DIGITAL ACCESS TO SCHOLARSHIP AT HARVARD
DASH.HARVARD.EDU

HARVARD LIBRARY
Office for Scholarly Communication

Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment

Citation
Frank I. Michelman, Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment, 72 Fordham L. Rev. 1407 (2004).

Published Version
http://ir.lawnet.fordham.edu/flr/vol72/iss5/4/

Permanent link
http://nrs.harvard.edu/urn-3:HUL.InstRepos:12956285

Terms of Use
This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. Submit a story .

Accessibility

Fordham Law Review

Volume 72 | Issue 5 Article 4

2004

Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment

Frank I. Michelman

Recommended Citation

Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 Fordham L. Rev. 1407 (2004).
Available at: http://ir.lawnet.fordham.edu/flr/vol72/iss5/4

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE CONSTITUTIONAL ESSENTIALS OF POLITICAL LIBERALISM

JUSTICE AS FAIRNESS, LEGITIMACY, AND THE QUESTION OF JUDICIAL REVIEW: A COMMENT

*Frank I. Michelman**

INTRODUCTION

My aims in this Comment are modest and primarily exegetical: to assemble what John Rawls says about the question of judicial review, and to resolve two apparent puzzles posed by his remarks bearing on this question. The remarks I have in mind are all found in Rawls's book *Political Liberalism*,[1] mainly in Sections 5[2] and 6[3] ("The Idea of Constitutional Essentials" and "The Supreme Court as Exemplar of Public Reason") of Lecture VI ("The Idea of Public Reason").[4] It is chiefly in these pages that Rawls reflects on whether and how judicial review may comport with a certain political conception of justice,[5] namely, the one he calls "justice as fairness" and commends as morally apt for our society.[6]

By "the question of judicial review" I mean simply the question of having judicial review or not. It is not so easy, alas, to say exactly what "judicial review" is,[7] but a crude definition will serve our needs here. Judicial review, we'll say, exists in a country's political-

---

* Robert Walmsley University Professor, Harvard University.

1. John Rawls, Political Liberalism (1996).
2. *See id.* at 227-30.
3. *See id.* at 231-40.
4. I have addressed these texts in writing twice before. *See* Frank I. Michelman, *On Regulating Practices with Theories Drawn from Them: A Case of Justice as Fairness*, *in* Nomos 37, Theory and Practice 325-36 (I. Shapiro & J. DeCew eds., 1995) [hereinafter Michelman, *Regulating Practices*]; Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law, in* The Cambridge Companion to Rawls 394, 403-07 (Samuel Freeman ed., 2003) [hereinafter Michelman, *Constitutional Law*].
5. On the meaning of this term, see Michelman, *Constitutional Law*, *supra* note 4, at 398-400.
6. *See id.*
7. For discussions of the possible dimensions of variation for a judicial review practice, see Michelman, *Regulating Practices*, *supra* note 4, at 325-26; Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 Wake Forest L. Rev. 813 (2003).

institutional practice when (a) questions of the constitutionality of legislation are regularly brought before courts for resolution; (b) the courts address these questions afresh, with a substantial degree of independence from the explicit or implicit opinions of other agents in the system including those who enacted the questioned law; (c) the resulting judgments of jurisdictionally competent courts are regarded as binding on other departments of government unless and until revised either by judicial decision or by constitutional amendment; and (d) the result of a judicial declaration of a legislative enactment's unconstitutionality is that the enactment thenceforth is treated as invalid, voided of the force of law.[8]

I. SETTING THE STAGE: LEGAL DUALISM AND LIBERAL LEGITIMACY

A. *Constitutional-Legal Dualism*

The question of judicial review arises only with respect to political and legal systems that are "dualist" in a sense conveyed by Rawls when he writes that "constitutional democracy is dualist: it distinguishes . . . the higher law of the people from the ordinary law of legislative bodies."[9] The liberal political order envisioned in *Political Liberalism* undoubtedly is constitutional-democratic and dualist. Justice as fairness calls for substantive limits and constraints on lawmaking, including requirements concerning "equal basic rights and liberties of citizenship that legislative majorities are to respect,"[10] and Rawls plainly expects that a society well-ordered by the standards of justice as fairness will treat these requirements as higher law to which ordinary lawmaking is beholden.[11] Thus, the stage is set for the possible entrance of judicial review. And yet the play of constitutional democracy quite conceivably could go on without judicial review, as we soon shall see. (If it could not, the judicial review question would already be settled in the affirmative by the commitment of political liberalism to constitutional democracy, which Rawls plainly does not think is the case.)[12]

---

8. These conditions describe a species of what Professor Tushnet calls "[s]trong-form judicial review." Tushnet, *supra* note 7, at 815.

9. Rawls, Political Liberalism, *supra* note 1, at 233.

10. *Id.* at 227; *see id.* at 291, 294-99 (explaining the "special status" of the basic liberties associated with the first principle of justice).

11. *See id.* at 233.

12. As I show in Part II.A., Rawls maintains that justice as fairness does not necessarily entail judicial review. He still might think constitutional democracy necessarily entails it. That would be possible, however, only if Rawls were not presupposing constitutional democracy as a feature of any political-liberal regime or any regime that carries out justice as fairness. *See, e.g.*, *infra* note 32. To my mind, the better reading is that Rawls *is* presupposing constitutional democracy in his reflections on judicial review. For Rawls, the connection between political liberalism and constitutional democracy is about as deep as it can get. Rawls poses the

B. *Validation and Legitimation: Two Functions of Constitutional Law in Rawlsian Constitutional Democracy*

In the kind of dualist system envisioned by Rawls, it is understood that not every series of events conforming to the accepted, formal protocols for an act of lawmaking—for example, duly registered approvals of a law-like text by majorities of quorums of both Houses of Congress and by the President—necessarily produces true or valid law, meaning minimally a norm or rule to which anyone purporting to be law-abiding is expected thenceforth to conform his or her actions. There is in place a higher level of law—constitutional law—and the legal validity of the new enactment depends on the conformity of the latter's *content*, not just its procedural pedigree, to the demands of the higher law.[13] To be clear, the claim here is not that this result—unconstitutional legislative enactments fail to produce valid law—follows logically and strictly from the very idea of dualism and the "higherness" of constitutional law.[14] Whether it does or not is a question we need not settle here—interesting as it may be to jurisprudence—because the claim here is only that the result follows in the kind of dualist system envisioned by Rawls.

Rawls understands law to be a medium always fraught with the potential for coercion. How, then, he asks, is it possible that schemes of social ordering by law may be morally permissible and perceived as such by all? How may a regime of coercive, majoritarian lawmaking possibly be justified among citizens presumed to regard themselves and each other as individually "free and equal?"[15] Rawls answers with the proposition he dubs "the liberal principle of legitimacy,"[16] in which legal dualism figures crucially:

> [O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials

---

"problem" of political liberalism as one of "work[ing] out a political conception of justice for a . . . constitutional democratic regime." Rawls, Political Liberalism, *supra* note 1, at xl-xli. His apparent assumption throughout his work on justice has been, as he wrote in an early essay, that "a constitutional democracy of some sort is required by the principles of justice." John Rawls, *The Justification of Civil Disobedience* (1969), *reprinted in* John Rawls: Collected Papers 176, 180 (Samuel Freeman ed., 1999).

13. I discuss the relations between legal validity and constitutional law in greater detail in Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 Rev. Const. Stud. (forthcoming 2003) [hereinafter Michelman, *Contract*]; Frank I. Michelman, *Living With Judicial Supremacy*, 38 Wake Forest L. Rev. 579, 588-93 (2003) [hereinafter Michelman, *Judicial Supremacy*].

14. Given dualism, legislators who enact legislative content in contravention of standing constitutional law no doubt act contrary to law, but perhaps it does not follow from that premise that the ostensible legal products of their actions must lack validity as law. Few of us, on reflection, will doubt that unlawful actions can alter the state of the social or the legal world.

15. Rawls, Political Liberalism, *supra* note 1, at 136-37, 217.

16. *Id.* at 137, 217.

> of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy.[17]

We need not delve just now into the precise meanings of all the load-bearing terms in this proposition.[18] All we need is awareness of three points. First, the "essentials" of a constitution include certain of its particular formulations (typically in a bill of rights) of those "equal basic rights and liberties," already mentioned, which "legislative majorities are to respect."[19] Second, to say that a given set of constitutional essentials is acceptable to everyone viewed as reasonable and rational is tantamount to saying that the set matches up acceptably with certain principles laid down by Rawls under the name of justice as fairness.[20] Third, by "legitimacy" Rawls means a certain sort of virtue in the system or "general structure of... authority"[21] by which laws in a given country are brought into being. To call such a system legitimate is to say that moral justification exists to enforce whatever laws may issue from that system against everyone alike, including persons who may deeply, considerately, and reasonably disagree with the justice or the prudence of some of those laws.[22]

The "liberal principle of legitimacy" posits a necessary condition[23] for the legitimacy of any system of government by law, constitutional democracy being one type of such a system. Such a system can be legitimate, in the sense that all the laws issuing from the system can justifiably be enforced against everyone including those who reasonably regard them as bad and wrong, on condition that certain "essential" components of the system are what they morally ought to be[24]—which for Rawls means they are compliant with the principles of justice as fairness.

Obviously, though, legitimacy cannot be decided merely by looking to see whether some written instrument headed "Constitution" contains a list of "essentials," including basic-liberties guarantees, that appear to honor correct principles of justice. The question always will

---

17. *Id.* at 217; *see also id.* at 137 (offering a like formulation).

18. I do so in Michelman, *Contract*, *supra* note 13; Frank I. Michelman, *Relative Constraint and Public Reason: What Is "The Work We Expect of Law?,"* 67 Brook. L. Rev. 963, 971-75 (2002) [hereinafter Michelman, *Public Reason*].

19. *Supra* text accompanying note 10; *see* Michelman, *Constitutional Law*, *supra* note 4, at 403-06 (discussing "constitutional essentials").

20. *See* Michelman, *Constitutional Law*, *supra* note 4, at 398-400; Rawls, Political Liberalism, *supra* note 1, at 291-92 (setting forth the two principles of justice as fairness and elaborating on the first principle).

21. Rawls, Political Liberalism, *supra* note 1, at 136.

22. *See id.* at 216-17; Michelman, *Contract*, *supra* note 13.

23. Rawls, Political Liberalism, *supra* note 1, at 137. Rawls says coercive political power is justified "only" when this condition is met. *See supra* text accompanying note 17.

24. *See* Michelman, *Contract*, *supra* note 13.

be whether such essentials are put effectively into practice. But they are *not* put effectively into practice if and insofar as legislative enactments in apparent violation of them are freely given effect as law by being, as we commonly say, "enforced." In other words, the liberal principle of legitimacy proposed by Rawls is satisfied only on condition that the constitution provides what it morally ought to provide *and* legislative enactments found at variance with constitutional requirements are effectively voided of force.[25] That is why I say invalidity must follow from unconstitutionality in the kind of constitutional-democratic, dualist system envisioned by Rawls—the relevant, key feature of such a system being its reliance on the effective rule of morally meritorious constitutional law as a guarantor of the moral supportability of the system of legal governance in force in the country.

C. *Therefore, Judicial Review?*

At this point, it may seem that there is for Rawls only one possible answer to the question of judicial review: Political morality demands it because political morality encompasses legitimacy,[26] and legitimacy, Rawls says, depends on ascertainable compliance by all ordinary lawmaking with (morally adequate) constitutional law. True as both those claims may be, however, they do not logically compel a choice in favor of judicial review. What—and all—they require is that certain norms be accepted as higher law, ascertained deviation from which renders other acts of lawmaking non-valid. It does not follow that any court of judges must or should be empowered to decide the constitutionality of procedurally proper acts of lawmaking. Other alternatives plainly are available, at least conceptually. For example, it might be the legislature's office to judge the validity of its pending enactments vis-a-vis constitutional requirements, and it might be the electorate's office to send packing legislators whom the electors judge to be shirking or mishandling that responsibility.

---

25. Here we must note a possible refinement. One may take the view that a norm can be valid law although no court or other official actor stands ready to "enforce" it or attach any punitive or other material consequence to non-compliance. Norms that are in that sense non-enforceable may still be regarded as legally binding on their addressees in the sense that anyone who flouts them without special justification is blamable for contempt of the law. *See, e.g.*, Michelman, *Judicial Supremacy*, *supra* note 13, at 592. There thus remains a possible sense of the term "legal validity" according to which the Rawlsian liberal principle of legitimacy might allow an unconstitutional legislative enactment to produce "valid" law, although not law to whose violation any adverse, material consequence may permissibly be attached. Since Rawls's reflections on judicial review take no cognizance of such a possibility, we safely may set it aside.

26. Legitimacy, remember, is defined as the moral justifiability of "the general structure of authority" by which citizens direct coercive political power upon each other. Rawls, Political Liberalism, *supra* note 1, at 136; *see supra* text accompanying notes 15-22.

Legislatures and electorates no doubt may fail and err in performing such offices, and the result then (lacking judicial review) will be jeopardy to the Rawlsian legitimacy of the political order. But so may judges fail and err—not just by mistakenly giving effect to enactments that really do violate morally apt constitutional essentials, but by mistakenly invalidating enactments demanded by morally apt constitutional essentials—and the result if courts do thus err will be the same, that is, jeopardy to legitimacy. Further complicating matters are the following two possibilities: first, that among a set of just constitutional essentials belongs a guarantee of the right of people to rule themselves politically and this right is infringed by subjection to judicial review;[27] second, that the presence of judicial review disastrously saps the will of legislators and electorates to look out for constitutional violations.[28] On these grounds and others that do not in any way contradict Rawls's liberal principle of legitimacy, generations of Americans from the founding onward[29] have questioned both the necessity of judicial review for constitutional-democratic justice and the compatibility of judicial review with constitutional-democratic prudence. Many Americans do so today,[30] and their arguments show, at least, that these are fairly debatable questions.

II. RAWLS ON JUDICIAL REVIEW: TWO PUZZLES

A. *A Pragmatic Stance Towards Judicial Review*

Rawls apparently agrees that the questions are debatable. At any rate, he forbears from undertaking finally to resolve them. He does rally to the support of judicial review, but only to the limited extent of defending it against charges that the practice cannot reasonably be thought to advance the aims of constitutional democracy—because, say, it is anti-democratic or anti-populist in principle. Rawls finds such charges unsustainable as long as judicial decisions "reasonably accord with the constitution . . . and with its amendments and politically mandated interpretations," on the theory that, in such a case, whatever constitutional law the reviewing court enforces may fairly be said to emanate from "the higher authority of the people."[31]

---

27. *See, e.g.*, Michelman, *Regulating Practices*, *supra* note 4, at 327-29; Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 Oxford J. Legal Stud. 18, 18-20 (1993).

28. The locus classicus is James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

29. *See* 2 The Anti-Federalist No. 15, at 437, 440 (Brutus) (H.J. Storing ed., 1981).

30. Leading contemporary works in this vein include Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (forthcoming 2004); Mark Tushnet, Taking the Constitution Away from the Courts (1999); Jeremy Waldron, Law and Disagreement (1999). Kramer, *supra*, is devoted largely to a history of the American controversy over judicial review.

31. Rawls, Political Liberalism, *supra* note 1, at 234.

It will be primarily up to the people to direct their higher, constitution-making authority as justice requires. Supposing they do so (as Rawls surely is entitled to suppose when presenting a normative account of justice in a constitutional-democratic society), the resulting constitution will "specif[y] a just political procedure and incorporate[] restrictions which both protect the basic liberties and secure their priority," and a constitution of that type "allows a place for the institution of judicial review."[32] This all amounts to a claim by Rawls that judicial review *may* be an on-the-whole effective way to carry out the legitimacy principle's demand for assurance of the compliance of ordinary lawmaking with a just set of constitutional essentials. However, he does not hold it to be the only way, or the way that necessarily is always and everywhere best. Judicial review, Rawls concludes, "can perhaps be defended given certain historical circumstances and conditions of political culture."[33] That is as far as he goes. In sum, it is plain that for Rawls, a choice against judicial review, while it might in some circumstances be prudentially ill-advised for persons concerned about liberal legitimacy, would not ipso facto, at all times and places, be a choice against a political-liberal conception of justice.[34]

B. *The First Puzzle*

So far, Rawls's stance appears clear and unequivocal. To say, as he does, that justice as fairness can take judicial review or leave it, depending on the circumstances, is not to equivocate; it is rather to take a stand. Judicial review being neither always required by justice nor always excluded by justice (so goes Rawls's claim), the question of having it or not is a pragmatic one to be made with certain justice-related concerns in view.

An appearance of equivocation may nevertheless enter the picture when we take a closer look at Rawls's category of constitutional essentials. Let us use the term "requirements of justice" to cover all the substantive demands contained in the two principles of justice. These demands include not only the basic-liberties guarantee of the first principle but the resource-distributional demands of the second principle, those of fair equality of opportunity and of the so-called difference principle permitting only such inequalities as may be conducive to the benefit of "the least advantaged members of

32. *Id.* at 339. But Rawls also stretches so far in the other direction as to allow for the possibility that a non-dualist regime of "parliamentary supremacy with no bill of rights" might be the "superior" choice from the standpoint of political liberalism. *Id.* at 234-35.

33. *Id.* at 240.

34. This conclusion resembles that of Ronald Dworkin. *See* Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 33-35 (1996).

society."[35] In Rawls's view, a political system is unjust insofar as it fails to ensure the application of public reason to legislative choices affecting the satisfaction of *any* of the requirements of justice, not merely insofar as it fails to ensure public reason's application to choices affecting the basic liberties.[36] It does not follow, though, in Rawls's view, that every requirement of justice should be made into a requirement of constitutional law. Rawls's name for the requirements of justice that do belong in constitutional law is "constitutional essentials."[37] He includes in that category certain guarantees respecting basic liberties, while excluding from it certain distributional norms (those of the second principle) which he nevertheless holds to be requirements of justice.[38]

Notice the consequence when we recall Rawls's proposition that the coercive exercise of democratic political authority is morally justified only as long as it conforms to a proper set of constitutional essentials (the "liberal principle of legitimacy").[39] Combining this with the exclusion of the second principle's resource-distribution norms from the constitutional essentials, but also keeping in mind the inclusion of those norms in the aims towards which a political practice must honestly and constantly strive in order to satisfy justice, we get the result of a possible gap between legitimacy and justice. A "general structure of authority"[40] may be simultaneously legitimate—morally deserving to have its laws complied with—and deviant from justice. Such a structure is legitimate, Rawls says, if it observably and reliably screens out lawmaking choices incompatible with any basic-liberties guarantee contained among the constitutional essentials, but it also is unjust insofar as it may fail to strive credibly and in good faith toward fulfillment of the resource-distributional demands of justice as fairness.

There is nothing wrong or untoward about allowing in this way for the possibility of legitimacy in a governmental system whose performance observably fails to measure up to justice. For what purpose, after all, do we employ the term "legitimate," if not to convey the complex judgment that a governmental system in the dock, so to speak, for its clear shortfalls from justice continues nevertheless to merit loyalty.[41] On the other hand, the justice-legitimacy gap

35. Rawls, Political Liberalism, *supra* note 1, at 291.

36. *See* Michelman, *Constitutional Law*, *supra* note 4, at 400-03. On the bearing of public reason, see Michelman, *Public Reason*, *supra* note 18, at 975-78.

37. Rawls, Political Liberalism, *supra* note 1, at 227-30.

38. *See id.* There are certain exceptions to this generalization, and we shall come to them. *See infra* notes 47-50 and accompanying text.

39. *See supra* text accompanying notes 17-19.

40. *See supra* text accompanying note 21.

41. *See* Michelman, *Contract*, *supra* note 13; Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 Fordham L. Rev. 345, 357-58 (2003) [hereinafter Michelman, *Ida's Way*].

normally strikes us as something we have little choice but to accept in a partially fallen world,[42] not as something we positively cherish and therefore seek to introduce or preserve when it might be avoided. Some cogent explanation therefore is required for excluding distributional guarantees from the legitimacy principle even as we insist on their figuring vigorously in the justice principle.

The puzzle I am driving at arises with Rawls's response to this need for an explanation. His response is, in fact, somewhat complex, although very compactly stated.[43] Rawls writes:

> Whether the constitutional essentials covering the basic freedoms are satisfied is more or less visible on the face of constitutional arrangements and how these can be seen to work in practice. But whether the aims of the principles covering social and economic inequalities are realized is far more difficult to ascertain. These matters are nearly always open to wide differences of reasonable opinion; they rest on complicated inferences and intuitive judgments that require us to assess complex social and economic information about topics poorly understood. Thus, . . . we can expect more agreement about whether the principles for the basic rights and liberties are realized than about whether the principles for social and economic justice are realized. This is not a difference about what are the correct principles but simply a difference in the difficulty of seeing whether the principles are achieved."[44]

For an American constitutional lawyer or law professor reading those words, what immediately comes to mind is a justiciability worry—which is to say, a worry about the suitability of a norm or class of norms for *judicial* application. The lawyer thinks that Rawls is saying, just as countless lawyers say, that we should be wary about giving constitutional-legal status to norms whose ranges of arguably correct application are so wide and whose correct applications therefore are so contestable, so opaque to demonstrably correct resolution, that these norms cannot credibly be imposed by judicial bodies on differently minded legislative bodies without undue disturbance to the relations of mutual respect that ought to subsist between the two classes of bodies.[45] Now, if that indeed is the worry, or one of them,[46] leading Rawls to divide the substantive demands of justice into those that are and are not constitutional essentials, then Rawls at this stage of his argument is presupposing judicial review's existence. But such an assumption seemingly runs counter to Rawls's

42. *See* Michelman, *Ida's Way*, *supra* note 41, at 352-58.

43. *See* Rawls, Political Liberalism, *supra* note 1, at 229-30.

44. *Id.*

45. For a measured, representative discussion, see Cass R. Sunstein, Designing Democracy: What Constitutions Do 223-24 (2001).

46. In fact, I believe there is a further worry about transparency that holds without regard to expectations about judicial review. *See* Michelman, *Constitutional Law*, *supra* note 4, at 404-06; *infra* Part III.B.

avowals that justice as fairness does not contain an answer to the question of judicial review but rather leaves that question open to pragmatic calculations whose results may vary across national systems. Thus, our first puzzle. Why reject a certified prerequisite for justice from the prerequisites for legitimacy just because that particular prerequisite is ill-suited to a practice—judicial review—that neither justice nor legitimacy requires? (Why not rather dispense with or hem in judicial review?)

C. *The Second Puzzle*

Whether out of a concern about justiciability or for some other reason, Rawls plainly does hold that excessive difficulty in ascertaining the fulfillment of a justice norm, or in securing agreement on that question, is a reason to omit that norm from the package of constitutional essentials that sets the conditions of legitimacy for the governmental order, according to the liberal principle of legitimacy. Yet he seems to maintain this stance inconstantly. Without apparent hesitation, Rawls includes among the constitutional essentials a requirement that the political liberties of everyone be guaranteed their "fair value."[47] "Fair value" of the political liberties means that everyone, regardless of social or economic position, has a "fair opportunity to hold public office and to influence the outcome of political decisions," and Rawls thinks it clear that a political order lacking such a commitment would not be rationally acceptable to every reasonable inhabitant of a constitutional-democratic political culture.[48] Fair value plainly is a distributional norm, and judgments regarding its satisfaction seem open to the sorts of obscurities and uncertainties that Rawls says attach generally to judgments regarding fair opportunity as well as to judgments under the difference principle regarding which policies will and which will not improve the prospects of the least advantaged.[49]

At least as strikingly, Rawls explicitly includes among the constitutional essentials the guarantee of what he calls a "social minimum" providing for satisfaction of citizens' "basic" material needs insofar as required to enable them to take effective part in political and social life.[50] The pressure such guarantees create toward over-extension of the judicial role have been very widely noticed.

---

47. Rawls, Political Liberalism, *supra* note 1, at 338.

48. *Id.* at 327-28.

49. For example, what does fair value of the political liberties demand in the way of equalization of the resources available for a person's primary and secondary education? *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 111-17 (1972) (Marshall, J., dissenting); Amy Gutmann, Democratic Education 136-48 (1987).

50. Rawls, Political Liberalism, *supra* note 1, at 7, 166, 228-29.

How, then, can Rawls include it as a constitutional essential while excluding fair equality of opportunity? That is the second puzzle.

III. ANSWERS

A. *Assuming Justiciability is the Driving Concern*

These puzzles are easy, hardly puzzles at all. Both yield to a single solution, which proceeds in two stages. At the first stage, we assume that a difference in degrees of justiciability is the only difference Rawls sees between basic-liberty guarantees and distributional guarantees, leading him to conclude that the former but not the latter belong among the constitutional essentials. On that assumption, Rawls's claim is that the relative non-justiciability of distributional norms of justice is a factor to be considered in constitution-writing, *in case* the relevant considerations otherwise weigh strongly in favor of judicial review.

We imagine a chooser, a constitution-writer, whose choices presumably are governed by the pursuit of the political conception of justice as fairness. Any choice in favor of judicial review thus will reflect a set of considerations that figure as reasons from within justice as fairness. We have already noticed in a rough way what might be the justice-sourced reasons for choosing for or against judicial review. Against such a choice, there would be weighing a concern that by committing decisions regarding the demands of justice upon politics to an electorally unaccountable judiciary, we compromise the equality—the fair value—of political liberty. We cramp the development and exercise of the rank-and-file's capacities for a sense of justice.[51] On the other side of the balance would be weighing beliefs that legitimacy depends on both the aptness to justice and the public credibility of the applied meanings attributed to the constitutional essentials, the meanings they acquire in the crucible of live political practice, and that independent judiciaries are better able than ordinary political bodies to produce apt and credible resolutions. So even granting judicial review's detraction from the fair value of political liberty, judicial review still might—although it also might not—be found on-balance favorable to the aim of realizing the most fully adequate total scheme of basic liberties that is practically within reach.

Suppose that the foregoing is roughly, in a nutshell, the Rawlsian justice-sourced argument for (or against) judicial review. Suppose we have a constitution-writer who, accepting this framework, estimates that the net contributions of judicial review to legitimacy will be very great, but only as long as highly non-ascertainable norms are kept out

51. *See supra* text accompanying notes 27-28.

of the judicially enforceable parts of the constitution.[52] In such a case, might not the writer prudently presume against including any such norms in the constitution? Might she not prudently decide to exclude all such norms except those, if there are any, whose inclusion is so crucial to legitimacy as to overcome losses owing to damaged or forgone judicial review, which will attend their inclusion? Rawls, we may infer, believes that neither fair equality of opportunity nor the difference principle rises to that level of urgency. It is "more urgent," he writes (plainly with legitimacy in view), that "the essentials dealing with the basic freedoms" be settled by constitutional law.[53] Given "firm agreement" on these essentials along with fair-seeming, recognizably democratic political procedures, "willing political and social cooperation between free and equal persons can normally be maintained"[54]—or, in other words, legitimacy is sufficiently served.

This answer to the first puzzle points directly to an answer to the second. Rawls, we are assuming for the moment, believes that justiciability (suitability to enforcement by judges) makes a difference that counts in deciding which of the requirements of justice as fairness should and should not be classed as constitutional essentials, or, in other words, which should and should not be written into constitutional law. But to believe that justiciability does always matter for this choice is not necessarily to believe that justiciability always—or ever!—is *the only* consideration that matters. Another that does, as we have just seen, is that of urgency in relation to liberal legitimacy. In Rawls's view, a graphic guarantee that everyone shall enjoy the fair value of the political liberties is, in fact, urgently required for the legitimacy of any system for the exercise of political power,[55] and likewise, apparently, for the assurance that everyone's basic material needs are met. The urgency factor that applies to assurances regarding the basic liberties also applies to these two distributional assurances. That observation argues for giving both of them some expression in constitutional law, even if at the cost of involving courts in decisions of a kind for which they are not especially well suited. (Alternatively, the result may be that courts forbear to judge beyond the bounds of their competence and we wind up having some constitutional rights that are judicially "under-enforced," a situation that Lawrence Sager argues convincingly we can live with.)[56]

52. For what is meant here by "non-ascertainable," see *supra* text accompanying notes 44-45.

53. Rawls, Political Liberalism, *supra* note 1, at 230.

54. *Id.*

55. *Id.* at 299, 327-29.

56. *See* Lawrence G. Sager, *The Why of Constitutional Essentials*, 72 Fordham L. Rev. 1421, 1424-26 (2004).

B. *Justiciability Aside*

To this point, we have assumed that when Rawls points out the relative non-ascertainability of fair equality of opportunity and the difference principle,[57] he is making a point about justiciability or over-extension of the judicial role. It is only on the basis of that assumption that any tension at all can be found between Rawls's exclusion of those two requirements of justice from the constitutional essentials and his professed agnosticism regarding judicial review. That assumption, however, is highly questionable. Rawls has reasons for concern about the relative ascertainability of constitutional essentials that are non-dependent on judicial review and stem directly from the liberal principle of legitimacy.[58]

Recall the crucial place of the idea of constitutional essentials in the liberal principle of legitimacy.[59] These selected features of the basic structure are to bear the full weight of legitimation in the first instance. The stated prerequisite to the moral supportability of the legal coercion emanating from the structure is that all such coercion should be constrained by an aptly selected set of constitutional essentials. Only on that condition may the structure and its coercive authority be rationally acceptable to all reasonable citizens. It follows that, in deciding which basic features of a regime are and which are not to be regarded as constitutional essentials, we have to avoid errors not only of under-inclusion, but also of over-inclusion.

Omission of one or another item from the list of those placed beyond the tender mercies of majorities—liberty of conscience, for example—may render the regime not rationally acceptable to the reasonable. That would be the error of under-inclusion, and it is obvious. Perhaps less obvious is what risk we might pose to legitimacy by placing in the category of constitutional essentials each and every dimension of political justice upon which rational citizens reasonably would insist. If (as in justice as fairness) a commitment to the difference principle is held to be such a dimension, what possibly can be hazardous to legitimacy in writing that commitment into constitutional law? A part of the answer is "non-transparency."

Consider that, in a Rawlsian view, I can willingly accept the daily run of coercive acts from a constituted regime, despite my reasonable moral and prudential aversion to many of them, as long (but only as long) as two conditions are satisfied: (1) I regard this regime as universally reasonably acceptable by the rational, and (2) I see my fellow citizens abiding by it. But this conjunction of perceptions is possible for me only if I can at all times see what the regime actually *is*

57. *See supra* text accompanying note 44.

58. The following explanation is taken from Michelman, *Constitutional Law*, *supra* note 4, at 404-06.

59. *See supra* text accompanying notes 23-24.

that my fellow citizens are abiding by, so that I can check whether *that* regime, the one actually in force, does in fact meet the test of universal reasonable and rational acceptability. (That is why interpreters, as Rawls says, must always be seen to be interpreting one and the same constitution.)[60] Now since, according to Rawls, the regime's acceptability to me is given in the first instance by its incorporation of correct settings for a certain, minimal set of required features—the constitutional essentials—then (if the fact of this incorporation is to be at all times observable by me) the requirements in the minimal set had better not be too opaque to a compliance check by reason of technical complexity of application. Such considerations plainly enter into Rawls's view that basic liberty rights can be constitutional essentials while the difference principle cannot.

IV. CONCLUSION

Rawls's responses to the judicial review question and closely related matters are pragmatic ones guided by the moral content of justice as fairness. That is a merely exegetical and stylistic conclusion. Beyond it lie some hard and deep substantive questions, chiefly whether Rawls's constitution-centered theory of normative legitimacy is a good one. Those questions are for another day. The task for this day has been that of getting clear what the theory is, especially as it bears upon the question of judicial review.

60. Rawls, Political Liberalism, *supra* note 1, at 237.