of the controversy.[73]

From the standpoint of liberal individualism, it seems clear that the woman's individual equality right should have prevailed. But from comprehensive pluralism's perspective both the woman's and the tribe's respective recognition-based claims ought to have been given proportionate consideration through submission to the justice as reversible reciprocity criterion. The tribe claimed that the patriarchal rule in dispute was essential to its survival as a cultural, social, economic, and political unit.[74] Also, given the history of mistreatment of Native Americans throughout American history,[75] the tribe's integrity and survival ought to have garnered additional urgency. The woman, on the other hand, besides having a recognition-based individual equality claim may also have had a material equality claim if exclusion from the tribe would have caused her to suffer economic disadvantages. If the patriarchal rule were proven truly indispensable to the tribe's survival as a cultural and political unit,[76] then comprehensive pluralism may well have justified prioritizing the group-based right over the individual one, provided that some compensation or accommodation short of full membership were accorded to her and to her children. Moreover, this conclusion is based on the supposition that if

[70] Id.
[71] 436 U.S. 49.
[72] *Martinez v. Romney*, 402 F. Supp. 5 (D.N.M. 1975); *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1976).
[73] 436 U.S. 49.
[74] Id.
[75] *See,* e.g., Helen Hunt Jackson, *A Century of Dishonor* (Boston: Little, Brown and Company, 1917).
[76] In the context of the actual dispute before the courts, it was pointed out that the patriarchal rule in dispute had actually been of recent vintage. Id., at--. That fact would militate against the tribe's claim that preservation of the said rule was vital to its survival.

Martinez had seriously internalized her tribe's predicament and the tribe her genuine need for the dignity of recognition as an equal, they could have compromised along these lines.

Given the ongoing dialectic propelled by comprehensive pluralism the above suggested solution ending up prioritizing the group over the individual would by no means be final. Instead, it would generate new tensions and conflicts and might produce certain changes inn dynamics. For example, women within the tribe may place internal pressures for incremental changes and tribal leaders may become more open to such changes over time. Be that as it may, this example illustrates how comprehensive pluralism differs in key respects from Rawlsian liberal pluralism.

Part IV. Comprehensive Pluralism Confronts Challenges from the Global South

Although Bonilla's references to my book contain certain inaccuracies and misreadings,[77] the overall thrust of his criticism calls for reflection and reasoned reaction. As I understand the sum total of Bonilla's objections to my comprehensive pluralism thesis, they amount to the following. The thorough pluralism that I proclaim rings hollow because I ignore or misunderstand the Global South and because, for all my claims that I do not prioritize the individual over the group, I remain yet another liberal individualist—and for the most part one tinged by American exceptionalism.[78] As noted above in the Introduction, Bonilla finds my approach flawed factually, methodologically, and theoretically, and I get the impression in reading him that it is my aspiration to pluralism that he finds most

[77] One such example is Bonilla's criticism of my reference to the *Yoder* case on page 251 of my book. *See* Bonilla, at--. Bonilla interprets my reference to *Yoder* as my endorsing individual-regarding concerns over group-regarding ones when my reference to the case is in the altogether different context of a possible clash between material welfare based distributive justice and its recognition-based counterpart.

[78] For example, Bonilla characterizes my discussion of social and economic rights as a reflection of their absence in the US constitutional setting in contrast to most of the rest of te world's constitutions. *See* Bonilla, at--.

objectionable because it amounts for him to pretense and disguise meant to conceal my Global North parochialism. My immediate reaction to this is that Bonilla ignores or discards my principle of justice as reversible reciprocity according to which I must exchange places with my ideological or theoretical antagonist to empathize as much as possible with her perspective and she must do the same, with a view to finding a solution that best accommodates both of us. Accordingly, if my religion clashes with hers, instead of focusing on my religion as right and hers as wrong, I should attempt to grasp her religion as if I were a fellow believer and she should do the same with mine, in order to try to find beliefs that share something in common and to best accommodate our remaining differences. Consistent with that, even if I were completely ignorant of the Global South[79], my theory may still be equally valid and its practical implications for the Global South could readily be discovered through dialogue with experts from that part of the world.

At a deeper level, however, Bonilla's critique raises two critical issues: the first concerns my justice as reversible reciprocity principle; and the second, my comparative constitutionalism methodology. Justice as reversible reciprocity assumes that one can, up to a point, exchange places with another and grasp what is essential from that other's perspective. This assumption is contrary to the claim, to which Bonilla refers to, according to which a man cannot sufficiently grasp a feminist perspective or a white female feminist that of her black counterpart.[80] If that latter position were taken to its logical conclusion, I as a Global North white man could not sufficiently capture the experiences or perspectives of those in the Global South. And more generally, justice as reversible reciprocity would end up as a purely abstract and largely empty concept with no practical purchase whatsoever.

[79] Bonilla acknowledges that my book discusses constitutional jurisprudence of the Global South but characterizes such discussion as "marginal". *See* Bonilla, at---. Needless to add, I disagree with that characterization as I draw on the jurisprudence in question to develop important insights relating to social and economic rights which constitute an important component of my justice essentials which are one of the central focuses of the book. *See* Michel Rosenfeld, , *A Pluralist Theory of Constitutional Justice*, at Chapter 2.

[80] *See* Bonilla, at--.

I reject that conclusion. Whereas I recognize the pitfalls of pretending to speak for another, this does not mean that one cannot understand and empathize with the experience and ideas of others through exposure to the latter's plight and through dialogue. It is unnecessary to fall into extremes of identity politics, and even if a white male cannot expunge all vestiges of sexism, racism, or colonial domination, he can through a fair reading of pertinent feminist, critical race, and anti-colonial literature better understand the plight of those who have suffered manifold injustices throughout history.[81] Moreover, once aware of details, feelings, and reactions to plights and situations that one could not have intuited on one's own, one can certainly imagine—albeit imperfectly and incompletely—how one would have thought and felt were one to have experienced what one just learned about. One cannot feel another's pain, but one can imagine it by reference to one's own experiences with pain so as to tend towards empathy rather than towards indifference. And, consistent with these observations, the requirements of justice as reversible reciprocity are both meaningful and capable of yielding practical implications.

One may object though that the reversal of perspectives required by justice as reversible reciprocity seems much less attractive when a woman, a racial minority, or one who has been subjected to colonial rule is asked to empathize with the plight of white males. This objection would be sound if the process involved amounted to comparisons of various claims to victimization. But this process actually figures as a single moment in the larger dialectic carved out by comprehensive pluralism, and it is designed to enhance mutual understanding, not to bestow normative approval based on the respective intensities of the competing emotions or senses of injustice at stake. What is ultimately normatively sanctioned depends on a comparison of the urgency of the plights and aspirations of those involved, and on the application of the second-order norms that guide the second (positive) dialectical moment set

[81] *See, e.g.,* Patricia Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights," Harv. C.R-C.L. L. Rev. 24 (1987): 401, 410-11 (Black female law professor detailing how her quest to rent an apartment contrasted with that of her friend who happened to be a white male law professor).

in motion by comprehensive pluralism. Bonilla interprets application of the second-order norms in question as leading to liberal individualist outcomes inevitably priming individual autonomy over group-regarding concerns.[82] But in doing so, Bonilla disregards both the counterfactual nature of the reversal of positions required by justice as reversible reciprocity and the dialectical dynamic between comprehensive pluralism's first and second-order norms.

Thus, for example, an underemployed white man who has lost the status and better pay of a manufacturing job he previously held, but now exported abroad due to globalization, may well experience being a victim of an undeserved and unfair degree of deprivation of material welfare. He may also then blame his new fate on racial minorities whom he considers to be unduly advantaged in the allocation of jobs and on large waves of immigrants from the Global South whom he perceives as advancing alien cultural, religious, and ideological views that threaten the ways of life in which he has been moored since childhood. This white man may moreover be attracted to a populism that fosters racism and xenophobia. Now, if this man were to counterfactually switch positions with one of his fellow citizens belonging to a racial minority and with an immigrant from the Global South, they would each be able to better understand their respective plights and to empathize with the predicaments associated with the injustices and frustrations experienced by the others. The white man would also be placed in the counterfactual position of understanding that his deteriorated plight is not caused by fellow citizens belonging to racial minorities or by immigrants from the Global South, but instead by massive dislocations of capital and labor attributable to globalization of the economy.[83] Finally, the three individuals concerned would compare after completion of their place switching process the relative depth and breath of their respective plights. The actual outcome of such a comparison is bound to vary depending on the particular circumstances involved, but exclusionary claims based on such actual outcomes—for instance, the white man calling for suppression of immigrant

[82] *See* Bonilla, at--.
[83] *See* Rosenfeld, *A Pluralist Theory of Constitutional Justice,* at 65.

cultures to better secure his own—would then be eliminated or minimized through submission to the relevant accommodationist second-order norms, including those enshrined in the (actually or counterfactually) constitutionalized justice essentials.

A fair application of justice as reversible reciprocity and of comprehensive pluralism's second-order norms should in no way disadvantage voices from the Global South or the perspectives they may bring to the table. Moreover, in principle this ought to be case in the context of interactions among representatives of the Global North and the Global South as well as in settings wholly circumscribed within Global South polities. Nevertheless, even if he were to concede this latter assertion, Bonilla may still object that at a deeper theoretical level, the whole way of proceeding pursuant to comprehensive pluralism betrays its aspiration to legitimacy and fairness extending to the Global South. Furthermore, such an objection would seem to mirror those of feminists and of racial or religious minorities who are extended offers of inclusion in socio-political and constitutional units framed by and for the dominant other.[84]

I am particularly susceptible to this latter type of objection as I have levelled similar ones against the counterfactual positions elaborated respectively by Rawls and by Habermas.[85] As I argue in the book, the two of them impose limitations on the input end of the process they undertake to yield justice and normative validity. Rawls deprives the would-be social contractors in the original position who are about to enter into a hypothetical social contract of any knowledge of their actual abilities or interests. This is meant to distill principles of justice rising above all clashes among competing conceptions of the good. In my critique, I note that on the output end Rawls's principles of justice prioritize liberal egalitarian individualism to the detriment of group related identities or concerns. Similarly, Habermas limits entry into his discourse ethics driven ideal speech situation to post-metaphysical perspectives, thus excluding all religiously based conceptions of

[84] *See, e.g.,* Katharine McKinnon, , *Difference and Dominance: On Sex Discrimination, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 381 (1987).*
[85] *See* Rosenfeld, *A Pluralist Theory of Constitutional Justice,* 167-85.

the good that cannot be translated into secular propositions. Consequently, what Habermas envisions as universalizable, and thus as normatively legitimate outcomes suffers from various deficits[86], including serious ones from a pluralist standpoint.

Comprehensive pluralism, on the other hand, imposes no limitations on the input end of the dialectical process. Consistent with this, Bonilla's criticism could either amount to an ad hominem one or to a theoretical one focused on the process itself or on its output. The former criticism would presumably leave my theory intact as it would target my factual or methodological grasp of the Global South. Accordingly, someone well versed in the Global South and with the right methodology could overcome my supposed personal limitations and leave the viability of comprehensive pluralism intact. The latter criticism, in contrast, deserves further inquiry which is better postponed till after examination of the methodological issue. In any event, it must be kept in mind that Bonilla's criticisms must be tackled in the context of the conjunction between comprehensive pluralism and acceptance of the four pillars of liberal constitutionalism.[87] And also, whether in the Global North or in the Global South liberal constitutionalism cannot function properly in the absence of meaningful interaction of what has been referred to as "the five arenas of a consolidated democracy".[88] These are: 1) the existence of a "free and lively civil society"; 2) the functioning of a "relatively autonomous…political society"; 3) the implementation of the rule of law; 4) the existence of a state bureaucracy capable of implementing democratically adopted policy; and 5) the presence of an "institutionalized economic society".[89]

[86] *See, e.g.,* Rosenfeld, *Just Interpretations,* 138-44 (detailing feminist objections to Habermas's dialogical proceduralism).
[87] One could take the radical position, which Bonilla does not, that liberal constitutionalism itself is incompatible with the political and institutional conditions and needs of the Global South. In that case, however, my entire book project would simply have no positive or negative implication for the polities in the Global South.
[88] *See* Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, MD: Johns Hopkins University Press, 1996), 7.
[89] *Id.*

From a factual standpoint, I have already noted that I disagree with Bonilla's characterization of my references to the Global South in the context of social and economic rights as being "marginal".[90] Moreover, Bonilla concludes that my approach to those rights and that my focus on theoretical and practical issues that they raise is a reflection of my being unduly biased by concerns confined to those within the grip of American exceptionalism.[91] This conclusion is based on Bonilla's unjustified assertion that the rights in question are pretty much settled beyond the US shores.[92] Instead, as confirmed by an article that we both cite,[93] such rights happen to be far from uncontroversial or uniform given that they are merely aspirational in several jurisdictions while justiciable in others. More generally, Bonilla's assertion that I pretty much ignore the Global South is belied not only by my book but also by the many years I have labored in the field of comparative constitutional law.[94] Perhaps what is most ironic in this context is that my entire project in the book is about the relationship between distributive justice and the constitution, thus addressing one of the three major distinct preoccupations and focuses of Global South constitutionalism.[95]

Even if all that were conceded, Bonilla could still be critical on methodological grounds. I now therefore turn to questions of methodology, or more particularly to those that I estimate lend support to comprehensive pluralism and to its capacity

[90] *See supra* note 79.
[91] Cite to Bonilla.
[92] *Id.,* at--.
[93] *See* Courtney Jung, Ran Hirschl, and Evan Rosevear, "Economic and Social Rights in National Constitutions," AM. J. COMP. L. 62 (2014): 1043, cited in Bonilla, at--; and Rosenfeld, *A Pluralist Theory of Constitutional Justice,* 78.
[94] In all fairness to Bonilla, he is in no way to be faulted for not taking account of any of my works besides the book. Nevertheless, my previous engagements with the Global South bear relevance on the questions and criticisms Bonilla raises concerning my supposed ignorance or lack of concern on the subject. Actually, I have engaged with Global South scholarship and constitutional jurisprudence for several decades. *See, e.g.,* Carlos Santiago Nino, "A Philosophical Reconstruction of Judicial Review" in Michel Rosenfeld, ed., *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Durham: Duke University Press, 1994), 285-332; Norman Dorsen, Michel Rosenfeld, Andras Sajo, Susanne Baer, and Susanna Mancini, *Comparative Constitutionalism: Cases and Materials 4th Ed.,* (St. Paul, MN: West Academic Press, 2022), 6 (first excerpted case in book from South Africa), 26 (discussion of Colombia's Constitutional Court's innovative "constitutional block doctrine"), 35-36 (discussion of African and South Asian constitutionalism). These are but a handful of examples. The casebook contains several dozens of case excerpts as well as excerpted commentaries from the Global South.
[95] *See* Philip Dann, Michael Riegner, and Maxim Bönnemann, eds. *The Southern Turn in Comparative Constitutional Law: An Introduction* (New York: Oxford University Press, 2020), 14, 29-30.

to deal satisfactorily with issues concerning the Global South. In the most general terms, comparative constitutional methodology falls into three distinct camps. The first of these considers the problems and solutions regarding constitutions being essentially similar throughout the world; the second maintains that the problems are similar and the solutions different; and the third that both the problems and the solutions are different.[96] Moreover, a more critical version of the latter position contends that the field is dominated by "Anglo-Eurocentric" paternalist hegemonists.[97] My own position amounts to a modified version of the second of these three positions. Furthermore, although I do not know where Bonilla would place himself as a constitutional comparativist, his critique of comprehensive pluralism evokes the radical version of the third position.

Taken literally, the third position would make the confrontation between the Global North and the Global South rather secondary if not entirely superfluous. Placed in its best light, the third position justifies recording differences and singularities in constitutional orderings perhaps with the added benefit of deepening the understanding of one's own constitutional system. But, consistent with this position, why would a common law trained American scholar be better suited to meaningfully appreciate the German civil law grounded constitutional law jurisprudence than those of the civil law countries of South America?

My own position as adjusted for the purposes of my book modifies the second one above in the following salient ways. First, I do not consider all existing constitutions, but only those that loosely fit within the mold of liberal constitutionalism. Second, given my concentration on distributive justice in its three dimensions and on the justice essentials, I only consider constitutions if (or as if) they come close to adhering to the four pillars of liberal constitutionalism. And third, I assume that factually or counterfactually the constitutional settings that I

[96] *See* Dorsen, et al., *Comparative Constitutionalism,* 27-29.

[97] *See* Günther Frankenberg, "Stranger than Paradise: Identity and Politics in Comparative Law," Utah L. Rev. 259, (1997): 262–63.

engage with comport with the above listed requirements of a consolidated democracy.[98] On the whole, these modifications tend to pool together similarities and to aggregate certain categorical exclusions. Whether such concentration on similarities and exclusions affect more polities in the Global South than in the Global North remains an open question. Nevertheless, suffice it for present purposes that my embrace of the second position with the said modifications would be inclusive of a large number of Global South constitutional jurisdictions, including Colombia, India, and South Africa to which Bonilla has devoted extensive attention.[99]

A couple of final points on methodology bear mentioning before tackling the issues of comprehensive pluralism's process and output as they apply to the Global South through examples. First, as noted above my approach is functional,[100] and as the book emphasizes throughout it is also systematically context based. Commentators who have focused on the Global South have tellingly recommended more functional and contextual comparative approaches to better counter domination of the Global North.[101] Combining function and context raises, however, a vexing question regarding the proper level of abstraction at which comparative analysis ought to be conducted. Too high a level unduly downplays important differences whereas one that is too low minimizes or conceals relevant similarities. But to a significant extent the comparative task at hand and the purposes for which it is conducted can point to the corresponding appropriate level of abstraction. A vivid example of this is provided by the deploying of the concept of caste to analogize the caste system in India, slavery in the US, and the treatment of Jews (before systematic extermination) in Nazi Germany.[102] Although formally only India had an actual caste system, the split between superior and inferior groups within a polity with the latter inextricably relegated at the bottom of the barrel was also

[98] *See supra,* at--.
[99] *See* Daniel Bonilla, ed., *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge: Cambridge University Press, 2013).
[100] *See* note 18 *supra.*
[101] *See* Dann, et al., *The Southern Turn in Comparative Constitutional Law: An Introduction,* 33 (advocating a functionalism that "must be contextualized").
[102] *See* Isabel Wilkerson, *Caste: The Origins of our Discontents* (New York: Random House, 2020), 73-88.

typified by US slavery and its racist aftermath and by the degradation of Jews and their violent expulsion from the precincts of mainstream of German society during the earlier years of the Nazi regime. To be sure, enormous differences separated the three historical experiences involved[103], but caste and its dehumanizing effects on those meant to permanently remain at the despised and undignified bottom convincingly provides a strong link of essential similarity among them.

The second methodological point raised in this context zeroes in on the relevant similarities and differences between Global North and Global South constitutionalism. I disagree with Bonilla on this point and believe that the meaningful differences involved–or at least those pertaining to liberal constitutionalism in the context of a consolidated democracy—are less acute than often proclaimed. As certain scholars of the Global South have specified, "[a]reas of the Global South can be found in racialized urban ghettos of North America, as much as the Global North in gated communities of the rich in Rio, Lagos, or Mumbai."[104] Keeping important differences of proportion in mind, both the Global North and the Global South have experienced dramatic disparities in wealth affecting material justice[105]; ethno-cultural conflict, religious strife and tensions, impacting on recognition based justice[106]; terrorism, both global and fitted to a particular nation-state, such as the FARC in Colombia, the IRA in Northern Ireland, or ETA in Spain,[107] all of which posing threats to the integrity of the four pillars of

[103] *Id.,* at 74.

[104] *See* Philip Dann, et al., *The Southern Turn in Comparative Constitutional Law: An Introduction,* 6.

[105] *See* e.g., Jason Hickel, *The Divide: A Brief Guide to Global Inequality and its Solutions* (London: Heinemann, 2017).

[105] Monika Thakur, "Cruelty and Violence in the Global South," *Global Studies Quarterly* 2, no. 2, (April, 2022): 1-12; Ludger Pries, Oscar Calderón Morillón, and Estrada Ceron Brandon Amir. "Trajectories of Forced Migration: Central American Migrants on their Way Toward the USA." *Journal on Migration and Human Security* 12, no. 1 (2024): 39-53.

[106] Monika Thakur, "Cruelty and Violence in the Global South," *Global Studies Quarterly* 2, no. 2, (April, 2022): 1-12; Ludger Pries, Oscar Calderón Morillón, and Estrada Ceron Brandon Amir. "Trajectories of Forced Migration: Central American Migrants on their Way Toward the USA." *Journal on Migration and Human Security* 12, no. 1 (2024): 39-53.

[107] Livia Isabella Schubiger, "One for all? State Violence and Insurgent Cohesion." *International Organization* 77, no. 1 (Winter, 2023): 33-64;, Virginia Page Fortna, "Do Terrorists Win? Rebels' use of Terrorism and Civil War Outcomes." *International Organization* 69, no. 3 (Summer, 2015): 519-56.

liberal constitutionalism; and indigenous populations' group-regarding claims pitted against individual-regarding ones originating both from within and without the indigenous traditional ancestral unit.[108] Because of this, I am convinced that fruitful comparisons are within reach and that productive distillations of poles of convergence and of divergence can be successively achieved through the process of reversal of perspectives prescribed by justice as reversible reciprocity.[109]

Finally, two examples from the Global South amply illustrate comprehensive pluralism's suitability in terms of process and output for constitutional matters in that part of the world. The first of these is provided by the *Shilubana* case[110] decided by the South African Constitutional Court. This case concerns succession upon the death of the leader of the Valoyi traditional community without a male descendant. The dispute was between the eldest daughter of the deceased and the latter's closest male relative in the context of the community's traditional customary law restricting succession to males. In rendering its decision in favor of the late leader's daughter, the Court sought to balance the evolving customary law of the community and the individual rights protected by the South African Bill of Rights. In so doing, the Court specified:

> The Valoyi authorities intended to bring an important aspect of their customs and traditions into line with the values and rights of the Constitution. Several provisions of the Constitution require the application of the common law and customary law, as well as the practice of culture or religion, to comply with the Constitution. [The Constitution] recognises the right to participate in the cultural life of one's choice, but only in a manner consistent with the Bill of Rights.[111]

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[108] Ann M Carlos, Donna L. Feir, and Angela Redish, "Indigenous Nations and the Development of the U.S. Economy: Land, Resources, and Dispossession," *The Journal of Economic History* 82, no. 2 (2022): 516-55; Luyanda Mtshali, "The Prominence of the Amalgamation of Land Reform and Agriculture for Rural Development in South Africa," *Journal of Nation-Building and Policy Studies* 7, no. 1 (2023): 71-84; Pablo Mansilla-Quiñones and Sergio Elías Uribe-Sierra, "Rural Shrinkage: Depopulation and Land Grabbing in Chilean Patagonia" *Land* 13, no. 1 (2024): 11.

[109] Bonilla also draws a distinction between post-colonial issues in the Global North and the Global South. *See* Bonilla, at--. Whereas I cannot address this matter adequately in the present context, I have dealt elsewhere with the dynamic of post-colonial constitutional models in the Global South and am convinced that their distinct features can properly be accounted for under the justice as reversible reciprocity standard. *See* Rosenfeld, *The Identity of the Constitutional Subject,* 179-83 (focusing primarily on the case of India).

[110] *Shiubana and Others v. Nwamitwa,* Case CCT 3/07 [2008] ZACC 9.

[111] *Id.,* at Para. 68.

Remarkably in this case, both the community and the Court sought to best reconcile the group-regarding interests of the community and the individual-regarding interests of the woman involved. This certainly aligns much better with comprehensive pluralism and justice as reversible reciprocity than any of the three US federal court decisions in the *Martinez* case discussed in Part III.[112]

The second example involves application of Article 246 of the 1991 Colombian Constitution which provides that "[i]ndigenous peoples' authorities may exercise jurisdictional functions within their territory and in accordance with their own laws and procedures, provided they are not contrary to the Constitution and the laws." In Decision T–523 (1997)[113], The Columbian Constitutional Court decided in favor of a tribal community in a controversy in which one of the latter's individual members sought to prevail based on his individual-regarding national constitutional rights. The individual in question had a trial conducted by tribal authorities and a conviction for murder for which he was subjected to physical punishment consistent with the tribe's practices. He claimed that he had been deprived of his due process rights as he was not assigned a lawyer at his trial, and of his right to freedom from torture and inhuman and degrading treatments by virtue of his subjection to corporeal punishment.[114] The Columbian Constitutional Court ruled in favor of the tribe determining that the right to a lawyer in a criminal proceeding was a Western tradition with no equivalent in indigenous law and culture, and that the corporeal punishment involved did not violate established international standards regarding torture and inhuman and degrading treatment. Instead, the Court noted that the punishment in question "was a common way of punishment not meant to humiliate the offender, but, rather, to re-establish the equilibrium between the offender and the community that had been broken by the offender's crime."[115]

[112] *See supra,* at--.
[113] This decision is excerpted in English translation in Dorsen, et al., *Comparative Constitutionalism,* at 692-93.
[114] In addition, the punishment in question involved loss of political rights within, and banishment from, the tribe. *See id.*
[115] *Id,* at 692-693.

The Columbian Constitutional Court's ruling in favor of the group as against the latter's individual member would also be deemed appropriate consistent with the reversal of perspectives required by comprehensive pluralism's criterion of justice. Indeed, besides affirming established and understood (including by the convicted individual) communal norms, the ruling also ought to have been deemed preferable by the punished individual. That is because once the latter would have weighed his physical punishment within his community against isolation and probable subjection to fellow inmate violence in state prisons, it would have been preferable from the standpoint of his own well-being to opt for remaining within the tribe.[116]

These two examples well illustrate that process and output pursuant to comprehensive pluralism's dictates need not in any way frustrate or distort constitutional approaches prevalent in the Global South. Moreover, the fact that comprehensive pluralism would legitimate the result favoring group-regarding over individual-regarding concerns in the last discussed case provides further evidence that Bonilla's characterization of my position as effectively confined to liberal individualism is entirely unwarranted.

Part V: Pluralizing the Universal and Surmounting the Twin Threats of Monism and Relativism

Julie Saada follows to its logical conclusion my suggestion to start from the middle, that is the plural, to attempt to reconcile the singular, the plural, and the universal.[117] In so doing, Saada rigorously unravels the philosophical paradoxes and contradictions that the theoretical journey that comprehensive pluralism undertakes encounters in its dealings with the universal. As Saada correctly

[116] The Columbian Constitutional Court has also reasoned along these lines. *See id.,* at 693-694.
[117] Cite to Saada.

emphasizes the universal is necessarily exclusionary whether one settles on a singular all time and all-purpose universal, such as Kant's categorical imperative[118], or one universal among many competing ones.[119] If comprehensive pluralism's universal as circumscribed by its second-order norms is understood as *the* universal as opposed to any proposed alternative, then the brand of pluralism that I defend entails a commitment to monism. On the other hand, if comprehensive pluralism is open to a large number of competing conceptions of the good, each of which with its own distinct conception of the universal, then it seems bound to fall into relativism. And that is because in the latter case I could only justify comprehensive pluralism's universal as one among many rather than the one that proves superior to others.

This philosophical conundrum that Saada systematically unravels is particularly daunting in terms of its practical implications in the realm of constitutional theory. As I specify in the book, I designate as universal what amounts to the community of communities within each particular constitutional unit that comports with, or aspires to, the strictures of liberal constitutionalism.[120] Moreover, the constitutional universal in question is most likely comprised of components that emerge as universal in absolute terms, such as strict prohibitions against torture, and components tied to a particular polity since they are designed to harmonize that polity's own peculiar *ethnos* with its own configuration of the *demos.*

Saada also raises a serious philosophical challenge to my Hegelian approach to conflict and contradiction given that I insist in rejecting Hegel's linkage between his dialectics and his conception of the progress of history towards its culmination into the Absolute Spirit marked by the complete reconciliation between the real and the rational.[121] Viewed from the perspective of Hegel's postulation of the culmination

[118] *See* Immanuel Kant, *Foundations of the Metaphysics of Morals* 54 (Lewis White Beck, trans., 1969) (universal morality requires treating all humans as ends. and not as mere means. This excludes other universals such as the utilitarian one which allows to treat others as means so long as that leads in increases in overall happiness).
[119] Cite to Saada.
[120] *See* Michel Rosenfeld, *A Pluralist Theory of Constitutional Justice,* at 12.
[121] Cite to Saada.

of history which definitively realizes *the* universal, each historical stage in the dialectical sequence both advances the quest towards the universal and is susceptible of retrospective integration as an orderly facet in the inexorable historical journey towards full universalization of *the* universal.[122] In contrast with this, comprehensive pluralism's dialectic leads from one set of conflicts and contradictions to others without any necessary historical progress and certainly without any expectation of any definitive culmination.

To the extent that comprehensive pluralism could not ultimately escape monism, this would bolster Michelman's claim that there is little difference between my theory and Rawls's in *Political Liberalism.* And if comprehensive pluralism could not avoid culminating in relativism, then Schlink's justice minima would be as justified in relation to his conception of the good as my justice essentials would be in relation to my own conception of the good. Furthermore, I could plausibly avoid falling into the dual pitfalls of monism and relativism by adhering to a Hegelian orderly progression towards the resolution of all contradictions. For example, I could postulate an ideal state in which all conflicts could be extinguished upon all existing competing conceptions of the good internalizing the ethos of comprehensive pluralism thus leading to full accommodation of their respective remaining differences. In rejecting such a Hegelian progression, however, the dialectical process associated with comprehensive pluralism seems bound to foster constant instability and irresolution as Saada's critical analysis intimates.[123]

Saada's further compounds the philosophical challenges confronting my pluralization of universals by noting that each universal involved confronts both internal and external contradictions.[124] For example, as she highlights, the French 1789 Declaration of the Rights of Man and Citizen contradicts the feudal status based universal and embraces a competing one erected on the premise of the inherent equality of all individuals. But this external contradiction is supplemented

[122] Id, at--. *See Hegel's Phenomenology of Spirit,* Paras. 798-808 (A. V. Miller, trans., 1979).
[123] Cite to Saada
[124] Id., at--.

by an internal one as evinced by the 1789 Declaration's exclusion of women from equal personhood and from citizenship.[125] Moreover, as Saada specifies, this dynamic between external and internal conflicts within competing universals split the latter into instituting and instituted universals and frames a dynamic between insurrection (against entrenched universals) and preservation (against universals viewed as threats from within or without).[126] Notably, this latter distinction can be regarded as a reprise at a higher level of abstraction of Martinico's understanding of the dynamic between constituent power and constituted power within the ambit of liberal constitutionalism.[127] As underscored in Part I, this dynamic emphasized by Martinico can either lead to the constant exercise of raw constituent power that easily meshes with populism or to a balance between constituent and constituted power cemented by adherence to a determinate political or constitutional theology.[128] This, in turn, raises the question of whether comprehensive pluralism can offer means of stabilization in the more abstractly posited confrontation between insurrection and preservation that Saada envisions.[129]

Saada intriguingly suggests that the only way that I may overcome the exclusionary facets of the plural universals that I seek to harmonize and accommodate within the same constitutional unit is through recourse to equality posited as a "meta-universal".[130] If I understand her correctly, Saada proposes that I avoid the monist and the relativist traps by elevating equality as an immutable universal towering above all other universals and paving the way to handling the contradictions within and among universals in ways likely to be emancipatory. In this scenario, comprehensive pluralism's universal is prevented from acquiring monistic aspirations to superiority as it is constantly subject to evaluation under the meta-universal criterion of equality. Similarly, the large plurality of competing

[125] Id., at--.
[126] Id., at--.
[127] *See supra,* at--.
[128] *See supra,* at--.
[129] Cite to Saada.
[130] Id., at--.

universals other than comprehensive pluralism[131] do not combine into an incommensurable relativist bundle as evaluation pursuant to the dictates of meta-universal equality allows for order and equality related rankings.

Although equality certainly figures prominently within comprehensive pluralism and within the constitution's justice essentials, I cannot fully accept Saada's advice that I elevate equality to the status of the meta-universal. And this for two principal reasons. First, Saada infers that in rejecting Hegel's dialectic progression to the end of history, I also do away with his key concept of *Aufhebung* with its dual meaning of at once cancelling (what sustains a preexisting conflict) and preserving (the reframed differences that sparked the conflict into a new unit in which that which has been cancelled can coexist as modified through submission to the dialectical process).[132] Actually, as I will briefly explain below, I embrace and make use of the Hegelian concept of *Aufhebung* in designing the dialectical journey prescribed by comprehensive pluralism. And second, although equality is central to justice at all levels, I cannot elevate it to the status of a meta-universal because it is an essentially contested concept. Indeed, there are as many competing conceptions of equality as there are of justice, with the consequence that a meta-universal equality would be necessarily subjected to internal as well as external contradictions. For example, should meta-universal equality conform to libertarian as opposed to egalitarian perspectives on equality? On the assumption that conflicts over the meaning of equality cannot be decisively settled, elevating equality does not lead to a satisfactory solution, but seems instead poised to result in an infinite regress.

At the abstract level at which Saada pitches her meta-universal suggestion, comprehensive pluralism's dialectic unleashes its process which consists in the logical sequence of its two moments. As already underscored, the first of these is the negative one which requires equalization of all conceptions of the good so as to enable consideration of each of them on its own terms. The second moment, the

[131] Arguably, comprehensive pluralism can be added to all other universals without altering the conclusion that recourse to equality as a meta-universal allows for overcoming relativism.
[132] Cite to Saada.

positive one, in turn requires accommodation of the now equalized conceptions to the extent that they do not thwart achieving the greatest possible accommodation required in order to secure the peaceful coexistence of as many conceptions of the good as possible. Accordingly, the first moment is driven by a quest for equality whereas the second is oriented towards the goal of maximizing plurality under conditions of peaceful coexistence. The second moment, moreover, is bound to foster inequalities among the (first moment) equalized conceptions of the good since virulent and uncompromisingly anti-pluralist conceptions of the good would be less accommodated—if at all—than limited pluralist ones such as liberal individualism.

In terms of the Hegelian conception of *Aufhebung,* the first moment of the above dialectic proceeds through negation of all existing inequalities institutionally and ideologically reinforced among the various conceptions of the good with adherents within the polity. Thus, if a minority religion is institutionally disadvantaged and its adherents discriminated against, the inequalities at stake ought to be counterfactually negated and cancelled. Furthermore, within this perspective, the second moment of the dialectic figures as a Hegelian negation of the negation that culminates in a re-hierarchization of the previously equalized conceptions of the good for purposes of maximizing pluralism's objectives. Obviously, the re-hierarchization in question preserves as best as possible the plurality of initially competing conceptions of the good but does so at the cost of producing new inequities which will require an entire new round of the same dialectical sequence. The actual hierarchies involved and the contradictions and conflicts they produce differ from setting to setting, but unlike Hegel I do not assume any overall progress toward a pluralist ideal. For example, the wars of religion between Catholics and Protestants in sixteenth and seventeenth century Europe gave rise to the institutionalization of secularism which afforded a buffer between the two warring religions.[133] Secularism, however, led to new asserted inequities as some claimed it

[133] *See* Michel Rosenfeld, *Constitutions and Religion* in Susanna Mancini, ed., *Constitutions and Religion* 21-22 (Edward Elgar Publishing 2020).

was antireligious and others that it sustained favoring one religion over others.[134] Finally, what makes comprehensive pluralism's dialectic pluralistic rather than monistic or relativistic is the unbroken sequence between negation and negation of the negation forged within the ever conflictual historical setting pitting equality against inevitably hierarchically structured optimized pluralistic accommodation.

The process of constant shifting inclusions and exclusions and of unending confrontations between instituting and the instituted seemingly prescribes endless turmoil and institutional instability. However, by shifting from the highest levels of abstraction to the much lower one at which questions of justice regarding the liberal constitution arise, one is likely to encounter a much more stable and manageable situation. The reasons for this are manifold and begin with the degree of unity and stability afforded by common internalization of the relevant *ethnos.* Indeed, though a polity's *ethnos* is by no means static, it can provide sufficient commonality over significant periods of time to allow for adequate stability to sustain the community of communities that functions as the constitutional order's universal. Moreover, by concentrating on the justice essentials as a minimum requiring constitutional enshrinement, many claimed injustices can be kept aside for subsequent infra-constitutional handling. Also, because of the reduction in inequalities and of differences that must be dealt with at the constitutional level, it stands to reason that the instituted will be reinforced thus reducing the need for destabilizing insurrection or for unending institution through exercises of an unbound constituent power starkly set against the constitutional status quo.

Conclusion

I am grateful for the insights, challenges, and questions raised by my five critics. They have prompted me to reconsider and to deepen my grasp of the main

[134] *Id.,* at 30-31.

arguments and positions that I have advanced throughout my book. Undoubtedly, my insistence on pluralism as against political liberalism may often matter much more in theory than in practice. In the struggle against illiberal populism and its evils, there is virtually no difference between my pluralism and Rawls's and Michelman's liberalism. Nevertheless, I have endeavored to demonstrate that these theoretical disagreements are consequential and that they can lead to significant practical differences within the confines of liberal constitutionalism. Furthermore, whether or not the justice essentials can fully rise above the conflict among conceptions of justice as sharply brought to light by Schlink's observations, I have tried to provide a roadmap indicating how one could embrace them as a discrete constitutional minimum while leaving ample room for the contest over conceptions of justice to unfold in society's broader socio-political space. I am grateful to Bonilla to have raised his series of insights and objections from the perspective of the Global South—a perspective that is not dealt with as such in the book though it nonetheless addresses various constitutional issues and examples hailing from that part of the world. I have also sought to demonstrate how my pluralist dialectic is as relevant to the Global South as it is to the Global North, and through examples drawn from the Global South illustrated how it does not prioritize the individual over te group. Finally, I am grateful for the theoretical insights of Martinico and Saada which have allowed to clarify and deepen important matters relating to my project in the book. Martinico's discussion of the dynamic between constituent and constituted power and between political and constitutional theology have allowed me to further explain and develop my views concerning how the nexus between *ethos* and *demos* affects the configuration of the associated constitution's justice essentials. Saada's systematic analysis of the interplay between the inclusionary and exclusionary features of universals have enabled me to further specify how the universal that emerges in a specific constitutional setting fits within comprehensive pluralism's dialectics.