Editorial

This issue of the Critical Quarterly for Legislation and Law is dedicated to an essay by *Frank Michelman* on socioeconomic rights. The essay is based on a paper that *Michelman* presented at the University of Luxembourg in October 2013. Also present as a respondent to *Michelman's* paper at the time was *Dieter Grimm*. We therefore begin this issue with *Michelman's* essay and *Grimm's* response. After having received *Michelman's* more or less final draft for publication we invited further responses to his paper from a number of scholars with whom he had been discussing the paper in the course of preparing it for publication, hence also the inclusion in this issue of two further responses to *Michelman* by *Martin Loughlin* and *Mark Tushnet*. We were fortunate to also solicit for this volume another short response by *Dennis Davis*, Justice of the Cape High Court in South Africa who presided in the High Court hearing of the *Grootboom* case,[1] one of the most dramatic socioeconomic rights cases in the history of South African law.

At the time of *Michelman's* visit to *Luxembourg*, he generously agreed to listen and respond to two papers that engaged with his paper as well as other lines of thought in his work by two researchers in the Research Unit for Law of the University of Luxembourg, *Brian Nail* (a postdoc at the time) and *Richard Mailey* (a PhD candidate). We also include in this volume these papers of *Nail* and *Mailey*, as well as another response to *Michelman* by *Thorsten Fuchshuber*, another PhD researcher at the University of Luxembourg at the time who recently completed his PhD research on the work of *Max Horkheimer*. These three papers introduce into the discussion wide ranging interdisciplinary perspectives on *Michelman's* work that open up the question of socioeconomic rights to broader social scientific inquiries into the modes of societal production and reproduction that condition the question of socioeconomic rights.

We also considered it important to include in the volume responses to *Michelman's* work from the perspective of the development of socioeconomic rights jurisprudence and adjudication in the *European Union*, hence the inclusion of the two final essays of *Orsola Razzolini* and myself in this volume. These two papers analyse what appears to the authors to be a rather paradoxical development in *Europe*, namely, a constitutional recognition of socioeconomic rights that leads to their marginalisation.

Michelman's essay engages with the question whether the political liberal project of "Legitimation by Constitution" (LBC) can be extended to the field of socioeconomic rights (SER). LBC concerns the idea that the people of a country would have sufficient reason to continue to support the political regime – notwithstanding some objections they may have to that regime – as long as they continue to receive reassurance from authorities they trust that the operations of that regime conform sufficiently with a good enough constitutional charter. If LBC is to work, argues *Michelman*, a principle of justice (1) that is crucial for governmental legitimacy (2) must be entrenched in a constitutional

1 *Western Cape/Cape Metropolitan Council/Oostenberg Municipality v Irene Grootboom and Others* (2000) 11 BCLR 1169 (CC).

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document or scheme (3) and justiciable by a constitutional or high court or other forum that is sufficiently detached and independent from the executive and legislative branches of government (4). And his question is whether all four of these requirements can be met in the case of SER. The political liberal position would have no trouble with embracing the first three conditions, but it would seem to have serious difficulty with the fourth condition. The fourth condition raises what *Michelman* calls the "standard worry" that has always bothered the political liberal position, namely, the worry that justiciability of SER would involve the court or similar forum responsible for judicial scrutiny in political deliberation that should remain the exclusive domain of the legislative and executive branches of government. It is with this standard worry in mind that *Michelman* then proceeds to explore whether the conception of an experimentalist weak form of judicial review that has emerged in recent constitutional scholarship can overcome political liberalism's standard worry. A key passage from *Michelman's* essay describes this weak form judicial review as follows:

> *The court acts in the first instance as instigator and non-dictatorial overseer of engagements among stakeholders very broadly defined, among whom state actors hold no privileged position, in an ongoing process of interpretative clarification of what a constitutionally declared right of (say) "access to health care services" consists of in substance and, simultaneously and reciprocally, of what sorts of steps by what classes of actors are concretely (in the current conditions of society, economy, and so on) now in order toward the achievement of due and adequate service to everyone's core interest – a process of successively clarified "benchmarking" as it is sometimes called. As the discursive benchmarking moves along and the emerging answers gain public recognition and authorization, the court might turn up the heat on deployment of its powers of review. At a relatively early stage, what the court presumes to dictate will be agendas of questions to be addressed and answered by one or another stakeholder group or class. At later stages, the court starts calling for substantive compliance with an emergent best-practice consensus, in the name of the constitutional right (say) to access to health care services. The screws tighten on what can count as a reasonable, sincere governmental response. The court serves as arbiter but it never has or claims a door-closing last word.*

Michelman surely considers this experimentalist project with care and an evident degree of positive interest and sympathy. After an initial phase of confident endorsement of the justiciability of a social minimum in the 1960 s and 1970 s, he has for a considerable time since then been yielding to political liberalism's standard worry that such justiciability would involve courts in the business of the other branches of government by requiring them to respond to open ended and polycentric social questions, the resolution of which cannot possibly turn on sufficiently defined and well established legal criteria. He has in fact until very recently argued that SER may and can be meaningfully embodied in constitutional documents as constitutional principles with regard to which governmental programmes can politically be held responsible, without rendering these constitutional principles justiciable. The development of *Michelman's* position on SER in the course of an illustrious career of constitutional scholarship that spans five decades of work – *Michelman* also retired from Harvard Law School in 2012 after fifty years of service – is traced in more detail in my essay in this volume. Suffice it to say that we

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find the ever-up-to-the-challenge *Michelman* again trying and testing a new development in constitutional thinking to see whether it might lead him beyond or away from a previous or current position on a question. The question that he considers this time is whether the concept of an experimental and weak form of judicial review – a concept that surfaces frequently in current constitutional scholarship – can help political liberalism overcome the obstacle of the standard worry.

Michelman's inquiry into the matter has not, however, led him to the point of affirming that the weak and experimental form of judicial review mooted in recent scholarship indeed overcomes the standard worry. He ultimately insists on leaving the question hanging for now. Showing us that key questions more often than not indeed remain hanging is surely one of the hallmarks of the scholarship that *Michelman* has developed over the years. One might understand him in this regard as the veritable Socrates of the constitutional scholarship of our time. Also remarkable in this regard is his ability to open up a question even further than it appeared to be open and to do this almost in passing. Even if the weak form judicial review would manage to get us over the standard worry, observes *Michelman* in a footnote, it may not necessarily lead to the results that one might want to expect from it. In the neo-liberal times that we live, observes the footnote, the experimental and weak form judicial review that current constitutional scholarship has been mooting may well hold some unwelcome surprises for those who pinned hopes for a constitutionally guaranteed social minimum to it. In the end, it is not only the standard worry that the new experimental judicial review would have to overcome, it would also have to address the question of whether judiciaries can generally be expected to remain steadfastly committed to a robust social minimum jurisprudence in the neoliberal climates in which we currently find ourselves. Times of electoral, legislative and executive neoliberalism, austerity politics and paralysing sovereign debt repayment would indeed render it unlikely that judiciaries would stand up against everything that is happening around them so as to remain true to a social minimum jurisprudence. And if they would (supposing they alone might avoid contracting the neo-liberal fever), would they not then by default fall foul of the standard worry again?

Be it as it may, the one inference that *Michelman* is prepared to draw from all of this is this one: If the weak form judicial review mooted in contemporary constitutional scholarship were to overcome the standard worry, it would mark another significant milestone in the apparent ascendancy of *legal* constitutionalism over *political* constitutionalism that would appear to be afoot in the world today, considering the way resistance to the judicialisation of typically "political" questions – among which questions pertaining to social minimum guarantees would undoubtedly figure – remains one of the cornerstones of political constitutionalism. It is to this inference in *Michelman's* paper that *Martin Loughlin* responds, as will be shown shortly. However, let us first look at the responses of *Grimm*, *Tushnet* and *Davis* before we turn to *Loughlin*.

Dieter Grimm's response to *Michelman* offers us a succinct statement of the standard German constitutional perspective on socioeconomic rights. *Germany* obviously qualifies as a state that meets among the most robust of criteria for a social welfare state that one can reasonably imagine in the contemporary world. Its status in this regard is not the result of justiciable socioeconomic rights or of the judicial enforcement of the social state principle that is entrenched in Article 28 of the German Basic Law (*Grundgesetz*). It is the result of political decisions and a generally robust post-war economy

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that has made the implementation of these decisions possible. *Grimm* nevertheless makes clear that this does not mean that the *Constitutional Court* does not play a role in implementing the social state-clause of the Basic Law. He stresses that the Constitutional Court applies it frequently, often in combination with the guarantee of human dignity, to secure equal treatment in the field of social security and to fill gaps that statutory law may have left open. It also fixes the minimum standard below which social benefits may not fall. However, because of its extreme open-endedness the social state-clause does not lend itself to maximizing social security. The Court can also not attempt to remedy a deficiency that concerns a whole sector of social life. Should this happen, the Court would be limited to obliging the legislature to concern itself with the matter and come up with a plan how to address the problem.

One can infer from these key points in *Grimm's* response to *Michelman* that *German* constitutional doctrine steadfastly endorses the political liberal principle that judiciaries cannot be called upon to resolve political questions that lead them out of the domain of clearly established and sufficiently closed legal principles and into the zone of open-ended questions that must be resolved in the political domain. In other words, *Michelman's* standard worry reigns supreme in German constitutional thinking, and this standard worry has evidently not given rise to the neo-liberalisation of German society, asserts *Grimm* in his response to *Michelman's* essay.

Grimm's observation regarding the inverse relation between SER and social minimum protection in *Germany* (no constitutional SER guarantees/significant political entrenchment of a social minimum) is in many respects echoed by observations that *Mark Tushnet* has articulated elsewhere regarding the inverse relation between judicial review and democratic measures of social welfare protection.[2] In his response to *Michelman* in this essay, *Tushnet* again raises the question whether courts are the institutional sites to which SER protection should be entrusted. He invokes for this purpose the scepticism of the American realist movement regarding the political liberal assumption that courts can generally be trusted to decide cases "within the bounds of honest, discursive defensibility… with a frequency sufficient to qualify those judgments as publicly authoritative" (the words with which *Michelman* describes this assumption in his essay). "How deep should the Realist skepticism run?" asks *Tushnet*, and he answers: "deep enough to cast doubt on the proposition that the courts act within those bounds often enough to sustain legitimacy." In fact, *Tushnet's* realist scepticism runs so deep that it prompts him to recommend an expansion of the scope of the weak form judicial review that *Michelman* explores as a possible answer to the "standard worry" regarding judicial protection of SER. This weak form judicial review, argues *Tushnet*, should be the standard form of judicial review in all cases of fundamental rights protection by judges, the protection of first generation rights or classical constitutional liberties included, for here, too, does the standard worry prevail – at least in the minds of those who are heirs to the American realist legacy – that courts end up deciding questions that should strictly be left to the political arena. The broad scope and open ended nature of the questions that pertain to the protection of classical constitutional liberties also do not afford judiciaries the claim

2 See *Mark Tushnet*, State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations, 3 Chi. J. Int'l L. 435 (2002).

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that they are acting within the bounds of closed legal reasoning and "honest discursive defensibility," claims *Tushnet*.

The advocacy of the political constitution that comes to the fore in *Martin Loughlin's* response to *Michelman* resonates significantly with *Tushnet's* position. The dismissal of the claim that normative argument regarding rights protections can rid the organisation of political communities of the political fact of authority or *Herrschaft* is the trademark of *Loughlin's* advocacy of a political constitutionalism that ultimately entrusts fundamental rights protections to historical governmental institutions and practices. *Loughlin* is duly aware that the authority of such historical governmental institutions and practices invariably relies on normative argument of the kind that political liberalism demands for judicial review, but these normative arguments remain for him instances of political practice. They do not transcend the political and can therefore also not be invoked for purposes of imposing "normative limits" on the political. The "legal constitution" is, for *Loughlin*, ultimately nothing more than an element of the political constitution and cannot, as a part of the whole, contain or constrain the whole. Considered from this perspective, *Michelman's* political liberal question whether a constitutional guarantee of a social minimum is a requirement of justice and a condition for the legitimacy of a political regime (*Michelman's* first two questions), becomes the question whether the social minimum guarantee is a condition for sustaining the authority of a political system. The questions of constitutional entrenchment and judicial enforcement of social minimum guarantees (*Michelman's* last two questions) then likewise become questions regarding the role that such entrenchment and enforcement play in the sustenance of political authority. As *Loughlin* puts it:

> *[C]onstraints on the range of a ruling body's powers serve to generate their authority. Rulers thus bind themselves to respect constitutional rules largely from self-interest, and under certain conditions this dynamic can lead ultimately to the evolution of a regime in which constitutional rules become self-enforcing.*

Loughlin's explication of the rise of "self-enforcing" systems of constitutional or limited government as a response to exigencies of authority would seem to return adamantly to a line of argument that *Niklas Luhmann* explored in ground-breaking fashion in his early work, *Grundrechte als Institution*, as I explain in more detail in my contribution to this volume. *Luhmann's* message was surely that, as *Loughlin* puts it, "processes of constitutionalization might owe as much, if not more, to prudential necessities than to the hegemony of liberal moral values." Considering that the normative and the authority-based understandings of constitutionalism may well be two different perspectives on the same complex phenomenon of constitutional government, concludes *Loughlin*, we may well be in need of a theory that would synthesize these two perspectives adequately.

In his contribution to this volume, *Dennis Davis* takes the weak form judicial review that *Michelman* interrogates to task for not allowing judiciaries to draw more robustly from the utopian aspirations that often obtain in constitutions of new democracies that emerge from immediate or recent pasts of systemic oppression. The demands of urgent social transformation in the wake of long years of oppression and discrimination require judiciaries of such emerging democracies to respond to the tension "between counter-majoritarian concerns and utopian constitutional aspirations," argues *Davis*. The weak form of judicial review that *Michelman* explores, he continues, would not allow for such

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a response. According to him, the exigencies of social transformation in these countries require judiciaries to sometimes infer a thicker social consensus from constitutional rights than the thin overlapping consensus on which the weak form judicial review considered by *Michelman* warrants. These words come from a courageous judge who on 17 December 1999 ordered Cape local and provincial authorities as well as the *Government of South Africa* to provide *Irene Grootboom* and fellow homeless squatters adequate shelter for their children, thus invoking the right of children to adequate shelter as a means of avoiding the cautious socio-economic jurisprudence of the *South African Constitutional Court* at the time (a cautious jurisprudence that was evidently duly constrained by political liberalism's standard worry, one might say in *Michelman's* terms). The *Constitutional Court* responded to *Judge Davis'* order (probably not very surprisingly to him) by dismissing it as inappropriate.[3] *Irene Grootboom* died in 2008. She was still living in a makeshift shack in an informal settlement on the Cape flats at the time of her death. She never received the adequate shelter the South African Constitution would seem to have promised her. But, slipping for a moment into a genre of discourse that is not that of law but that of poetry (and poetic justice), one might imagine her having had some last recollection of the one judge that deemed her unconditionally worthy of a home before she finally packed up and left the Cape; the one judge who would not have her worthiness conditioned by available resources of the state, the proper province of jurisprudence, or whatever else.

Thorsten Fuchshuber's response to *Michelman* questions the very basis of social cooperation on which *Michelman's* conception of political liberalism turns. His arguments in this regard turn on *Marx's* analysis of social production in capitalist societies as reified processes of imposed cooperation under the sway of which individuals do not experience themselves as subjects of the production process that voluntarily and freely cooperate to pursue common objectives. To the contrary, they experience themselves as co-opted units of production processes in which exigencies of survival compel them to cooperate, argues *Fuchshuber*, following *Marx*. Responding to the typical *Habermasian* critique of *Marx's* analysis of societal reification which basically imputes to this analysis an overestimation of instrumental and an underestimation of communicative reason in societal processes, *Fuchshuber* points our attention to the expansive exploitation of workers in informal (typically zero-hour contract) job markets that attests to the fact that cooperation under circumstances of rapacious capitalism is more often than not forced cooperation. The *Habermasian* critique of *Marx* would seem to turn a blind eye to these realities. Under these circumstances – circumstances which *Michelman* can also be understood to refer when he invokes "today's neoliberal climates" – observes *Fuchshuber*, a constitutional social minimum guarantee can even mutate into a cynical excuse for increasingly unscrupulous exploitative practices. Those who do not wish to take on zero-hour contracts, devoid as they invariably are of any formal social security benefits, can always fall back on the constitutionally guaranteed social minimum, would the cynical response go.

We showed above that *Michelman* himself is far from professing facile faith on justiciable constitutional social minimum guarantees when such "neo-liberal climates" prevail. It is worthwhile observing however, as I do in the last essay in this volume, that

3 See *Grootboom and Others v Oostenberg and Others* 2000 (3) BCLR 277 (C).

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Michelman would nevertheless be first among those who would take the constitutional battle – should it clear the hurdle of the standard worry – right into the private sphere, for what it may be worth. There is no conceptual impediment that would prevent one from arguing that private employers are also subject to constitutional constraints and that certain informal employment contracts may simply be considered unconstitutional.

Be it as it may, forced or unfree "social" cooperation is an undeniable fact of the rapacious capitalism that seems to have a field day in "today's neo-liberal climates," and this capitalism sometimes enjoys this field day with the stamp of approval of powerful judiciaries, as will be shown shortly. *Fuchshuber's* response to *Michelman* surely constitutes a reality check for overly optimistic expectations from constitutional SER guarantees. It is nevertheless doubtful whether *Michelman* himself is in need of this reality check. His questioning is, as we have seen, always more concerned with how things might work if they were to work. And a passage that he penned many years ago still conveys with sobering effect his realistic regard for the way they more often than not do not work the way we might hope them to do:

> *[W]e never let ourselves forget that any of society's goals respecting democracy, self-government, and a rule of law or of reason must be ones of approximation, of holding in check the misfortune of how things are, of choosing among necessarily compromised offerings, of necessarily damaged goods.*[4]

Brian Nail's contribution to this volume duly recognises this "holding in check the misfortune of how things are" at work in *Michelman's* work. Percipient literary scholar that he is, *Nail* points out the therapeutic idiom to which *Michelman* turns in 1969. There is no triumphant "war" rhetoric at work in *Michelman's* constitutional thought, only an insistence on the need to minimise the damage of imperfect arrangements. So *Nail*, in a key passage, notes that:

> *Michelman's shift away from the rhetoric of war and towards the language of medical treatment in his 1969 Harvard Foreword is worthy of attention. Michelman suggests that "In the end, no doubt, a victorious War on Poverty will have somehow attacked and conquered relative deprivation." However, from the outset, he questioned whether or not legal efforts to proscribe the institutional forms of discrimination that putatively produce and sustain social inequalities nevertheless fail to address the material deprivations that beset the victims of discrimination. Both rhetorically and philosophically, Michelman articulates a crucial shift in his early antipoverty project; he distances himself from the metaphorical language of war, and takes up the language of medical immunization. Responding to the potential criticism that by attending to severe deprivation as opposed to social inequality his approach may be "construed as an attack on symptoms rather than on the disease itself," Michelman asserts that "treatment of symptoms is not always a thing to disparage: to hide the signs of measles under a layer of cosmetics is unworthy; to treat the symptomatic suffocation of a pneumonia patient is not." Rather than pursuing an ideological battle against various forms of discrimination, he argues that "alleviating specific depri-*

4 *Frank Michelman*, Brennan and Democracy (2000) at 8.

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vations is a much more manageable task than closing the general inequality gap to acceptable dimensions.

Richard Mailey – Nail's PhD research companion for most of the two Postdoc years that Nail spent in Luxembourg – evidently has trouble finding the same solace in the merely therapeutic aspiration of *Michelman's* constitutional jurisprudence, or in the reach of this therapy. *Mailey's* contribution to this volume takes issue with *Michelman's* argument regarding the duty of abidance to a law that one might find morally reprehensible under circumstances where that law does not corrupt the whole legal system of which it is part. In a 2003 article, "Ida's Way," *Michelman* affirmed this duty, arguing that:

> *Every Ida… [i.e. every conscientious citizen] who attaches great moral importance to the general goods of union has strong, moral reasons to wish for a favorable judgment regarding the respect-worthiness of the system-in-place as she reconstructs it. All reasonable Idas, therefore, have reason to be tolerant of what they see as moral mishaps in the systematic history – specifically, by writing off those mishaps as mistakes.*[5]

Mailey interrogates the position *Michelman* takes here with reference to the intriguing story of the Canadian doctor *Henry Morgantaler* who blatantly violated anti-abortion laws in *Canada* on conscientious grounds. In the end, the *Canadian Supreme Court* vindicated *Morgentaler* by striking down as unconstitutional the laws that criminalised his actions, but this still leaves one with the problem that up until this vindication many years later by the highest court in *Canada*, *Morgentaler* was to be considered a criminal, and *Michelman's* position in "Ida's Way," instead of offering relief from this criminalisation, seems to endorse it. *Mailey* is aware of the fact that his engagement with *Morgentaler's* story takes him somewhat away from the general SER focus of the articles in this volume, but it is not difficult to see how the *Morgentaler* story might come to figure in the context of SER. With a little imagination, we can turn *Dennis Davis* into the *Morgentaler* of the Cape.

Suppose *Judge Davis* decided to rebel against the overturning of his *Grootboom* judgment by the *Constitutional Court*. Suppose he commenced to organise a sit-in strike in the High Court of the Cape that paralysed the regional justice system quite effectively before all the striking judges and court personnel were forcefully removed by the police as well as charged and convicted for whatever crimes the criminal justice system in *South Africa* may have considered appropriate. Whatever might have been *Justice Davis'* fate in the hands of the South African justice system had this story actually come to pass, Michelman's position in "Ida's Way" would surely not have been of any help to him. And *Mailey* would find this failure of *Rawlsian* or *Michelmanian* political liberalism to come to *Justice Davis'* avail deeply problematic. He does not offer a clear answer as to how this political liberalism might have come to *Davis'* or *Morgentaler's* avail, but he does suggest that this liberalism would lose its soul were it to just write them off as common criminals. Might a reminder of *Michelman's* due regard for democracy and the rule of law as nothing more than "holding in check the misfortune

5 *Frank Michelman*, Ida's Way: Constructing the Respect-Worthy Governmental System, 72 FORDHAM. L. REV. 345, 364 (2003).

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of how things are" and of choosing "among necessarily compromised offerings [and] necessarily damaged goods" serve somewhat to save liberalism's soul for *Mailey*? We cannot answer this question here and will leave it hanging in order to turn now to the much more worrying soullessness that would appear to have set foot in that part of the world that has come to call itself the *European Union*.

The last two essays in this volume turn to the fate of constitutional SER protection in European Law. In her essay, *Orsola Razzolini* develops a meticulous labour law perspective on SER protection in the EU and shows how the constitutionalisation of SER protections in EU law has not led to the stabilisation and promotion of these protections. It has, quite to the contrary, rendered them more precarious than they were when protected only by the national law and legislation of Member States of the EU. She takes into account a broad spectrum of EU case law, but it is especially the *Laval* and *Viking* judgments of the *Court of Justice of the European Union* (CJEU)[6] that inform her views in this regard. And this is her frank assessment of the Court's stance in these cases:

> *One explanation for the controversial approach taken by the Court lies in contradictory EU views of "social dumping". Although the Court of Justice did not deny that "fighting social dumping" is an overriding reason of public interest, its main focus was on the creation of a Single Market and, consequently, on the effectiveness of the economic freedoms provided by the Treaties, regardless of the manner in which those freedoms are exercised, including social dumping. In other words, social dumping has become, in reality, the most basic and most frequently used legitimate tool to achieve the Single Market, which deeply, and inevitably, undermines the substance and nature of collective rights.*

The views that I develop in the last essay of this volume resonate firmly with the assessment of the jurisprudence that the CJEU developed in the *Laval* and *Viking* series of cases that *Razzolini* offers here. I refer in this regard to the *Lochnerization* of European law that took place in *Laval* and *Viking*. And, it is against the background of this *Lochnerization* of EU law that my essay expresses serious doubt regarding the wisdom of allowing judiciaries to decide the fate of SER protections. It is for this reason that the last pages of my essay attach much importance to *Michelman's* cautionary note regarding the expectations one might have from the judicialisation of SER protections in today's "neoliberal climates." Much as anyone concerned with adequate guarantees of SER protections would and should respect and admire the opposing position that *Dennis Davis* develops in his response to *Michelman* in this volume, and much as I respect *Judge Davis'* courageous stand in *Grootboom,* I basically accept with resignation that it is not the task of judges to develop the utopian potential that constitutional rights may seem to promise, for the utopian potential that some judges may come to extract from constitutional rights may well hold nasty surprises for those concerned with SER protections. Utopian imaginations should be reserved for poets, I argue elsewhere.[7] The task of judiciaries, I would like to suggest – following the *Michelman* who wrote

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6 EU: Case C-341/05 [2007] (*Laval*); EU: Case C-438/05 [2007] (*Viking*).

7 See *Johan Van der Walt*, Law, Utopia, Event – A Constellation of Two Trajectories, in: LAW AND THE UTOPIAN IMAGINATION, Sarat et al (eds) 60 -100 (2014).

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Brennan and Democracy – is indeed merely a matter of "holding in check the misfortune of how things are."

This resignation is not likely to win the approval of *Mailey* and *Fuchshuber*. Some comprehension may come its way from the side of *Nail*. There may well also be considerable resonance between the positions of *Grimm*, *Tushnet*, *Loughlin* and *Razzolini* on this count, limits of which of course stand to be determined more carefully still. And where does *Michelman* stand today? Can we pin him to the stoic resignation that he voiced in *Brennan and Democracy*? This is, as always, difficult to say. He is most likely yet again arrested in thought by some irresolvable question that has yet to dawn on the other Athenians.

Johan van der Walt

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