THE COMPELLING IDEA OF SOCIOECONOMIC RIGHTS: 
RECIPROCATING PERTURBATIONS IN LIBERAL AND DEMOCRATIC 
CONSTITUTIONAL VISIONS

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NOTE TO HAIFA READERS

I am taking the opportunity for a faculty seminar to float a draft that is still far from settled or finished but about which I would very much welcome discussion. This draft is for my chapter contribution to a multi-authored book on constitutionally binding socioeconomic rights, for which a projected aim is development of a set of conceptions of constitutional rights, adjudication, and separation of powers that are compatible with both a left-critical and a strong-democratic outlook. I come more from the liberal-constitutionalist side of those debates.

I look around and I see, on the one side, soi-disant deep democrats advocating for aggressive judicial enforcement of constitutional socioeconomic rights and, on the other side, committed liberal constitutionalists pleading for a reduction of the judicially enforced rule of law to an inconclusive conversation (“dialogue”) between the court and the government. I notice that the occasion for the movements on each side appears to be a widening recognition of a compelling, non-rejectable idea of socioeconomic constitutional rights. This paper is a reflection on that cluster of observations.

I. INTRODUCTION

A. Provocation

Consider the signature proposition of this book: Constitutionally binding socioeconomic rights – thus do we proclaim – are of the essence of democracy.¹

You might not find that to be much of a provocation, so inured is the world by now to treatments of “democracy” in which the idea of fundamental rights becomes virtually definitional or axiomatic.² Not so tame, however, is such a pronouncement when issuing from us the authors of this book. From us, it comes with more than a tinge of irony and paradox. For it is also a declared part of our joint venture here to envisage, as the ideal form of a constitutionally embedded political practice, something insistently and decidedly left-critical in spirit, something – “advanced” democracy as limned by Karl Klare, “transformative” politics as limned by Danie Brand – that it seems would be tendentiously ill-disposed towards any form of institutional confinement or “pedagogical guardianship”³ of the politics of the people. And how could we possibly think of constitutionally binding fundamental rights – democratically “essential” rights – as any part of that? (Are not fundamental rights,

¹ K. Klare chapter [or maybe editors’ introduction].
² [Cite Sultany article; Dworkin; Michelman “Human Rights.”]
³ [Habermas F & N 279.]
the very idea of them, a hallmark of a legal liberalism that strong democracy rejects? Do we not regard liberal democracy as, precisely, a sort of democracy that is not the advanced kind? The ironic note in our position is not to be missed. It is, in fact – or so I shall be suggesting – a key to our undertaking in this book. We would seem to have launched ourselves on the quest – as Morton Horwitz neatly but Delphically styles it – for fundamentality without fundamentalism.

Do not get me wrong. I am to be sure an inveterate liberal sympathizer, but this is not to be an attack on either advanced-democratic aspirations or the slogan of our book. My plan for this chapter is rather to the contrary: First, confirm the tensions lurking in our slogan construed as an utterance of deeper-democratic thought; second, use the provocation of socioeconomic constitutional rights (with the emphasis now on “socioeconomic” instead of “rights”) to highlight a reciprocating tension in a well-known, widely appealing liberal line of defense for a strongly constitutionalized practice of politics; third, point out how the resulting tensions can and do bend thought on each side towards modulations of their respective accustomed perceptions and valuations of constitutional rights, constitutional adjudication, and separation of powers; finally, suggest how such developments might be propitious for an alliance between antipoverty-minded liberals and rights-friendly deep democrats (not doubting the important philosophical difference that still separate the two camps) in the practical pursuit of the conditions of a just and democratic state from which, both camps agree, robust, constitutionalized socioeconomic rights cannot be excluded. What interests me here – to talk for the moment the philosophical talk of latter-day “political” liberalism – is the prospect of an overlapping consensus between political liberals and advanced democrats on the moral necessity of constitutionalized socioeconomic rights.

B. A hypothesis: Rapprochement of liberal and strong-democratic constitutional thought under pressure of the idea of socioeconomic rights

Suppose there is in circulation an idea of the moral necessity of socioeconomic rights. Suppose it is, for many of those who hold it, a compelling idea, meaning an idea before whose force some other habitually and even deeply held normative preconceptions might have to give way. It would be something like a generalized form of the slogan of our book: Socioeconomic rights are of the essence of ____ [a

4 [Klare on”basic” as differentiated from “advanced” democracy.]

5 [Horwtiz HLR Foreword.]
morally sustainable political practice; a good, or a well-ordered, or a just society]. It seems that by thus generalizing the proposition we could widen considerably the idea’s potential constituency. But would such a widening come, for committed strong democrats, at the cost of an unwelcome reversal of meaning or loss of the sting of contentiousness?

We know that far from everyone we have to deal with in the world will agree even to the generalized form of the socioeconomic-rights proposition, much less find the idea to be a compelling one. Assume, though, that many do as in fact appears to be the case. It further appears that some who do come out of a prior envelopment in liberal political thought, while others come out of a strong-democratic tradition – understanding those two terms to name bodies of ideas that are considered by those who hold them to be mutually opposed in certain respects they hold to be deeply important; and understanding further that those respects historically have included, very saliently, differing perceptions and valuations of a form of political practice for which “constitutional” has been the shared and standard name, along with contained notions of constitutional rights, constitutional adjudication, and a constitutional separation of powers.

A compelling idea of socioeconomic rights – one that is experienced as non-rejectable by those to whom it occurs – might exert a metamorphic pressure on received valuations and notions of constitutionalism, rights, adjudication, and separation of powers held by liberals and strong democrats respectively. If it was the same – or close to the same – compelling idea exerting the pressure, the result should be at least some measure of rapprochement of liberal and strong-democratic constitutional ideas. Such is this chapter’s hypothesis. Confirmation of it might suggest some stronger thesis about an always-already underlying siblinghood of liberal and strong-democratic political visions. A fast rejoinder to that will surely be that the specific variants of liberalism and strong democracy we put into play here – “antipoverty” liberalism (as I shall be calling it) and “advanced” democracy – are neither of them really liberal or strong-democratic (as the case may be) where it counts. We can take a moment at the end to think that over. But it might not be too soon to invite reflection on the fact that neither “antipoverty” liberalism nor “advanced” democracy is an entry you can find in any survey-book of contemporary liberal or democratic theory; rather both are conceptions that have been coined and named ad hoc, by one or another of us, out of the very brainwork that has taken us to the brink of the project of this very book.
II. CONSTITUTIONALLY BINDING SOCIOECONOMIC RIGHTS: A MINIMALIST ACCOUNT

*Socioeconomic rights*, we say, *are of the essence.* By “socioeconomic rights” we mean legally cognizable assurances respecting people’s access to certain kinds of costly goods and services, with corresponding obligations on the state and others in society. Of course that leaves a lot of questions open, but my aims here are best served by a minimalist account of the idea of “socioeconomic rights,” one that leaves further questions open to debates such as those occurring in various chapters of this book. Even in this “minimum-core” version, I want to argue, we can trace the metamorphic pressure of the idea, once received as compelling, on both accustomed-liberal and accustomed-democratic perceptions and valuations of constitutional rights, adjudication, and separation of powers.

*A targeted state of social affairs; a required level of exertion*

At a minimum, then, the idea of socioeconomic rights envisions a desired state of social affairs, a targeted set of social outcomes: roughly, that no one at any time lacks the means of access to levels deemed adequate of subsistence, housing, health care, education, and safety.\(^6\) Needless to point out, the level and quality of efforts exerted in that direction by state lawmakers and other functionaries – setting policies and programs, enacting and administering laws, and so on – will largely determine how far that condition of affairs prevails at any given time.\(^7\) Socioeconomic rights, at a minimum, are mandates for a required level of exertion by the state. The required level – the standard – might or might not be “whatever it takes to make it be the case that everyone has by tomorrow a decent house to live in.” The standard might or might not be one that we see fit to implement by the means of an authorization of individualized claims by anyone lacking a house to get a house. It might be a “best efforts” or “progressive realization” standard, with allowance for lawmakers to take due account of certain other principles (liberty, dignity, independence, self-respect, self-sufficiency, the rule of formally realizable law, general economic growth and prosperity) that might (or might not) be ranked high in that society’s ordering of

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\(^6\) The access could be – maybe *should* normally be – through the availability of decent work by which people can gain the same for themselves and their dependents. [W. Forbath articles.]

\(^7\) It will also, of course, depend heavily on patterns of conduct by actors in civil society, so the relevant state policies and laws will importantly include the bodies of regulatory and general background laws that guide, sanction, and incentivize conduct in markets, families, and so on.
political values. Within the minimalist account of constitutionally binding socioeconomic rights, questions such as those remain open to further debate.

**B. A constitutionally binding requirement**

1. discursive cogency in the standard

But what the standard does have to be, in order to meet this book’s idea of socioeconomic rights, is *constitutionally binding*. That requirement means, first, that the standard is to control and constrain the acts and choices of the country’s government including its parliament enacting primary legislation. And so it also means, second, that the standard “may not be altered [or interpreted away] by majoritarian processes except in rare and extraordinary cases.” And so it must further mean, third, that the standard is *cogent*, meaning that it fits into its cultural context in such a way that questions about its correct or preferred application in cases of uncertainty can be addressed *discursively*. “Discursively” does not mean that correct applications can be decided by rote or mechanically (“calling balls and strikes”). It means the questions are examinable and decidable by appeals to publicly available reasons, or a balance of them, that the standard as received can aptly (with greater or lesser credibility) be claimed to designate as relevant. In sum, the very idea of constitutional bindingness of socioeconomic rights requires an establishment in practice of a standard of compliance that measures up to certain requirements of discursive cogency.

Of course it is sometimes, in our age, doubted or denied that *any* standard can *ever* meet such a test – or at least it is seriously doubted whether any *plausible* standard for state exertion toward the realization of socioeconomic guarantees can realistically hope to work that way in any form of social life that is now available to us. But the point I want make is that a *rejection* of that kind of discourse-skepticism is already presupposed by any idea of constitutionally binding socioeconomic rights. By affirming the moral necessity of that idea, advanced-democratic thought sets itself in opposition to discourse-skepticism. The significance of this point for our purposes here will become evident later on.

2. institutional consequences

A further, obvious implication of constitutional bindingness is that findings of non-compliance *have institutional consequences* for the required and permitted conduct – and so presumably for the actual, ensuing behaviors – of actors in state and

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8 [K. Klare chapter.]
society. From which it would appear to follow further, and finally, that the standard must be in some form or degree be institutionalized in political practice. It must be the case that public political consciousness converges on some site or process for decisions on compliance/non-compliance that register as authoritative for the time being.

There is nothing in the minimum-core idea of socioeconomic rights to require that the authoritative site be one we would see as a “court” or the authoritative process be one we would see as “adjudication.” The fact is, however, that courts and adjudication are the site and the process that are currently cemented into those positions by our dominant political cultures. And so it is to be expected that if constitutionally binding socioeconomic rights do not comfortably fit our currently prevailing conceptions and valuations of those institutional establishments – but constitutionally socioeconomic also are for us a compelling idea – then the push will be on for modification of those currently prevailing conceptions and valuations.

III. A TENSION IN ADVANCED DEMOCRACY: CONSTITUTIONALLY BINDING RIGHTS?

I take as definitive for our purposes Karl Klare’s profile of the aims and commitments of advanced democracy (AD). I concentrate on those features that would seem most directly to trouble the idea of constitutional rights, and I embroider on them just a bit. So:

(1) AD is – as liberalism also is\(^9\) – a humanistic-universalist doctrine, committed to the realization of certain targeted conditions (of the good, of freedom, of justice) for all individual human beings without distinction or preference.

(2) AD is also, however, a “comprehensive” doctrine in precisely the sense that would raise objections from modern-day “political” liberals: It posits as directive for politics a broadly substantive but still contentious partisan conception of the good life for all individual human beings, to wit, the good life as a life of active self-realization.\(^10\)

Thus, AD also, accordingly,

\(^9\) [Compare e.g. Dworkin, *Is Democracy Possible Here?* 9-11.]

\(^10\) [Compare Rawls on a “political” as opposed to a “comprehensive” value of autonomy.]
(3) is committed to a form of political practice that assures to each person the social conditions required for a full and adequate lifetime experience of authentic self-determination;

(4) is furthermore committed (seeing that we live in a world where self-realization occurs in crucial part through politics) to the promotion of robust popular civic engagement and political participation, including but not limited to the processes of determining what is concretely required in current conditions for the satisfaction of points 1 through 4;

and

(5) is furthermore accordingly egalitarian to the point of hostility to any and all social conditions and markers of domination, disrespect, and indignity, and so is biased against hierarchies of status and command in politics and society, including in the forms of bureaucracy and legality.

No one conversant with the constitutional debates of the past century can possibly miss the prima facie problematic feel, within this sort of deeper-democratic vision, of constitutionally binding rights. “But hasn’t that really been solved by now?,” you might ask “Haven’t all these chronic complaints about le gouvernement des juges and a ‘counter-majoritarian difficulty’ been shown to be treatable by anodyne conceptual remedies?” The serious answer must be that no, the complaint has not been shown dissolvable in that way because it is not – as experienced, at any rate, by the most thoroughgoing deep democrats – merely and simply a complaint about judicial review, but rather one about constitutional bindingness at large.

Take les juges away; banish judicial review; make the deliberative parliamentary democracy the judge (“in its own cause”) of the constitutionality of its own actions. Still the problem (or the contradiction) remains of a supposedly thoroughgoing practice of everyone’s self-actualization through a politics that remains under institutionalized, disciplinary oversight. That is, after all, what “binding” irreducibly signifies. The binding constitution’s restraint of politics might be relatively mild and flexible. It might even take an ostensible form of “self”-restraint: Let the oversight institution be internal to the majoritarian-democratic parliament; let be nothing more than a conventionally entrenched practice of oh-so-deliberative parliamentary debates

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11 [Dworkin]

12 [Foucault.]
and votes on the constitutional compliance of bills and agendas.\textsuperscript{13} If the practice is truly conventionally entrenched, how is it – this is a crucial, testing question for our purposes; mark it down – \textit{any less a supervisory institution than a reviewing court?} If it is not, or if it is not expected sometimes to intervene effectively in ways that hurt, insult, and frustrate the aims and judgments of self-respecting political actors not excluding those presumed to act and judge sincerely and devotedly in the public interest, then bindingness is a fiction at best or a fraud at worst.\textsuperscript{14}

Counter-majoritarian difficulties? Those are at least somewhat persuasively said to be controllable by a variety of conceptual-cum-political-scientific treatments. “The Constitution is law enacted by the People, so faithful enforcement of it by judges is the true pro-majoritarian position.”\textsuperscript{15} Or “The People themselves can enforce their Constitution on Election Day, we don’t need and shouldn’t mainly use judges to do it for us.”\textsuperscript{16} Or (another variant) “The judges inevitably ‘follow th’ iliction returns’ anyway when they enforce the Constitution, so what is the problem?”\textsuperscript{17}

I do not mean to make light of any of those teachings; there is wisdom in them all. My point is only that none of them ultimately addresses or therefore can dissolve the core of the objection that it seems all-out deep democracy must raise against constitutional bindingness, because that objection is not merely counter-judicial or counter-adjudicative. Insofar as the people seriously treat a \textit{made} Constitution as binding, they institute the constraint of \textit{that} Constitution on their politics. They bind themselves faithfully to apply \textit{that} Constitution by construing it, meaning \textit{not} to invent, not to rewrite it on the fly; and they thereby, to that extent, subordinate their politics to the pedagogical guardianship of someone or something that is not by any means guaranteed to be (nor was it meant to be) themselves authentically then and there.\textsuperscript{18} (Talk about an “authentic” collective/individual self that is “drunk” or “tired” or “asleep” or in some other way off-stage for the moment will lead in directions where I do not believe advanced democrats of our kind will care to go.)

\textsuperscript{13} [Waldron describing the British Parliament (sometimes).]
\textsuperscript{14} [cite the late work of Edwin Baker.]
\textsuperscript{15} [Ackerman, endorsed by Rawls.]
\textsuperscript{16} [L. Kramer; “popular constitutionalism.”]
\textsuperscript{17} [Mr. Dooley; Barry Friedman]
\textsuperscript{18} [Michelman, “Constitutional Authorship.”]
We authors of this book, all of us, understand this. It is why – again I let Karl Klare give voice to our joint mind – we put the weight of our proposition on bindingness in general and not specifically on judicial review, although we do at the same time treat judicial review as the central case of bindingness with which we have to deal. To put the point another way: When we reach toward advanced-democratic revaluations and transformations of constitutional adjudication and the separation of powers, we mean that as an episode in a broader pursuit of a transformed understanding of constitutional bindingness “itself,” in keeping with advanced democratic values and aspirations. (But then do we also we catch here, in the very moment of commitment to the reform – which means the retention – of constitutional bindingness, a glimpse of a departure of “advanced” democratic valuations of constitutionalism from those that have up until now been more typical of the deep-democratic mainstream?)

IV. A TENSION IN POLITICAL LIBERALISM: LEGITIMACY OVER JUSTICE?

A. Political-liberal constitutional thought in a nutshell

The following, extremely condensed summary of some elements in political-liberal thought is designed with several ends in view: first, to bring out clearly this thought’s reliance on the idea of binding constitutional rights for justification of the force of liberal law; second, to show how the justificatory aim points compellingly (for some of us) toward socioeconomic rights; and third, to highlight political liberalism’s contractualistic starting point – that is, its organizing idea of society as scheme of cooperation among ultimately self-responsible individuals – which stands in seeming sharp contrast to advanced democracy’s starting point – dare one say its foundation? – in a humanitarian ethic of care for the good of every person. My interest is in showing how there might issue from these two bodies of thought, with their seemingly contrasting initial impulses, an agreement on the proposition that constitutionally binding socioeconomic rights are of the essence of a morally justifiable political order – and an agreement, furthermore, that might sufficiently extend to what we will have to mean in practice by “rights” and “binding” to allow for alliance between the two camps in the practical pursuit of the conditions of a just and democratic state.

1. social cooperation to social justice: individuality, agency, reciprocity:
   fairness in the basic structure: equality

We deal with a species of “political” liberal thought. Which is to say, the line of thought starts out from a perception of a political society as a large-scale scheme and
practice of cooperation across a diverse population of citizens. Already embedded in this basic idea of social cooperation is a conception of the citizens – the cooperators – as individualized agents: each one a distinct “source of claims and projects,” each endowed with an own life to live for the better or for the worse, each possessed of certain “moral powers” and a “highest-order interest” in their development and exercise – powers both to “have, to revise, and rationally to pursue” a conception of one’s aims in life and to “understand and . . . act from principles” of due regard for others likewise conceived. Social justice, then, is the demand, among persons keenly sharing a sense of themselves and others having in common these endowments and corresponding interests, for fairness in the basic terms of cooperation – meaning by “basic” terms those made manifest in the society’s major legal, social, and economic institutions (its “basic structure”), which combine to produce the differing positions, conditions, and prospects of life that various persons will occupy from time to time. Some notion or version of equality of opportunity is an obvious, ineluctable implication.

2. antipoverty; fair equality of opportunity as a principle of justice

In what I am naming as the “antipoverty” liberal view, fair terms of social cooperation (“principles of justice”) must accordingly include a strong antipoverty commitment. The judgment is simple and straightforward: We cannot fairly and reasonably expect persons thus conceived 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 conditions anyone would require to be or become a respected and self-respecting contributor to political exchange and contestation and furthermore to social and economic life at large. Fairness – justice – in the basic structure thus requires more than equality of economic and other opportunity in a formal-legal sense. It includes what John Rawls calls a principle of “fair” (in pronounced contradistinction to merely formal) equality of opportunity, and that logically that must mean policies addressed to structural barriers and handicaps posed by poverty in the full social sense. Depending on how

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19 [Rawls.]

20 This does not mean we take ourselves and others as selves produced or maintained independently or apart from society. For a compelling, recent restatement of the claim of the historically contingent, socially constructed substrate and substance of liberal subjectivity, see Steven L. Winter, “Down Freedom’s Main Line”, 41 Rechtsfilosofie & Rechtstheorie (forthcoming, 2012) (special issue).
we assess the relevant social and economic facts, fair equality of opportunity – a core
component of justice conceived as fair terms of social cooperation – could mean not
only a “safety net” level of assurance of literally vital necessities but well beyond that
a quite muscular antidiscrimination policy, jobs policy, industrial policy, family
policy, fiscal-redistributive policy, and educational adequacy going beyond the most
basic level.

3. the place of constitutional rights in political-liberal thought: justice to
legitimacy: order, disagreement, “constitutional essentials”

In the sight of a political liberal, every legal order or rule-of-law regime presents
a question of moral justification. Liberals of all stripes are joined in the belief that
stable, effective legal ordering is an indispensable requirement for decent forms of
human social existence, and furthermore that the stability of any legal order depends
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.21 But of
course the fact is that persons living within a liberal political and legal order
inevitably will find themselves sincerely and reasonably divided over not just the
wisdom or prudence of various laws and policies but even about their compatibility
with justice. And then how – liberals must ask – can a demand for general
compliance with duly issued laws be justified morally, consistent with a liberal view
of citizens as free and equal moral agents?

Political liberalism answers (note, again, the affinity to contract) that the demand
can be morally justified, on condition that the country’s body of unquestioned
supreme laws – its body of constitutional laws – guarantees the observance of a
defined package of equal basic rights and liberties of citizens and that the guarantees
are observably carried out in practice. (That last point is not for us a minor one: A
constitution, for this purpose, is not just a floating set of norms or directives, it is an
observably ongoing social practice.) If an effectively binding constitution is of the
right kind, John Rawls proposes – if it is democratic and also guarantees due respect
for certain basic rights and interests of persons – then that kind of rightness in the
constitution (we say) can make it reasonable to call on everyone for compliance with
approximately all of the laws, rulings, and decrees that issue in accordance with the
procedures, requirements, and limitations laid down by that constitution. Rightness

21 See id.; John Rawls, A Theory of Justice 211 (rev. ed. 1999) (hereinafter cited as
in a country’s binding constitutional laws can thus render the prevailing legal order and all of its works *legitimate*, in one widely accepted use of that term.\(^{22}\)

A constitution that thus measures up is what we may call a “legitimation-worthy” constitution. In a political-liberal view (and hence in an antipoverty liberal view), a constitution, in order to be legitimation-worthy, must include guarantees respecting certain basic individual rights such as freedoms of conscience, expression, association, and full and fair access to the forums of democratic debate and political decisionmaking. 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.”

Do the liberal constitutional essentials extend to 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? Political liberalism answers yes. Rawls includes, as one of the liberal constitutional essentials, a guaranteed “social minimum” covering the “basic needs” of all citizens,\(^{23}\) which Rawls defines as a package of material goods and services up to the levels (the “social minimum”) required for a person’s capability to “take part in society as [a] citizen[],”\(^{24}\) and “to understand and to fruitfully exercise” his or her capacities as a self-actuating person.\(^{25}\)

C. Toward paradox: Legitimacy versus justice?

1. the “gap”

As Rawls recognized, the “social minimum” that he treats as a constitutional essential falls considerably short of the commitment to fair equality of opportunity demanded by liberal justice as he conceives it. The social minimum is a liberal-capitalist-style “safety net.” Fair equality of opportunity, by contrast, potentially includes everything mentioned above in point IV.A.2. How can we explain the

\(^{22}\) See Rawls, Liberalism 137 (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 319-43. On the variant significations of “legitimacy” in constitutional-legal debates, see generally Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv. L. Rev. 1787 (2005).

\(^{23}\) Rawls, Restatement 47-48.

\(^{24}\) Rawls, Liberalism 166.

\(^{25}\) Id. at 7.
discrepancy? If robust, fair equality of opportunity is a liberal principle of justice, how could it be (and why should it be) excluded from the list of liberal constitutional essentials?

The answer lies in a gap that Rawls posits between two standards of critical appraisal for a political order, respectively named “justice” and “legitimacy.” Justice posits a set of ideal conditions of a political society that each of us (“you and I,” in Rawls’s phrase) posits to himself or herself as a morally mandatory target for individual and social striving, at the same time granting that opinions will reasonably and sincerely differ – even among those who know they all understand the issue to be one of fairness in the basic terms of social cooperation – about what that concretely requires. Legitimacy is something else. Legitimacy sets a minimum public standard for a constitution’s adequacy to authorize morally a public demand for regular compliance by citizens with the laws and policies that issue from it, granting that some of those laws and policies do not – in your sincere best judgment or in mine – really measure up to the requirements of justice. Legitimacy thus seems to set a less demanding standard than justice. Legitimacy treats injustice as tolerable up to a point; it issues a call for tolerance, of a kind, even from those who most directly bear the burdens and the stings of ongoing injustice.

2. reason for the gap: transparency

But why introduce such a gap between justice and legitimacy? It seems we must do so in order to allow for human imperfection and for honest political disagreement. In any possible human practice, shortfalls from justice are inevitable, and so are serious disagreements about what counts as a shortfall. So if justice were to set the standard for legitimacy, no real-life, concrete legal order could at any moment be legitimate – could exert a reasonable claim on everyone for faithful, general compliance with its laws – in the eyes of any fraction of the citizens remotely approaching a totality. A legitimacy standard, it appears, in order to do the public work we want it for – to underwrite morally a public demand (which liberals cannot relinquish) for general compliance by everyone with constitutional laws – must be

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26 Rawls wrote that “an injustice is tolerable only when it is necessary to avoid a greater injustice.” Rawls, Justice 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, [or] there would be greater injustice otherwise . . . .” John Rawls, Legal Obligation and the Duty of Fair Play in Collected Papers 117, 125 (Samuel Freeman ed. 1999).
more accommodating of real-world political imperfection and disagreement than any corresponding ideal standard of *justice* conceivably could be.

To make the case a bit more concrete, we can turn back to the specific question before us. Why would John Rawls think that a “social-minimum” (safety net) guarantee should be included among the legitimacy conditions, but full-scale antipoverty should not, *when it is the latter that justice truly requires?* Rawls’s answer rests crucially on a perception of a difference in the transparency of judgments regarding satisfaction of these two measures of compliance. A standard of legitimacy, meant to serve as the sovereign public test of the legal order’s deservingness of general respect and compliance, should be easy to apply with confidence. The standard cannot work as intended where people predictably will run into intractable, severe disagreements about whether that standard is really being honored in the practice, and Rawls finds that to be a decisive reason to exclude fair equality of opportunity from the liberal standard of legitimacy.

We can all, Rawls thinks, pretty much easily tell whether the conduct of the powers-that-be can support a finding of good-faith pursuit by them of the safety-net commitment. By contrast, 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 acceptability of its demand for our patience and tolerance regarding apparent shortfalls from justice. And so we fall back on the safety-net assurance. Citizens who know that their basic (negative) 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.

3. an antipoverty-liberal contradiction

So there we have, for antipoverty liberals, the paradox of political-liberal legitimacy. Owing to alleged excessive non-transparency-in-application of the principle of fair equality of opportunity which they nevertheless unflinchingly affirm as a true requirement of justice, antipoverty liberals find themselves invited to give themselves a moral permission to demand every citizen’s compliance with the edicts of a regime that they themselves must denounce as seriously unjust. Legitimacy in that way beats back justice. It is not a contradiction, exactly. Legitimacy, we have
seen is one thing and justice is another, and maybe (?) legitimacy is more urgent. But who can rest comfortably with that?

And that may not yet be the worst of it. The status as a principle of justice of fair (as distinguished from formal) equality of opportunity may be clear to the antipoverty liberal contingent, but it is sharply – and who is to say not reasonably? – contested in most if not all of the liberal-aligned societies that concern us in this book. In those conditions, it might not be reasonable – it might even be unjust, in a political-liberal view – for the antipoverty crowd to presume to dictate to everyone else that observable fulfillment of the contested principle shall be a precondition for justified public demands for general compliance with the duly issued laws of a regime that is otherwise widely viewed as mainly a just one. If that were the case, then political liberals who, like Rawls, hold fair equality of opportunity to be a strict requirement of justice, would indeed be caught in contradiction. Public demands for compliance with the edicts of a regime that flagrantly denies fair equality of opportunity to some fraction of the citizenry would be, in our view, unjust to those who suffer the denial, but insistence by us on the withdrawal of such demands would be unjust to fellow citizens who sincerely contest the status of that principle as a requirement of justice.

Conceptual tensions are widely held to be a common if not inevitable occurrence in large normative conceptions. Many may be innocuous or benign. The ones we have just been charting are not. They have consequences, including the one that concerns us here, namely, the Rawls-endorsed exclusion of fair equality of opportunity from the list of essential components of a liberally legitimation-worthy constitution. The resulting challenge to antipoverty liberals is find away to dissolve these tensions, or at any rate to tame them to the point where they need not and do not bear that specific consequence.

4. the key to salvation: an assumption of cogency; antipoverty-liberal proceduralism

This very challenge appears to be at work today in liberal constitutional scholarship, instigating searches by scholars in the antipoverty-liberal camp for a revised and softened core conception of the adjudicative “enforcement” (and hence of the “bindingness”) of constitutional rights. Antipoverty liberal constitutionalists are these days turning out a profusion of theories and conceptions of “weak” –

27 [Tushnet.]
“dialogical,” “experimentalist,” “catalytic,” you name it – judicial review and they are doing so (I believe the evidence would show) at least partly under pressure from what they experience as a morally compelling idea of constitutionally binding socioeconomic rights. Now, an obvious key to the plausibility of this liberal-side discourse of a weakened or softened conception of constitutional bindingness and adjudicative “enforcement” is – and for our purposes most interestingly, considering what we said above in Point II.B.1 regarding the presuppositions of advanced-democratic constitutional theory – a presupposition of the possibility of discursive cogency in a publicly legible, constitutionally mandated standard for state exertion towards the social outcomes targeted by a socioeconomic constitutional right.

Only insofar as we see it as binding can a (legitimation-worthy) constitution hope to confer legitimation on the legal outputs of the regime it claims to constitute; that much is obvious. But recall, now what we concluded above in point II.B.1:

The very idea of constitutional bindingness of socioeconomic rights requires an establishment in practice of a standard of compliance that measures up to certain requirements of discursive cogency. Of course, it is sometimes, in our age, doubted or denied that any standard can ever meet such a test – or at least it is seriously doubted whether any plausible standard for state exertion toward the realization of socioeconomic guarantees can realistically hope to work that way in any form of social life that is now available to us. But the point I want make is that a rejection of that kind of discourse-skepticism is already presupposed by any idea of constitutionally binding socioeconomic rights.

And likewise – as I am now about to explain further if the point is not already obvious – is the same rejection presupposed by the antipoverty-liberal response to the discomfiture of legitimacy trumping justice so presume.

2. antipoverty-liberal (political-liberal) proceduralism

We concede, with Rawls, that a set of prescriptive terms for a legitimation-worthy constitution cannot work properly as such unless we can expect a more-or-less spontaneous and wide public convergence on a judgment that the terms are being fulfilled. 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


28 [Hogg; Dixon].
29 [Gerstenberg]
30 [Young.]
whose considered judgments regarding such questions can reasonably be accepted, and are in fact widely accepted, as publicly authoritative. (And notice still again the affinities to contract.) Of course I have in mind courts of law exercising powers of constitutional review. Americans would not have to agree regularly, or even all that often, with their Supreme Court’s constitutional law-of-democracy 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, enough of the time, of getting close enough to right answers to let their judgments serve as a publicly authoritative test of fulfillment of the agreed prescriptive terms of our political-procedural framework.\footnote{I think that’s plainly correct as a statement of possibility (which in fact holds true for a good many citizens), granting that many of us would conclude that the US Supreme Court is currently failing the test.}

It is, indeed, precisely for that sort of reason – enabling political legitimacy on liberal terms – that many liberals, including John Rawls, defend the use of courts as authoritative public arbiters of the fulfillment of the constitutional essentials (courts as “exemplars of public reason”). But Rawls apparently feared that the question of fulfillment of a fair-equality-of-opportunity term would be so often 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 that the courts are assigned to arbitrate. The Rawlsian reservation, then, comes down to what I have called a “standard worry” about constitutionalization of socioeconomic rights:

Down one path . . . lies the judicial choice to issue concrete, positive enforcement orders in a pretentious, inexpert, probably vain but nevertheless resented attempt to reshuffle the most basic resource-management priorities of the public household against prevailing political will. Down the other lies the judicial choice to debase dangerously the entire currency of rights and the rule of law – the spectacle of courts openly ceding to executive and legislative bodies a nonreviewable privilege of indefinite postponement of a declared constitutional right.\footnote{I-CON 2008.}

What Rawls, however, did not foresee was the burgeoning credibility within the discourse of liberal constitutionalism (under pressure, as I believe, of the conviction that robust antipoverty simply must be embraced as a condition of the legitimacy of a constitutional-democratic political regime), of conceptions of dialogical,
experimentalist, catalytic etc. modalities of judicial review and constitutional litigation. He did not appreciate the ways in which courts, engaged in rights-talk, could be seen to work as non-dictatorial contributors to the cogency and credibility of a loosely, not tightly, institutionalized process of deliberative-democratic debate over the implementation of the principle fair equality of opportunity, sufficient to allow for full recognition of that principle as an essential component of a legitimation-worthy constitution.

V. RECIPROCATING APOSTASIES

A. A meeting halfway

We can take as illustrative a “democratic experimentalist” model of judicial review. The court acts in the first instance as an 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 cogency and authorization, the court might turn up the heat on deployment of its powers of dictation and enforcement. At a relatively early stage, what the court dictates and enforces will be agendas of questions to be addressed and answered by one or another stakeholder group or class. At later stages, the court begins to require substantive compliance with the emergent best-practice standards, in the name of the constitutional right (say) to access to health care services. The screws tighten on what can count as cogent or “reasonable” and the court serves as an arbiter.

The points I need to make do not require that we right now delve further into the merits of that model compared with others on the table and explored in other chapters. Those points are two in number. First: No solution of this procedural-discursive kind to the antipoverty liberal contretemps of legitimacy defeating justice is conceivable without the assumption of the possibility of discursive cogency in the constitutionally legible and binding standard for state performance. Second: Surely we can make out here something a like a “meeting halfway” between liberalism of the “antipoverty” kind and strong democracy of the “advanced” kind. The self-styled
democrats look past their tradition’s accustomed aversions to legal bindingness, constitutional rights, and (in some quarters) deliberative pretensions. The soi-disant liberals reciprocally look past their tradition’s accustomed attachments to rights-essentialism, formally realizable law, and competitive/offsetting institutional self-aggrandizement (the “separation of powers”). They learn to grow comfortable with democratically inspired notions of constitutional rights as mandatory topics of deliberative-democratic debate, of constitutional adjudication as the non-dictatorial oversight and management of such debate, and of separation of powers as a collaboration of branches in the conscious pursuit of commonly held but uncertainly defined goals.

B. Renegade thoughts

[In this section I will make a compilation of the respects in which “advanced-democratic” thought involves modification or rejection of certain of stances we’re accustomed to meet in the strong-democratic mainstream tradition, and the respects in which “anti-poverty liberal thought” involves modification or ejection of stances we’re accustomed to meet in the liberal-constitutionalist mainstream tradition. On the democracy side the stances in question are an antipathy to bindingness (as pedagogical tutelage or servitude) and a suspiciousness toward rights (as vehicles of domination and alienation). On the liberal constitutionalism side the stances in question are of rights-essentialism and demands for a formally realizable rule of law. I will want to discuss briefly as well the questions of whether and how advanced democracy remains strong-democratic and liberal constitutionalism remains liberal.]

C. Overlapping consensus

[Here we focus on points of convergence and division between advanced democracy and antipoverty liberalism. The doctrines share (1) a universalist/humanitarian/individualist moral outlook; (2) an experience of the compellingness of an idea of constitutionally binding socioeconomic rights; (3) a strenuous rejection of discourse-skepticism; (4) embrace of a conception of constitutional bindingness that is satisfied by the combination of (a) a discursively cogent standard of commitment or obligation with (b) some form of institutionalization of an administration of the standard that is authoritative but non-dictatorial. The doctrines are divided by the contractualist foundations of political liberalism as opposed to the foundation of advanced democracy in a comprehensive conception of the good for humankind. The concluding suggestion will be to the
effect that (1)-(4) can support an overlapping consensus, and the clash of foundations
does not at all get in the way.]