POVERTY IN LIBERALISM: A COMMENT ON THE CONSTITUTIONAL ESSENTIALS

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While some principle of opportunity is a constitutional essential—for example, a principle requiring an open society, one with careers open to talents (to use the eighteenth-century phrase)—and while a social minimum providing for the basic needs of citizens is also a constitutional essential, fair equality of opportunity requires more than that, and is not counted a constitutional essential.¹

I. INTRODUCTION: ANTIPOVERTY LIBERALISM?

What follows is not about rereading or rewriting the constitutional law of the United States.² It is an intervention perhaps seemingly quite far

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² I ventured an antipoverty reading some years ago. See Frank I. Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, Welfare Rights in a Constitutional
afield from that; a response from an antipoverty liberal (so to style myself) to an arguably worrisome bit of text from a book of political philosophy by John Rawls.5

That text appears at the outset of this Article. Arguably worrisome, I called it. But worrisome how, to whom, and in what context? That text, after all, is just a snippet out of someone’s political philosophy. Political philosophy, you say, is one thing, and American constitutional law is another thing, and we are here to discuss American constitutional law. “The gap between American law and liberal justice is too large to be obscured by judicial demigods,” writes Bruce Ackerman, referring to Ronald Dworkin’s mythical philosopher-judge, Hercules, J.4 But in fact not even the demigod’s authorial conjurer, Ronald Dworkin, will go so far as to read into American constitutional law the redistributive requirements he defends in his capacity of liberal political philosopher.5 It seems, then, that working on the law must be our first concern as antipoverty-liberal-legal savants, without getting mixed up in philosophical fine points.

But matters may not be so simple. John Rawls presents a certain philosophical reconstruction of a general political outlook called “liberalism.”6 Understand that here I do not use liberal in the everyday journalistic, “blue state,” “red state” sense in which, say, Peter Edelman is “liberal”7 and Ilya Shapiro is not.8 I mean “liberalism” as that term is used

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6. See RAWLS, LIBERALISM, supra note 1.

7. See Edelman, supra note 2.

to name a much wider political doctrine or outlook that I take to fit our country’s politics as a whole. Liberalism in the sense I mean always carries certain modifiers whether spoken or unspoken: “individualist liberalism,” “rights-based liberalism.” And we can add to that a further connection, spoken or unspoken, to constitutionalism.

These days, around the globe, we hear questions raised about whether a political culture’s attachment to liberal rights-based constitutionalism makes that culture fatally resistant to getting done politically what really would have to get done, in order to practically do away with the blights on justice and human decency we blue-staters have in mind when we speak of poverty.9 It is as if the liberalism stuff is in the drinking water—so it makes me resistant, it makes Professor Edelman resistant, it makes all of us who drink the water resistant. My commentary on Rawls comes as a small part of a broader reflection about talk of that kind.10

Such thoughts may circulate more widely in other parts of the world than they currently do in the United States.11 Still, they may not be entirely absent from the minds of some Americans reading this right now. Associations of liberalism with “possessive individualism”12 have surely not passed completely out of style here. And of course there can be no doubt about liberalism’s deep devotion to respect for individuality and for the concerns and dignities of persons taken severally as individuals—not, I

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9. See, e.g., Sanele Sibanda, Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty, 22 Stellenbosch L. Rev. 482, 483, 486 (2011) (interrogating critically “the relationship between constitutionalism and poverty eradication,” and suggesting that South African constitutionalism’s “ostensible weddedness” to liberalism may “make it ill-suited for achieving the social, economic and political vision it proclaims”).

10. See also Frank I. Michelman, Liberal Constitutionalism, Property Rights, and the Assault on Poverty, 22 Stellenbosch L. Rev. 706, 716–18, 723 (2011) (affirming a deep antipoverty commitment in “social” liberalism, but accepting that distributive justice may “not always be achievable by means meeting the demands of an up-and-running liberal constitutional order”).

11. See, e.g., Sibanda supra note 9.

must emphasize, necessarily taken as selves produced or maintained independently or apart from society, but taken as each one a “source of claims and projects,” each having an own life to live for the better or for the worse. Of course, those individuality bells go off in John Rawls’s widely heralded body of liberal political philosophy.

Does my leading Rawlsian text sound a peal of that bell? If so, how closely does it chime with allegations of a deep-seated resistance within liberalism to an all-out societal commitment to the conquest of poverty? Those questions will be my focus in this Article. I see them as questions of real concern to lawyers living in liberalism and drinking its water. “Antipoverty” we may be, but if or insofar as we are also members of the liberal party—bound in mind and spirit to liberalism’s normative individualist inspirations—we may want to know whether it is true, as some claim, that our liberalism gets in the way of our antipoverty engagement.

Rawls seems to me to pose a testing case. His works would seemingly be the last place in which to go hunting for evidence of an ineluctable resistance in liberalism to the practical subjugation of poverty. In our time, John Rawls’s philosophical excavations of liberalism are the ones that you might well regard as the most dedicatedly antipoverty of all. Rawls famously lays down all of the following as strict requirements of justice for any developed political society: not only equality of economic and other opportunity in a formal-legal sense, but a materially robust (he calls it “fair” by way of distinction from “formal”) equality of opportunity; a guaranteed fulfillment of everyone’s basic material needs; and furthermore that any remaining inequalities of wealth and income be limited to those found required to make the economic condition of the most economically deprived social group as favorable as it possibly can be

17. See RAWLS, LIBERALISM, supra note 1, at 6; RAWLS, RESTATEMENT, supra note 1, at 43–44.
18. See RAWLS, LIBERALISM, supra note 1, at 7; RAWLS, RESTATEMENT, supra note 1, at 47–48, 162.
made while respecting the equal basic liberties of everyone. Yet even Rawls stops a bit short, or so it may seem. Not all of those requirements of justice are included within Rawls's list of the commitments—the “constitutional essentials”—that the regime must faithfully and observably keep if it means to place all citizens under an obligation to work within the system, as a “loyal opposition,” in the pursuit of the rest of justice. One requirement of justice that is decidedly not included by Rawls in the constitutional essentials is “fair” (material) equality of opportunity. Does that omission flow from a prior commitment to liberal individual rights? Does it thus signal liberalism’s incapacity to grasp and respond fully to the injustice of avoidable structural poverty?

In order to pose those questions clearly, I have to do some background work. In Part II of this Article, I develop the Rawlsian liberal case for treating some kind of antipoverty commitment (for Rawls, the “social minimum”) as a liberal constitutional essential. In Part III, I develop the Rawlsian grounds for rejecting a more robust antipoverty commitment (“fair equality of opportunity”) as a constitutional essential.

To see why that rejection might be worrisome from an antipoverty standpoint, consider a notable argument from Tommie Shelby. Shelby maintains (it seems to me unanswerably) that citizens are not morally bound by any principle of civic mutuality or reciprocity to a regime that casually accepts or permits their continuing subjection to intolerably unjust treatment. Shelby further maintains that a political regime’s blatant failure to deliver on a commitment to the vigorous pursuit of fair equality of opportunity for everyone may render that regime more than barely or marginally unjust—may in fact render it “intolerabl[y]” unjust—to some fraction of its citizens. That failure, Shelby argues, cannot be cured by the

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19. See RAWLS, LIBERALISM, supra note 1, at 6–7; RAWLS, RESTATEMENT, supra note 1, at 42–44.
20. See RAWLS, LIBERALISM, supra note 1, at 227–31; RAWLS, RESTATEMENT, supra note 1, at 49.
21. See RAWLS, LIBERALISM, supra note 1, at 228.
23. See id. at 145.
24. Id. at 145–47.
regime’s faithful observance of a more narrowly constricted set of constitutional essentials, not even one that includes a tightly drawn economic safety net.\(^{25}\) From those premises follows the inevitable conclusion: The regime that fails to deliver on fair equality of opportunity may thereby forfeit its moral claim to the loyalties of all who live their lives within its domain, and thus its claim to be in that sense a legitimate regime.

So argues Shelby, with great power. Suppose he is right. What follows for our question about a deep-seated resistance within liberalism—up to and including Rawls—to an all-out commitment to the conquest of poverty? I take up that question in Parts IV and V of this Article, and I conclude as follows: first and most important, Rawls’s reasons for excluding fair equality of opportunity from the constitutional essentials contain nothing to detract from his insistence that fair equality of opportunity is an indispensable entailment of liberal justice; and second, the question of the constitutionalization of fair equality of opportunity remains pragmatically debatable within liberalism, and is in no way foreclosed by Rawls as a matter of deep liberal principle.

II. A STATE OBLIGATION TO COUNTERACT POVERTY: TWO KINDS OF REASONS

If you think that some kind of antipoverty commitment belongs in the constitutional law of your country or any country, you almost certainly must also think that antipoverty policy and performance are proper obligations of a morally supportable and morally decent state—or at least of a state in certain favorable conditions of economic and political development. For what sorts of reasons might you think this?

A. Humanity-Based Reasons

You might be convinced that each one of us (who can afford to do so) stands under strict moral obligation to do something to alleviate the grave material distress of others in our neighborhood, or perhaps of others wherever in the world we find them in distress. The ground of this moral obligation, you might think, is simply shared humanity, along with facts of suffering and need that we cannot help but notice. How you measure “need” might depend on further details about how you conceive the human condition and the human good. Followers of the “capabilities approach” proposed by Martha Nussbaum might not fully agree with followers of the social contract tradition on how to define the kinds and levels of

\(^{25}\) Id. at 148–51.
deprivation that would ignite any “natural” duties we might have to come to the aid of others in need. All I assume for the moment is that you believe we do have such duties. You believe you stand under moral obligation to contribute toward the relief of others in need, just because others do in fact stand in need, and you are able to help them.

But then you might run into difficulties. You might further think (individualist-liberal that you are) that there must be some equitable limit to your duty or duty-share, which must connect in some way to facts about what others nearby could do to help out, but maybe are not doing. In that case, you might feel that the purely humanitarian obligation, unaided by politics, cannot suffice to tell you what to do. As Ronald Dworkin writes:

We may try to live with only the resources we think we would have in a fair society, doing the best we can, with the surplus, to repair injustice through private charity. But since a just distribution [can only be established] through just institutions, we are unable to judge what share of our wealth is fair.

But then you perceive further that one cannot immediately pass on from there to negative conclusions about individual moral duties to assist in providing others with what they need. There does, after all—as pointed out by Charles Fried and Liam Murphy, among others—happen to exist among us an agent capable of imposing a distribution among citizens of the burdens of aid, and capable also, let us assume, of conducting a fair political deliberation on the scope of needs and the contours of an equitable distribution. That agent is the state. To those who begin with a conviction of the moral obligation resting on each person to contribute equitably toward the relief of others, by reason of common humanity, it will come naturally to claim that the state is morally bound to exercise those capabilities, or (if that is too metaphysically statist a view) that citizens are morally bound to press the state to do so and to pay unressistingly the taxes required for fulfillment of the obligation.

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26. See Nussbaum, supra note 14, at 81–95 (comparing an outcome-based approach with more procedurally focused social contract theories).
28. See, e.g., Charles Fried, Right and Wrong 118–31 (1978) (arguing for humanity’s moral obligation to assist others, while recognizing the need for supportive institutional structures); Liam B. Murphy, Moral Demands in Nonideal Theory (2000) (noting that many feeling an obligation to help others rely on the government for assistance in meeting such obligations).
29. See Fried, supra note 28; Murphy, supra note 28.
Of course, it is still also true that each person, acting alone or in voluntary collaboration with others, can try in good faith to define and fulfill an individual equitable share of obligation to provide for the needy, regardless of what others in a position to help may or may not do. But frustration may await whoever will make the attempt, and so we may find ourselves strongly drawn to the idea that our efforts along those lines are most effectively and satisfyingly directed at getting the state to tax us in order to pay for what some in our midst desperately need but cannot afford.

But, then further trouble lies just ahead, if you are a liberal. You know that far from everyone who stands to be taxed will agree with your humanitarian starting point. In fact, you know of quite a few fellow citizens who hold an opposite conviction: that they stand under no obligation to help out others whose needs arise from no active fault of theirs, and furthermore that for the state to tax away their wealth to fund the provision of goods and services to such others would be a rank injustice to them. And what will you say, then, to those whom you cannot talk out of that view, as you agitate and vote to impose the tax on them?

B. “Political” Reasons

Liberalism typically starts from an idea of the free and equal moral agency of persons. It follows that, in the eyes of a liberal, every legal order—every rule of law regime—presents a question of moral justification. Persons living within a political and legal order inevitably find themselves sincerely and reasonably divided over not just the wisdom or prudence of various laws but even over their compatibility with justice. A

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31. See supra note 27 and accompanying text.
32. This is not to take a position on whether or how far the conduct of the activities thus funded should be centralized, bureaucratized, or kept in the hands of state functionaries.
33. See, e.g., Leslie Carbone, Slaying Leviathan: The Moral Case for Tax Reform 5-6, 75-77 (2009) (contending that a policy of redistribution by taxation of lawfully obtained wealth is unnatural and unjust).
34. See Rawls, Restatement, supra note 1, at 18–19 (connecting a fundamental idea of persons as each endowed with “moral powers . . . to have, to revise, and rationally to pursuing a conception of the good” and to “understand . . . and to act from . . . principles of political justice” to a fundamental idea of society as a fair scheme of social cooperation).
35. See, e.g., Rawls, Restatement, supra note 1, at 2 (noting deep and persisting division, within the tradition of democratic thought, about how to resolve
clear example is the division we have just noticed over the question of deriving an antipoverty obligation of the state from a supposed pre-political, or “natural,” duty resting on each citizen to come to the aid of others in economic distress.36

Now suppose the legal order and its stability—both very great goods in the eyes of a liberal37—depend at every moment on a general expectation of regular compliance with the order’s duly issued laws by everyone within range, regardless of inevitable, sincerely held, reasonable disagreements about both social policy and political morality or justice.38 But, then liberals must ask how such a demand can be justified morally, consistent with a liberal view of citizens as free and equal moral agents? How can those of us convinced of the moral probity and necessity of a state-conducted war on poverty hope to justify our subjection of those who disagree to coercive funding of what they deeply and sincerely regard as an unjust war?

Rawls responds that political coercion of that kind can be morally justified, even in the presence of sincere disagreement about justice, but only on the condition that the country’s constitution effectively guarantees the observance of certain equal basic rights and liberties of citizens.39 If, and only if, the constitution is of the right kind—if it is democratic and guarantees due respect for certain basic rights and interests of persons—then, in the view of Rawls, that kind of rightness in the constitution can make it reasonable to call on everyone for compliance with the laws, rulings, and decrees that issue in accordance with the procedures, requirements, and limitations laid down by that constitution.40 Constitutional rightness can thus render the prevailing legal order and all of its works legitimate, in one widely accepted use of that term.41

36. See supra Part II.A.
38. See RAWLS, JUSTICE, supra note 16, at 211 (footnote omitted); Michelman, supra note 37, at 345–47.
39. See RAWLS, LIBERALISM, supra note 1, at 137.
40. See id. at 137, 227–30.
41. See id. at 136–37 (proposing “the liberal principle of legitimacy”); id. at 227–28 (specifying the “essential” components of a legitimation-worthy constitution). We should note that allowance is made for instances of civil disobedience and conscientious refusal. See RAWLS, JUSTICE, supra note 16, at 319–43. See generally
A constitution that measures up to this standard is what we may call a “legitimation-worthy” constitution. But of course a constitution that you happen to find in force cannot be deemed legitimation-worthy just because it is in force. According to Rawls a legitimation-worthy constitution must include guarantees respecting certain basic individual rights such as freedoms of conscience, expression, association, and fair access to the forums of democratic debate and political decision making. The components of this package of guarantees—required of any constitution in order that it should be legitimation-worthy—are what Rawls calls the liberal “constitutional essentials.” So then here is a question of possible interest to us taking part in this symposium on “Constitutionalism and the Poor”: Do the liberal constitutional essentials include any kind of guarantee respecting everyone’s access to material goods? Is any sort of constitutional guarantee of that kind required for liberal constitutional legitimacy?

Rawls answers yes. As one of the liberal constitutional essentials, Rawls includes a guaranteed “social minimum” covering the “basic needs of all citizens.” His thought appears to be that we cannot fairly and reasonably call on everyone to submit their fates to the mercies of a democratic-majoritarian lawmaking system without also committing our society, from the start, to run itself in ways designed to ensure to every person the chance of being or becoming a competent contributor to political exchange and contestation and furthermore to social and economic life at large. Accordingly, among the essentials of any liberally legitimation-worthy constitution must be a guarantee of access to material goods and services up to the levels (the social minimum) required for a person’s ability “to understand and to be able fruitfully to exercise [her] rights and liberties” and to “take part in political and social life.” Thus arises what I call the “political” case for a constitutionalized antipoverty commitment.

That is all fine and dandy, you might say, but how does it help us liberals out of the bind of expected moral disagreement over the question of the antipoverty obligations of the state? We must expect that citizens of


42. [*See* RAWLS, LIBERALISM, *supra* note 1, at 137, 227–30.]
43. [*See* id.]
44. [*RAWLS, LIBERALISM, *supra* note 1, at 228–29; see RAWLS, RESTATEMENT, *supra* note 1, at 47–48.]
45. [*Id.* at 7, 166.]
a sufficiently strong libertarian or neoliberal persuasion will no less avidly and sincerely reject the political case for state antipoverty obligation than they will the simple humanitarian case with which we started. So what have we gained?

The answer, if there is one, must lie in a gain in the strength of our own conviction, to the point where we would be prepared to call unreasoned or unreasonable an opposition to it. If all we have to offer is the proposition that every relatively well-off person’s pre-political, or “natural” duty to help out others in distress, just because those others are a part of the human family and in distress, then there is nothing further we can say to those who beg to differ, beyond simply repeating in a raised voice our own conviction of an extended-family obligation. On the level of political obligation, by contrast, we may feel that we can carry the force of argumentative reason a good deal further. We speak as follows to our fellow citizens:

You agree, don’t you, on the equal claim of everyone to consideration as a free moral agent with an own life to live? You agree that a reasonably just and stable legal order can be a very great good for everyone involved? You agree on the likely dependence of that good on a warranted expectation of the normal compliance by everyone with the laws duly issuing from that order? You agree, then, that the order’s basic terms and commitments ought to be such as to make it reasonable for each citizen to demand the normal compliance of others with those laws in spite of inevitable disagreements about the wisdom and even the justice of some of those laws?

And do you think it is reasonable, then, to demand loyalty to a system from those whom the system callously and by design permits to fall into traps of closed or grossly constricted real opportunity to take a competent and rewarding part in the exchanges of political and social life? And is that not what a liberal market-based order always risks doing—to a practical certainty borne out by experience—when unattended by a constitutive commitment to the prevention and correction of such eventualities? At least where prevention and correction could be provided at no more than a moderate cost to anyone else’s enjoyment of the system’s goods?

That line of questions might gain some adherents from among those who doubt or reject the starting premise of the strictly humanitarian case for state antipoverty obligation—the premise rooted in our supposed natural duty, outside of politics, to aid others in distress whether or not
directly as a result of any fault of ours. Many of the doubters might still feel the force of an argument that does not depend on any natural duty to aid but rather on a proposition about what we reasonably owe to others upon whom we see fit to place demands—in this instance, demands for normal compliance with the dictates of a legal order from which we expect most people to draw very great lifetime goods but which will inevitably leave some people trapped in poverty if systemic commitments and safeguards against such outcomes are lacking.

Of course not every listener will be convinced, or perhaps even moved, by our argument of political morality. Those drawn toward anarchist views will take off at the second question in the series. Those of strong libertarian persuasion might stay with us through the first four questions in the series but part company at the latter three. Still, we can hope that our political case for the state’s antipoverty obligation will draw considerable numbers of adherents from among those who do not cotton to the humanitarian argument standing alone. Such would seem to be the expectation of Rawls and other liberals who join with this form of argument.

Adherents, yes; but adherents to what? Some who embrace the humanitarian case might hesitate to embrace the political case because they are afraid the political case may end by demanding too little of the state compared to what the humanitarian case demands. The levels of provision required by justice conceived politically, or as some say, “contractually,” as fair terms of social cooperation,46 might fall short of what would be required by justice conceived “naturally” in terms of obligation to see that everyone can live a fully human life as defined (say) by Martha Nussbaum’s list of “central human capabilities.”47

Now Rawls, a model liberal, does, as we have seen, conceive of justice as fair terms of social cooperation.48 He also thinks that justice, so conceived, demands a good deal more than the minimum safety net we might claim is provided in the United States—namely, it demands fair equality of opportunity.49 Fair equality of opportunity would seemingly

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46. See RAWLS, LIBERALISM, supra note 1, at 139 (discussing the basic framework of society as defined through social and political cooperation); Michelman, supra note 37, at 364 (finding in Rawls’s principle of legitimacy “an indissoluble kernel of . . . contractualism”).
47. See NUSSBAUM, supra note 14, at 76–78.
48. See RAWLS, LIBERALISM, supra note 1, at 139.
49. See RAWLS, RESTATEMENT, supra note 1, at 41–42.
mean whatever set of policies is found to be required to compensate for the structural barriers and handicaps posed by poverty in the full social sense: family socioeconomic status, ghetto conditions and cultures, social impediments to movement and mobility including educational neglect, prejudice, disparagement, discouragement, and barriers to entry and mobility. Depending on how we assess the relevant social and economic facts, fair equality of opportunity—a component of justice conceived as fair terms of social cooperation—may encompass antidiscrimination policies, jobs policies, family policies, and educational adequacy going beyond the most basic level. And of course it would mean those policies not only declared in legislation, but effectively and thoroughly implemented—subject, however, to a condition of nonencroachment on everyone’s “indefeasible claim to a fully adequate scheme of basic equal liberties, which . . . is compatible with the same scheme of liberties for all.”

We had better pause for a moment right there. Rawls famously gives the scheme of basic liberties a categorical priority over most of the economic-distributive aspects of justice. The priority of liberty means there are to be no tradeoffs of the scheme of basic liberties against the pursuit of fair equality of opportunity. Of course the basic liberties comprising the prioritized scheme are mainly defensive, negative, individual liberties. And right there, you might say, is the point where the liberalism—the liberal individualism—in Rawls’s conception sounds its inevitable note and steps into the way of a full-blown antipoverty commitment.

I doubt it, for the following reasons. First, the basic liberties of the first principle are not all merely negative or defensive. They include a positive guarantee of “the fair value of the political liberties,” and measures reasonably required for the assurance of that fair value to all cannot normally be deemed infringements on the other liberties comprising the prioritized “scheme” of basic liberties. Second, neither can state regulation of liberty or property reasonably aimed at assuring “an open society . . . with careers open to talents,” including everyone’s “freedom of

50. See id.
51. Id. at 42.
52. See id. at 43.
53. See id. at 46–47; RAWLS, LIBERALISM, supra note 1, at 294–99.
54. See RAWLS, LIBERALISM, supra note 1, at 159; id. at 227 (listing prioritized basic liberties).
55. See RAWLS, RESTATEMENT, supra note 1, at 46, 149–50.
movement and free choice of occupation.” 56 Third, it is true, as Rawls writes, that full-scale fair equality of opportunity “goes beyond that,” 57 but what is demanded beyond that can seemingly be supplied by exercise of the state’s power of taxation; it is clear that Rawls cannot and does not regard taxation as an encroachment on the negative liberties of the first principle. 58 In sum, although I cannot now pursue the question to its possible limits, it is hard to think of a case in which the state would be blocked from the vigorous pursuit of fair equality of opportunity by Rawls’s principle of prioritization of the basic liberties over the pursuit of economic justice. Some possible means to the latter end might be blocked, but perfectly good alternatives would remain.

III. A FLY IN THE OINTMENT? THE REDUCTION OF JUSTICE BY LEGITIMACY

Here we have what surely must count as one of the leading conceptions for our times of an individualist-liberal political philosophy. We see that, in the terms of this conception, there is nothing un-liberal about an antipoverty commitment on the constitutional level. Sharply to the contrary, the Rawlsian conception takes such a commitment to be required by liberalism’s deepest impulses toward individual dignity and worth. This all seems contradictory to concerns about some supposed deep hostility of liberalism to antipoverty. Where, then, is the problem?

The problem may be a little hard to detect in Rawls. It arises—if at all—in a gap that Rawls posits between two standards of critical appraisal for a political order: justice and legitimacy. Justice describes a set of conditions of a political society towards which each of us as citizens ought rightly to be striving. Legitimacy is something else. Legitimacy sets a minimum standard for a constitution’s adequacy to command morally the compliance of citizens with the laws and policies that issue from it, regardless of whether some of those laws and policies do or do not—in your best judgment or in mine—really measure up to the standard of justice. Legitimacy thus sets a less demanding standard than justice.

56. Rawls, Liberalism, supra note 1, at 228; Rawls, Restatement, supra note 1, at 47; see also Rawls, Liberalism, supra note 1, at 294–96.
57. Rawls, Liberalism, supra note 1, at 228.
58. See Rawls, Restatement, supra note 1, at 160–61 (discussing “some of the kinds of taxation by which economic and social background justice might be preserved over time” (citation omitted)); see also Liam Murphy & Thomas Nagle, The Myth of Ownership: Taxes and Justice 54–59 (2002) (discussing Rawls’s distributive concept of taxation and social justice).
Legitimacy treats injustice as tolerable up to a point; it issues a call for tolerance, even from those who most directly bear the burdens and the stings of ongoing injustice.\textsuperscript{59}

But why introduce such a gap between justice and legitimacy? It seems we must do so to allow for human imperfection and for honest political disagreement. In any possible human practice, shortfalls from justice are inevitable and so are disagreements about what counts as a shortfall, so if justice were to set the standard for legitimacy, no real-life legal order could be legitimate—that is, could exert a reasonable claim for faithful, general compliance with its laws—in the eyes of any, let alone most, of its citizens.\textsuperscript{60} A legitimacy standard must accordingly be more accommodating of real-world political imperfection and disagreement than any corresponding ideal standard of justice conceivably could be.

Take the example that troubles Professor Shelby.\textsuperscript{61} In Shelby’s view, Rawls is dead right to maintain that justice requires society’s dedicated pursuit of conditions of materially fair equality of opportunity for all.\textsuperscript{62} Rawls further perceives (and this, too, seems right to me) that citizens who share this conviction, but who also labor under certain “burdens of judgment,”\textsuperscript{63} are bound at times to find themselves in reasonable, sincere disagreement over whether that requirement of justice is satisfied or is even adequately motivating the country’s politics.\textsuperscript{64}

\textsuperscript{59} Rawls wrote that “an injustice is tolerable only when it is necessary to avoid an even greater injustice.” \textsc{Rawls, Justice, supra note 16}, at 4. A bit more expansively, he wrote that unjust institutions can sometimes be tolerable because “a certain degree of injustice . . . cannot be avoided, [or] social necessity requires it, [otherwise] there would be greater injustice.” \textsc{John Rawls, Legal Obligation and the Duty of Fair Play, in Collected Papers} 117, 125 (Samuel Freeman ed., 1999) [hereinafter \textsc{Rawls, Legal Obligation}].

\textsuperscript{60} See \textsc{Rawls, Restatement, supra note 1}, at 40–41 (explaining in comparable terms the need for a “political” conception of justice).

\textsuperscript{61} See \textit{supra} notes 22–25 and accompanying text.

\textsuperscript{62} See Shelby, supra note 22, at 129–30 (reporting and endorsing Rawls’s view, as paraphrased by Shelby, that “the social arrangement we participate in should be organized to give each of us a fair chance to flourish,” so that “no citizen’s life prospects are diminished because the social scheme disadvantages him or her in ways that cannot be justified on impartial grounds”).

\textsuperscript{63} These burdens include the variant total life experiences of citizens in their assorted “offices and positions, . . . divisions of labor, . . . social groups and . . . ethnic variety,” which cause “judgments to diverge to some degree on many if not most cases of any significant complexity.” \textsc{Rawls, Restatement, supra note 1}, at 35–36.

\textsuperscript{64} See \textsc{Rawls, Liberalism, supra note 1}, at 228–30.
Now, the requirement of the dedicated pursuit of materially full and fair equality of opportunity for all is a part of Rawls's liberal standard of justice.\textsuperscript{65} On the level of legitimacy, by contrast, full and fair equality of opportunity is (quite explicitly) \textit{not} required;\textsuperscript{66} rather, what is required is the guarantee to everyone of what Rawls calls a “social minimum.”\textsuperscript{67} What is the difference? The social minimum is comparable to what we have learned to call the “safety net” in a capitalist-welfare state.\textsuperscript{68} Fair equality of opportunity, by comparison, is that full set of policies we reviewed in Part II, required to compensate for structural barriers and handicaps posed by poverty in the social sense.\textsuperscript{69} And it decidedly should \textit{not}, in Rawls’s presentation, be deemed a constitutional essential for a legitimation-worthy constitution.\textsuperscript{70}

Why should it not? Rawls’s answer combines what at first may appear to be two distinct reasons, cast in terms of relative urgency and relative transparency of judgment regarding satisfaction. It is more \textit{urgent}, Rawls proposes, to settle constitutionally the framework of “just political procedures”—in which he includes guaranteed personal and political liberties—than it is to settle matters of economic justice, fairness, and distribution.\textsuperscript{71} And that is all the more so, he adds, given the relative non-transparency of judgment regarding satisfaction of that latter part of justice.\textsuperscript{72} A standard of legitimacy—the test of the legal order’s deservingness of general respect and compliance—should be easy to apply with confidence.\textsuperscript{73}

\begin{itemize}
\item \textsuperscript{65} Id. at 139.
\item \textsuperscript{66} Id. at 228.
\item \textsuperscript{67} Id. at 228–29.
\item \textsuperscript{68} In a capitalist-welfare state, writes Rawls, “a decent social minimum covering the basic needs” is provided, but a “principle of reciprocity to regulate economic and social inequalities is not recognized.” Rawls, Restatement, \textit{supra} note 1, at 138. In welfare-state capitalism, “the aim is that none should fall [by accident or misfortune] below a decent minimum standard of life.” Id. at 139.
\item \textsuperscript{69} Under fair equality of opportunity, “the aim is to realize in the basic institutions the idea of society as a fair system of cooperation between citizens regarded as free and equal,” so that there should be no “underclass,” but rather all should be enabled to be “fully cooperating members of society on a footing of equality.” Rawls, Restatement, \textit{supra} note 1, at 140; see also \textit{supra} Part II.
\item \textsuperscript{70} Rawls, Liberalism, \textit{supra} note 1, at 228.
\item \textsuperscript{71} Rawls, Liberalism, \textit{supra} note 1, at 229–30; accord, Rawls, Restatement, \textit{supra} note 1, at 48–49 (“just constitutional regime”).
\item \textsuperscript{72} See Rawls, Liberalism, \textit{supra} note 1, at 230.
\item \textsuperscript{73} See \textit{id.}; Rawls, Restatement, \textit{supra} note 1, at 48–49.
\end{itemize}
That criterion is met, Rawls finds, by basic liberal rights of conscience, expression and so on.\textsuperscript{74} We can all, he says, easily tell and agree when the core contents of freedoms of conscience or expression are not really being respected by the powers that be, or when a minimum social safety net is not being provided.\textsuperscript{75} But, the requirements of fair equality of opportunity are much more complex, manifold, and debatable—to the point, Rawls suggests, where that just cannot work as a standard that the regime must observably meet, as a minimum-floor condition on the reasonableness of its demand for our patience and tolerance regarding apparent shortfalls from justice.\textsuperscript{76}

These two considerations, relative urgency and relative transparency, work most convincingly when woven together, with transparency helping to explain urgency. Citizens who know their basic liberties are guaranteed as a part of a democratic political system—along with assurance of access to that system on fair terms, and along with a social safety net—know enough, Rawls suggests, so that they can reasonably be asked to take their chances on working within that political framework to achieve the effective pursuit of the more complex, demanding, and debatable remainder of justice consisting (largely) of fair equality of opportunity.\textsuperscript{77}

\section*{IV. SUBSTANCE AND PROCEDURE}

That wraps up the Rawlsian rationale for omitting fair equality of opportunity from the constitutional essentials. Professor Shelby calls the argument “plausible,” which it surely is.\textsuperscript{78} Plausible, though, to whom? To what extent is the argument’s plausibility \textit{to us} an accompaniment of our liberalism? And to what extent, then, does that plausibility-to-us signal a limit on the dedication of any possible liberalism to the abolition of poverty? By forbearing to question the legitimacy of a regime we find to be seriously delinquent in the pursuit of fair equality of opportunity, do we renge on our avowals of the regime’s \textit{injustice} in that respect, or at any rate set up excuses for injustice, rooted in our liberalism? Might this be an instance of injustice accepted in order to avoid a “greater injustice,”\textsuperscript{79} with

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\item \textsuperscript{74.} See \textit{id.} at 228.
\item \textsuperscript{75.} See \textit{id.} at 228–229 (“Whether the constitutional essentials covering the basic freedoms are satisfied is more or less visible on the face of the constitutional arrangements . . . .”).
\item \textsuperscript{76.} See \textit{id.}
\item \textsuperscript{77.} See \textit{id.} at 229–30.
\item \textsuperscript{78.} See \textit{Shelby, supra} note 22, at 145.
\item \textsuperscript{79.} \textit{RAWLS, Legal Obligation, supra} note 59.
\end{itemize}
\end{footnotesize}
competing injustice consisting, perhaps, of constriction of enjoyment by the prosperous of the fruits of their exercises of liberal market freedoms? Is that what Rawls means by his demotion of the relative “urgency” of fair equality of opportunity, as compared with the basic liberties?

Again, I do not think so. It is not the case that Rawls attaches a stronger political-moral value or a weightier political-moral obligation to defense of the basic liberties than to fulfillment of fair equality of opportunity. I suggested at the end of Part II that the Rawlsian stipulation of the priority of liberty—the priority of respect for the basic liberties over the pursuit of fair equality of opportunity—is a liberal constraint on the selection of the means to be employed in the latter pursuit but does not downgrade or weaken commitment to it as an end of liberal justice.80 Here the question is subtly different. It is not about a rule to regulate compromise of one set of political ends as a means to achieve another set. Rather, it is about the comparative suitability of the sets to serve as a measure of the legitimacy of a political regime. In contexts of the latter sort, we are well used to hearing it suggested that matters of procedure take precedence over matters of substance. Without tying ourselves to naive claims about a clean separation of substance from procedure,81 it seems we can sometimes reasonably hope that parties caught in profound disagreement about certain matters of great importance to them—those being what we call the “substance” of their debate—can nevertheless agree on an institutional framework—call it a “procedure”—to be used in deciding how to deal with those matters. Innumerable widely respected works of political and constitutional theory are built on exactly that premise.82 If we said, in that context, that getting the framework settled is “more urgent” than getting the substance settled, we would not be saying that the framework questions are the weightier to the parties or to the cosmos in any final sense. Nor should we thus read Rawls when he says it is more urgent to settle the framework issues at the outset in the Constitution.

80. See supra notes 55–58 and accompanying text.
81. See, e.g., Joshua Cohen, Pluralism and Proceduralism, 69 CHI.-KENT L. REV. 589 (1994) (showing the futility of such claims).
82. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 181–83 (1980) (defending judicial review to deal with “questions of [democratic] participation” but not with “the substantive merits of the political choice under attack”); STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 54–59 (1989) (“No substantial principles of justice are so far implied by the existence of a procedure of weighing, and of adjudicating between, competing claims.”).
But then what is it that leads Rawls to conceive of the “framework” as including defensive, substantive basic liberties but not fair equality of opportunity? Is that from the liberal drinking water, a trace or remainder of liberal possessive individualism? There is no doubt that certain defensive liberties of political expression, association, and franchise must go into a democratic political-institutional framework, but how—if not as a possessive-individualist prejudice—can the same be said of individual liberties of conscience, of the person, of trade, of property, while forbearing to say the same of an overall condition of fair equality of opportunity?

Taking Rawls at his word, his answer lies in considerations of transparency, not in comparisons of importance as a matter of justice. A political-procedural framework cannot work as such where people can be expected to disagree sharply about whether its components are really being honored in the practice, and Rawls finds that to be a decisive reason to omit fair equality of opportunity from the “framework” description. Now, that reason is simply not of a kind to test the possible limits of liberal conceptions of social justice. To the contrary, as we are about to notice, that reason ties directly into a lively current debate among liberals who are agreed on the strong antipoverty implications of liberal justice, even as they disagree about the ways and means of the deployment of courts of law in service to those implications.

V. TRANSPARENCY AND ADJUDICATION

A set of prescriptive terms for a political-procedural framework cannot work well as such unless we can expect a wide and spontaneous convergence of judgments across the public regarding the fulfillment in practice of each of the terms. A term can nevertheless work perfectly well even though no one, in his or her own mind, can ever feel sure about the answer to the fulfillment question. That will be true as long as we have observably in operation an institutional arrangement whose answers to such questions can reasonably be accepted, and are in fact widely accepted, as publicly authoritative. Of course I have in mind courts exercising powers of constitutional review. You would not have to agree regularly, or even all that often, with the Supreme Court’s constitutional law-of-democracy

83. See MACPHERSON, supra note 12.
84. See supra notes 72–76 and accompanying text.
85. See RAWLS, LIBERALISM, supra note 1, at 228–30; RAWLS, RESTATEMENT, supra note 1, at 162.
86. See RAWLS, RESTATEMENT, supra note 1, at 8–9 (presenting the idea of a well-ordered society).
decisions in order to accept, however grudgingly, the idea that the Court acts with sufficient competence and good faith to stand a good enough chance of getting close enough to the right answers to let such judgments serve as publicly authoritative tests of fulfillment of the agreed prescriptive terms of our political-procedural framework.

Some liberals draw from their liberalism strong reasons to protest against granting the courts morally decisive authority of that kind. Other liberals, including John Rawls, defend the use of courts as authoritative public arbiters of the fulfillment of framework requirements (constitutional essentials), precisely for the purpose of enabling political legitimacy on liberal terms. Rawls apparently feared that the question of fulfillment of a fair equality of opportunity term would so often be resistant to anything approaching a sharply reasoned answer that inviting courts to decide it would pose an undue risk to overall judicial credibility; and so such a term should not be included among the “framework” terms the courts are assigned to arbitrate.

Thus the Rawlsian reservation comes down to a qualm about what lawyers call the “justiciability” of constitutional socioeconomic guarantees. It is not about a political-moral essence of liberalism; it is only about the amenability of alleged defaults by the state in the field of fair equality of

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88. Rawls wrote:

[The idea of public reason does not mean that judges agree with one another, any more than citizens do, in the details of their understanding of the constitution. Yet they must be, and appear to be, interpreting the same constitution in view of what they see as the relevant parts of the political conception and in good faith believe it can be defended as such. The court’s role as the highest judicial interpreter of the constitution supposes that the political conceptions judges hold and their views of the constitutional essentials locate the central range of the basic freedoms in more or less the same place. In these cases at least its decisions succeed in settling the most fundamental political questions.] RAWLS, LIBERALISM, supra note 1, at 237.

89. See id. at 228–30.
opportunity to some form of public institutional appraisal, having sufficient apparent cogency and reliability to allow fair equality of opportunity to work properly as a “framework” term whose fulfillment is partially decisive of the legitimacy of the political regime. That question, as applied to judicial review, is actively under discussion among distinctly liberal-minded participants in the field of comparative constitutional studies, and that is where we may leave it.

VI. PHILOSOPHY, CONSTITUTIONALISM, AND THE POOR

Beyond all doubt, this has been primarily a foray into political philosophy and only incidentally into constitutional law. Regarding its possible interest for our topic of “Constitutionalism and the Poor,” I offer two brief observations. First, those of us who give our support to some form and degree of constitutionalization of antipoverty may want to be as clear as possible, with ourselves and with others, about the reasons we think we have for doing so and about the arguable strengths and weaknesses of those reasons. Second, if or insofar as we are also members of the liberal party, bound in mind and spirit to liberalism’s normative individualist inspirations, we may want to know whether it is true, or how or to what extent it is true, that our liberalism inevitably gets in the way of our antipoverty engagement. If, after all, that is true, then we might have choices to make. Insofar as it is true that liberalism limits antipoverty, it does not automatically follow that you or I must give up on liberalism—especially if it is true, as I believe and have tried to explain, that liberalism does not limit antipoverty very much, if at all.