

EQUAL CITIZENSHIP: RACE AND ETHNICITY

RACE, LABOR, AND THE FAIR EQUALITY OF OPPORTUNITY PRINCIPLE

Seana Valentine Shffrin*

The civil rights movement and the labor movement figure among the most important political movements in the United States in the twentieth century. Many liberals locate their political identity in large part through their support of these struggles. Yet, strangely, race and labor have an uncomfortable background presence in the most important piece of liberal writing of the last century, John Rawls's *A Theory of Justice*.¹ While feminists have provoked lively and fruitful discussion about the place of gender and family in *A Theory of Justice*,² the precarious presence of race and labor in Rawls's theory has not generated the same attention.³

* Associate Professor of Philosophy, UCLA and Professor of Law, UCLA School of Law. I am grateful to Benjamin Chan, Sharon Dolovich, Tal Grietzer, Barbara Herman, Máximo Langer, Gillian Lester, Lisa Lucas, Collin O'Neil, Tommie Shelby, Steven Shffrin, Jeremy Waldron, Lesley Wasser, and the participants in the *Fordham Law Review* symposium for critical comments and assistance.

1. John Rawls, *A Theory of Justice* (1971); John Rawls, *A Theory of Justice* (rev. ed. 1999). Where passages occur in both editions, I will abbreviate the citation as "Rawls, *A Theory of Justice*," followed by the page number(s) of the first edition and then the page number(s) of the revised edition, separating the editions by a slash. Otherwise, I will make clear to which edition I am citing and where there are differences between editions.

2. See, e.g., Susan Moller Okin, *Justice, Gender, and the Family* 89-109 (1989); Joshua Cohen, *Okin on Justice, Gender, and Family*, 22 *Can. J. Phil.* 263 (1992); Jane English, *Justice Between Generations*, 31 *Phil. Stud.* 91 (1977); Linda R. Hirshman, *Is the Original Position Inherently Male-Superior?*, 94 *Colum. L. Rev.* 1860 (1994); Eva Feder Kittay, *Human Dependency and Rawlsian Equality*, in *Feminists Rethink the Self* 219-66 (Diana Tietjens Meyers ed., 1997); S.A. Lloyd, *Situating a Feminist Criticism of John Rawls's Political Liberalism*, 28 *Loy. L.A. L. Rev.* 1319 (1995); Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 *Ohio St. L.J.* 19 (1998); Martha C. Nussbaum, *Rawls and Feminism*, in *The Cambridge Companion to Rawls* 488 (Samuel Freeman ed., 2003); Kimberly A. Yuracko, *Toward Feminist Perfectionism: A Radical Critique of Rawlsian Liberalism*, 6 *UCLA Women's L.J.* 1 (1995). These criticisms provoked further, sympathetic reflections by Rawls about gender equality and its role in justice as fairness. John Rawls, *Justice as Fairness: A Restatement* § 50 (Erin Kelly ed., 2001); see also *id.* at 11, 64-66, 117.

3. There are some discussions of race and Rawls, but mainly they focus on the resources (or lack thereof) that Rawls's framework might bring to bear on problems of race and not on the attention or lack of attention to these problems within Rawls's

My primary aim in this Article is simply to dwell on the ambiguous status of race and labor in *A Theory of Justice*—central in some respects, but importantly peripheral in others. I will also speculate about why a theoretical apparatus that has the resources to address these issues omits to do so directly. Although race and labor cannot be treated as a piece, I discuss them both because some of the peculiarities of their treatment together become evident when considering the part of the theory most pertinent to these topics—the relatively under-scrutinized fair equality of opportunity principle.⁴ I will not argue in depth for any particular changes to the theory, although I will outline some ways the theory could be significantly more responsive to these modalities by including explicit anti-discrimination principles in the theory and by elevating the fair equality of opportunity principle to a higher level of priority. I will also discuss the complications such responsiveness might engender.

I. RACE

In some respects, the place of race in Rawls's theory is just what one would expect. Although it is not explicit in his first description of the original position,⁵ it is clear from its spirit and from Rawls's later remarks that race and ethnicity are features obscured from parties in the original position.⁶ Indeed, expositors frequently cite the opacity of

own work or by the principles of justice. See, e.g., Andrew Koppelman, Antidiscrimination Law and Social Equality 190-205 (1996); Larry L. Thomas, *Rawlsian Self-Respect and the Black Consciousness Movement*, 8 Phil. F. 303 (1977-78). But see Thomas W. Pogge, Realizing Rawls 164-65 (1989) (noting that race-and-gender-based inequalities are "neglected" in *A Theory of Justice*); Hirshman, *supra* note 2, at 1864-65, 1881 (noting that Rawls takes religious conflict to be liberalism's main struggle and ignores both race and the contribution of race and gender to the rise of religious fundamentalism). See also Simon Caney, *Cosmopolitanism and the Law of Peoples*, 10 J. Pol. Phil. 95, 102 (2002) (noting in the context of Rawls's international theory that Rawls's conception of a decent society allows for racial discrimination).

4. But see Larry A. Alexander, *Fair Equality of Opportunity: John Rawls' (Best) Forgotten Principle*, 11 Phil. Res. Archives 197 (1986); Richard J. Arneson, *Against Rawlsian Equality of Opportunity*, 93 Phil. Stud. 77 (1999) [hereinafter Arneson, *Against Rawlsian Equality*]; Richard J. Arneson, *What Sort of Sexual Equality Should Feminists Seek?*, 9 J. Contemp. Legal Issues 21 (1998) [hereinafter Arneson, *What Sort*]. While Alexander and Arneson are critical of the fair equality of opportunity principle, I will take the opposite tack and argue that Rawls does not take it seriously enough. See also the briefer discussions in Brian Barry, *Theories of Justice* 217-25 (1989); James S. Fishkin, *Justice, Equal Opportunity, and the Family passim* & 154-58 (1983) (arguing that equality of opportunity may require incursions into family autonomy); Pogge, *supra* note 3, at 165-81; Robert P. Burns, *Rawls and the Principles of Welfare Law*, 83 Nw. U. L. Rev. 184, 245-51 (1989) (criticizing the priority of equal opportunity over the difference principle); Thomas W. Pogge, *Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions*, 12 Soc. Phil. & Pol'y 241, 251-55 (1995).

5. Rawls, *A Theory of Justice*, *supra* note 1, § 24, at 137/118.

6. See, e.g., John Rawls, *Political Liberalism* 25 (1996) (explicitly placing race behind the veil); see also Rawls, *A Theory of Justice*, *supra* note 1, § 16, at 99/85, § 25,

parties' race as a representative feature of the "veil of ignorance," without even noting that it is only implicit that race is to be obscured.⁷

Nonetheless, it is strange how little is made of race and racism in the theory. The two principles do not include any general anti-discrimination principle for government, other basic social institutions, or citizens.⁸ Strikingly, there is nothing explicit in the two principles that resembles what many regard as the centerpiece of our (somewhat) liberal Constitution—namely, the Equal Protection Clause—or its statutory fellow travelers, the Civil Rights Acts. These omissions are also troubling with respect to gender, sexual orientation,

at 149/129 (arguing that race is an arbitrary characteristic that would not be the basis for any positive principle), § 77, at 506/443 (arguing that no race lacks the capacity for moral personality which is the basis of equality).

7. See, e.g., English, *supra* note 2, at 91; see also Robert John Araujo, *Critical Race Theory: Contributions to and Problems for Race Relations*, 32 Gonz. L. Rev. 537, 543 (1996-97); Roger Brownsword, *An Interest in Human Dignity as the Basis for Genomic Torts*, 42 Washburn L.J. 413, 482 (2003) (stating that the Rawlsian veil in *A Theory of Justice* excludes race and sex and finds racial discrimination unjust); Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 Cornell L. Rev. 595, 669 (1999); Jesse Furman, *Political Illiberalism: The Paradox of Disfranchisement and the Ambivalences of Rawlsian Justice*, 106 Yale L.J. 1197, 1202 (1997); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 Minn. L. Rev. 1, 22 (2000) (reporting that the veil from *A Theory of Justice* excludes knowledge of race, sex, age, abilities, beliefs, and commitments); Thomas E. Hill, Jr., *Autonomy and Agency*, 40 Wm. & Mary L. Rev. 847, 849 (1999); Erik Luna, *Race, Crime, and Institutional Design*, 66 Law & Contemp. Probs. 183, 203 (2003) (describing the veil as obscuring race, citing *A Theory of Justice*); Dawn C. Nunziato, *Justice Between Authors*, 9 J. Intell. Prop. L. 219, 228 (2002) (stating that the Rawlsian veil excludes race, citing *A Theory of Justice*); Yuracko, *supra* note 2, at 4 & n.6 (citing race and sex as features of the veil, though noting that sex—but not noticing that race—is not among the original features of the veil).

8. The two principles of justice defended in *A Theory of Justice* are:

First Principle

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second Principle

Social and economic inequalities are to be arranged so that they are both:

- (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

Rawls, *A Theory of Justice*, *supra* note 1, § 46, at 302/266. The first clause of the second principle is labeled the "difference principle," and the second clause is labeled the "fair equality of opportunity principle." The first principle has lexical priority over the fair equality of opportunity principle, which, in turn, has lexical priority over the difference principle. The formulation of the two principles underwent some evolution in subsequent writings by Rawls, but the changes are not significant for my purposes. See Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 42-43 (reordering two clauses in the second principle, adding the phrase "members of society" after "least-advantaged" in the difference principle, and altering the first principle to provide for each person having the "same inalienable claim to a fully adequate scheme of equal basic liberties").

and disability. But, while much of my argument pertains to these other omissions as well, I focus on race because it is especially surprising that the principles of justice do not directly protect against racial discrimination, given the evident concern John Rawls had about our history of racial injustice. Rawls cites the wrongness of racial discrimination as a prototypical "considered conviction" of justice.⁹ He repeatedly emphasizes the injustice of slavery.¹⁰ Nonetheless, the principles themselves do not specifically forbid racial discrimination or arbitrary discrimination more generally.

To be sure, there are provisions in the two principles that do some or even much of the work of an anti-discrimination principle. The first principle guarantees the equal basic liberties.¹¹ In *A Theory of Justice*, Rawls identifies the basic liberties of citizens as "roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law."¹² The first principle's guarantee thus clearly rules out slavery as well as apartheid.¹³ It thereby also rules out forms of discrimination that have

9. See, e.g., Rawls, *A Theory of Justice*, *supra* note 1, § 4, at 19/17 (noting certainty in our convictions that racial discrimination is unjust), § 6, at 30-31/27-28 (criticizing utilitarianism for accommodating discriminatory preferences), § 25, at 149/129 (ruling out caste systems and other positive principles of discrimination as not even moral conceptions).

10. See *id.* § 39, at 248/218 (criticizing slavery); see also Rawls, *Political Liberalism*, *supra* note 6, at xxxi (taking opposition to slavery as a starting point to extend the theory of justice to tackle inequities suffered by women), 151-52 n.16 (stressing the importance that matters like the abolition of slavery be permanently enshrined so that citizens express a firm commitment about their common status to one another), 233 n.18 (discussing the failures of the judiciary in interpreting the Reconstruction Amendments), 249-51 (discussing the strategy of abolitionists in convincing the public, as well as the civil rights movement); Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 23-24 (contrasting the conception of people as fair and equal with the conception of slaves, citing work on American slavery), 29 (citing approvingly our antipathy to slavery as a fixed point that we will never relax); Thomas Pogge, *A Brief Sketch of Rawls's Life, in Development and Main Outlines of Rawls's Theory of Justice* 3-4 (Henry S. Richardson ed., 1999) (discussing Rawls's early childhood awareness of issues of race). Rawls's interest in this history was marked by a reputedly voracious appetite for books about Abraham Lincoln. Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 29 n.23, 147 n.18; Rawls, *Political Liberalism*, *supra* note 6, at 45 n.48, 232-33 n.15 (all citing different books about Lincoln); John Rawls, *Times* (London), Nov. 27, 2002, at 32 (noting Rawls's admiration for Lincoln); Ben Rogers, *John Rawls*, *Guardian*, Nov. 27, 2002, at 24.

11. Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 42-43; Rawls, *Political Liberalism*, *supra* note 6, at 291; Rawls, *A Theory of Justice*, *supra* note 1, § 11, at 60-61/53, § 46, at 302/265-66. The difference in formulation in these versions does not affect my point.

12. Rawls, *A Theory of Justice*, *supra* note 1, § 11, at 61/53.

13. See *id.* § 25, at 149/129; Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 21. In *A Theory of Justice*, Rawls is quite explicit that the parties would reject racist principles as both unjust and irrational. Rawls, *A Theory of Justice*, *supra* note

a direct impact upon the equal distribution and protection of the basic liberties. But, significantly, with the important exception of the fair value of the political liberties,¹⁴ Rawls argues that only the *formal* equal basic liberties are guaranteed by the first principle. The worth or value of those liberties may be affected by the distribution of other primary goods whose distribution is regulated by the second principle.¹⁵ Not all forms of discrimination have an impact upon the equal enjoyment of the formal basic liberties, even though they may affect the worth of the basic liberties and are objectionable in other respects. For example, racially-based employment discrimination, housing discrimination, discrimination in the provision of public amenities, discrimination in economic markets—loans and consumer pricing practices generally—are all signal forms of racial discrimination; but they do not necessarily interfere with the formal equality of the basic liberties. To put it concretely, it is unclear what specific provision of the two principles would directly condemn as unjust the treatment of Rosa Parks and countless other African-Americans who were told they had to sit at the back of the bus.

Perhaps anti-discrimination principles may be derived from the guarantee of “the rights and liberties specified by the liberty and integrity (physical and psychological) of the person” or “the rights and liberties covered by the rule of law.”¹⁶ Arbitrary treatment arguably conflicts with the principles underlying the rule of law and with respect for the integrity of the individual.

Were we in a society governed by the two principles, and drafting its constitution or laws, I would certainly push this position. But it has weaknesses as an interpretation of the text. For one thing, it is certainly regrettable that the anti-discrimination character of these principles is so submerged. For another, the examples meant to illustrate the gist of these principles are scanty and do not offer much encouragement for the idea that they provide the backbone of citizens’ protection against objectionable discrimination. If these liberty guarantees are meant to function, in part, as principles condemning racial discrimination, it is disappointing that this is not made explicit, especially given Rawls’s otherwise heightened sensitivity to the way in which publicly articulated guarantees play a role in expressing our mutual respect and in securing the social bases

1, § 25, at 149/129. Strangely, Rawls does not extend the thought to have the parties consider principles protecting them against behavior that would arbitrarily treat race as a relevant basis for decisions and distribution.

14. See Rawls, *A Theory of Justice*, *supra* note 1, § 36, at 224-25/197.

15. *Id.* § 32, at 204/179.

16. See Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 44; see also Rawls, *Political Liberalism*, *supra* note 6, at 291; Rawls, *A Theory of Justice*, *supra* note 1, § 11, at 60-61/53.

for self-respect.¹⁷ Instead, these provisions, as Rawls exemplifies them, seem intended to provide for citizens' physical security against one another; to provide for a truth-seeking, open, public, codified, and systematically applied institution of legal enforcement; and to protect against overzealous methods of state enforcement, such as psychological torture.¹⁸

Tommie Shelby draws attention to another section of the text about the rule of law, in which Rawls identifies as injustices "the subtle distortions of prejudice and bias [that] . . . effectively discriminate against certain groups in the judicial process." These instances of discrimination represent the failure of judges and others in authority "to apply the appropriate law or to interpret it correctly."¹⁹ This is encouraging, but both ambiguous and rather tentative. Here, Rawls's remarks concern only judicial enforcement of independently formulated laws; however they are formulated, they must be impartially administered. He suggests neither that the rule of law requires positive legislation to take a particular cast, nor that it creates a positive duty to create anti-discrimination legislation. Indeed, in another section, Rawls characterizes formal justice as directing that "in their administration laws and institutions should apply equally (that is, in the same way) to those belonging to the classes defined by them," but that this notion does not necessarily entail "substantive justice."²⁰ He entertains and does not decisively reject conceptions of formal justice and the rule of law that are consistent with "the most arbitrary forms of discrimination."²¹ Moreover, however broadly understood, the guarantee of the rule of law only applies to the state and its legal system.²² Importantly, it does not represent the idea that other forms of discrimination in the provision of public amenities by non-governmental actors are unjust in addition to being immoral.²³ Many bus companies, lunch counters, and hotels, are, after all, privately operated.

These considerations render it at best ambiguous whether anti-discrimination principles are derivable from the first principle. Hence, it would also be at best ambiguous whether anti-discrimination

17. See Rawls, *A Theory of Justice*, *supra* note 1, § 12, at 65-75/57-65, § 82, at 544-48/477-79.

18. See *id.* § 38, at 235-43/206-13, § 10, at 59/51.

19. See *id.* § 38, at 235/206-07; see also Tommie Shelby, *Race and Social Justice: Rawlsian Considerations*, 72 *Fordham L. Rev.* 1697, 1705 (2004).

20. Rawls, *A Theory of Justice*, *supra* note 1, § 10, at 58-59/51-52.

21. See *id.* § 10, at 59/51-52 (entertaining the notion of compliance with the rules of formal justice nevertheless being consistent with other forms of injustice).

22. *Id.* § 38, at 235/207.

23. I deliberately bypass the issue of whether some forms of discrimination in some private associations may be deeply immoral, but not unjust. I discuss the scope and justification of rights of exclusion and the right of freedom of association in greater depth in Seana Shiffrin, *What's Really Wrong with Compelled Association?* (2004) (unpublished manuscript, on file with author).

principles could be adopted at the constitutional stage, for the constitution's scope involves adopting those provisions and erecting those social institutions that the principles of justice require.²⁴ Even if they could be adopted at the constitutional stage, it seems regrettable to leave open whether they *must* be, rather than making the commitment to anti-discrimination norms explicitly part of the foundations of the public culture of justice.

Furthermore, interpreting these provisions of the basic liberties to include implicitly a general principle forbidding arbitrary discrimination renders the placement of the fair equality of opportunity principle peculiar. The hypothesized anti-discrimination provisions of the first principle cannot encompass fair equality of opportunity. If they did, it would then make no sense that there is an independent fair equality of opportunity principle. Perhaps what is entailed by the first principle guarantees something more like formal equality of opportunity. But this is a strange intention to ascribe to Rawls in *A Theory of Justice*, given that the discussion of fair equality of opportunity explicitly pits it against the alternative of formal equality without identifying formal equality as a part of the first principle.²⁵ If he meant formal equality of opportunity to be a complement or an entailment of the first principle, it is peculiar that he did not say so.²⁶

As the prior argument suggests, the first principle is not to be read singly, out of context. It is supplemented by the second principle, the lexically prior part of which might be characterized as a robust anti-discrimination principle. That part provides: "Social and economic inequalities are to be arranged so that they are . . . attached to offices and positions open to all under conditions of fair equality of opportunity."²⁷ Fair equality of opportunity requires that conditions must be such that those with equal talent who make equal efforts have the same chance of occupying positions of status and power.²⁸ Although Rawls's articulated motivation for the principle is to insulate the mechanisms of access to these positions from the influence of class differentials,²⁹ the terms of the principle would also rule out many of the most significant forms of discrimination. For

24. Rawls, *A Theory of Justice*, *supra* note 1, § 31, at 196-99/173-75.

25. *Id.* § 12, at 72-73/62-63.

26. In *Justice as Fairness*, however, Rawls does note that he regards some formal principle of opportunity to be a constitutional essential. His brief discussion is somewhat confusing. He does not indicate why this principle is not an explicit component of the first principle, even though two sentences earlier he states that the first principle "covers the constitutional essentials." Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 47.

27. Rawls, *A Theory of Justice*, *supra* note 1, § 46, at 302/266; *see also id.* § 14, at 83/72.

28. *Id.* § 12, at 72-73/62-63.

29. *Id.* at 73/63.

example, employment discrimination is obviously incompatible with the principle of fair equality of opportunity. And, in most social contexts, housing discrimination and other significant forms of economic discrimination will also be incompatible with fair equality of opportunity.³⁰

But, deriving principles of anti-discrimination from the fair equality of opportunity principle is an unsatisfying route of ensuring racial equality and of marking the wrong of racial discrimination.³¹ For one thing, it renders the status of many anti-discrimination norms instrumental to the aim of ensuring that the labor market functions as it should. This is strange mostly because anti-discrimination norms seem to have a more intrinsic, primary place in our notions of justice than this conception admits. In addition, if the employment sector were well enough insulated and complemented by a thorough-going egalitarian education and training system, other forms of economic discrimination or discrimination in the provision of public amenities might not compromise fair equality of opportunity. Thus, so long as their effects did not violate the difference principle (the principle requiring the basic institutions to be organized so that if there are social and economic inequalities, they are to the greatest benefit of those least advantaged by them), they might not be unjust as measured by the two principles. Although a crucial reason that discrimination is so offensive to our sense of justice has to do with the distorting effect on individuals' career prospects, other opportunities, and avenues of access to power, it is not the exhaustive, or perhaps even the central, objection to racial discrimination.

Finding principles of anti-discrimination embedded within the second principle raises additional troubles that connect to the second topic of this Article: the underdeveloped articulation of the importance of labor in Rawls's theory. As the theory is set out, the first principle is lexically prior to the second principle; and the second

30. Perhaps these forms of discrimination are also incompatible with the first principle's guarantee of the fair value of the political liberties. In what follows, for ease of discussion, I will put aside the fair value of the political liberties and focus on fair equality of opportunity, because the latter principle more closely resembles an anti-discrimination principle than the former. But many reservations that I have about generating anti-discrimination principles from the fair equality of opportunity principle also hold for their relationship to the fair value of the political liberties.

31. Richard Arneson advances a different line of criticism—namely, that the principle does not sufficiently promote sexual equality. As he points out, the fair equality of opportunity principle would not provide grounds to criticize stereotyping socialization practices that affect ambitions in gendered ways and, through them, reproduced gender inequity. See Arneson, *What Sort*, *supra* note 4, at 25-27. The same might also be said of racial socialization practices. While it is true that socialization practices are not directly subject to criticism by the fair equality of opportunity principle, it would be difficult to provide the sort of educational training necessary to fulfill the principle's commands without thereby engaging in teaching that also combatted the stereotypes that produce significant differentiation of ambitions.

principle is to give way if the two come into conflict. This renders important aspects of an anti-discrimination regime secondary, in theory, to the protection of other basic liberties. If a conflict does arise, it may have practical ramifications as well. For example, depending on the scope of the basic liberties and in particular the scope of the right of free expression, laws against racial harassment in the workplace may be difficult to defend.

One might suggest that the scope of the right to free expression should be sensitive to the aim of ensuring equality and avoiding discrimination. Rawls is explicit that the basic liberties should be conceived in ways that are reasonable and sensitive to other systematic aims.³² But his main example of this mutual adjustment involves understanding the right of free expression in light of the conditions necessary to satisfy a different basic liberty—the fair value of the political liberties—that, as part of the first principle, enjoys the same status as the right of expression.³³

It is less clear, within the theoretical apparatus, how we should understand the suggestion that the scope of the right of free expression that does fall within the range of the basic liberties is to be understood in light of our interest in equality of opportunity. Rawls does endorse the idea that we may prohibit job advertisements that would exclude applicants of a particular ethnicity, race, or gender; but he seems to suggest that these restrictions on the content of this sort of commercial speech do not bear on the basic liberties because this sort of commercial speech falls outside the range of speech protected by the first principle.³⁴ While this categorization of employment advertisements may represent a reasonable limit on the scope of the basic liberties, it would be much more controversial and implausible to claim that all workplace expression by employees falls outside the scope of the basic liberty of freedom of speech. And if this is so, then the problem of racial harassment in the workplace and more general issues pertaining to hate speech will arise. If the scope of (some) of the basic liberties is to be interpreted in light of the aims of the second principle, a convoluted, and not obviously coherent, relationship between this interpretative directive and the lexical priority principle is suggested. For, if the interpretation of the scope of the basic liberties is to be *highly* sensitive to the aims of fair equality of opportunity, this may deprive the lexical priority of the first principle over the principle of fair equality of opportunity of much purchase.

Admittedly, though, one might dispute whether the dilution of the lexical priority principle would be regrettable, all things considered. As I will discuss at greater length below, no sustained argument

32. See Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 104.

33. See *id.* at 148-49.

34. See Rawls, *Political Liberalism*, *supra* note 6, at 363-64.

appears in Rawls's work for the priority of the first principle over the principle of fair equality of opportunity. The main argument for the lexical priority principle focuses on conflicts between the difference principle and the first principle. Rawls appeals to the fact that past a certain floor, parties in the original position would be more concerned to secure guarantees of their ability to pursue their conception of the good than to enjoy greater material wealth.³⁵ Whether this argument provides grounds for placing lexical priority on the first principle over the fair equality of opportunity principle depends on how we understand the purpose of the latter principle.

On this subject, too, Rawls is strangely circumspect. The fair equality of opportunity principle might be understood as a principle of economic efficiency in production: Production is most likely to be most efficient if the system of allocation of jobs is sensitive only to talent and willingness to work and insulated from the influence of arbitrary factors. Understood in this way, the argument for the lexical priority principle would be germane to establishing the priority of the first principle over the entire second principle, not merely the difference principle. But this interpretation of the fair equality of opportunity principle has serious flaws, generally and in the specific context we are considering. While this interpretation would provide an argument for the priority of the first principle over the fair equality of opportunity principle, it would do so at the cost of leaving mysterious the priority of the fair equality of opportunity principle over the difference principle. If the fair equality of opportunity principle only represents a principle of efficiency, wouldn't it follow from the difference principle, which seeks arrangements to the maximal benefit of the least well-off? Even if the difference principle did not imply the fair equality of opportunity principle, understood in this way, why would a principle of efficient labor division have priority over the difference principle from the perspective of parties in the original position?

From the perspective of an interest in racial equality, this interpretation would have two further defects. First, it would represent an even more instrumental justification for anti-discrimination norms, one driven merely by an interest in efficiency and not from sensitivity to the inherent unfairness and indignity of racial discrimination. Second, it *would* be peculiar, then, to suggest, in light of the grounds for the priority principle, that although the first principle has priority over the second principle, it should be interpreted so as to be sensitive to the aims of the second principle. Why would it be attractive to delineate a narrower scope to the right of free expression in order to serve the interests of economic efficiency?

35. See Rawls, *A Theory of Justice*, *supra* note 1, § 82, at 541-48/474-80.

This interpretation of the fair equality of opportunity principle is thus unpromising and, in fact, explicitly contradicted by Rawls.³⁶ As I will discuss in greater depth below, the attractions of the fair equality of opportunity principle range beyond their contribution to economic efficiency. Briefly, given the central moral interests of the parties, it makes perfect sense that they would act to insulate access to employment and positions of power from the influence of morally arbitrary factors, such as race, gender, and class position. Access to employment and positions of power would be of interest to them not only because such positions are conduits to other primary goods, such as wealth, but also because one's work and one's ability to influence public affairs often represent important, and more intimate and direct, avenues for the exercise of one's capacities and for other modes of the pursuit of one's conception of the good.³⁷ Furthermore, the opportunity to make effective contributions to the scheme of social cooperation, commensurate with one's skills and abilities, in conjunction with other citizens, is also relevant to the realization of one's capacity for a sense of justice. By acting in a cooperative way and contributing to the scheme of social cooperation effectively, one acts as a participating member of the cooperative scheme of social justice.

In addition, the primary good of self-respect may be implicated here as well. It may matter to ensuring conditions of self-respect that individuals are guaranteed that they will be treated as individuals in relevant ways and that they will be insulated from the operation of ignominious bias. Thus, each individual in the original position may have a direct, individual interest in how access to these positions is regulated and not just a more general interest in ensuring that the system of labor division tends toward the most productive system of wealth generation imaginable.

But, if fair equality of opportunity is interpreted this way, then the argument for the priority principle does not speak to this aspect of the priority; it only directly speaks to the priority of the first principle over the difference principle. If the fair equality of opportunity principle appeals to interests of the parties other than their interests in monetary wealth, then it is unclear why they would opt for a strict priority of the first principle over the second. Their interests in fair and equal access to work and in not suffering discrimination in such an important area of life might rate competitively with their interests in the other basic liberties. This is why I remarked at the beginning of

36. *Id.* § 14, at 84/73. In *Justice as Fairness*, a footnote indicates that Rawls does not regard the fair equality of opportunity principle to be entailed by the difference principle, but that he is also uncertain about how to respond to some critics' suggestions that the lexical priority of the former over the latter should be relaxed. See Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 163 n.44.

37. Rawls, *A Theory of Justice*, *supra* note 1, § 14, at 83-90/73-78.

the discussion of the fair equality of opportunity principle that the interpretative strategy's implicit dilution of the lexical priority principle might not represent such a terrible result. There may not be a deep rationale for this aspect of the lexical priority principle.

But this interpretation points to some difficulties for the theory. First, although perhaps appropriately, the loosening of the lexical priority principle complicates the already difficult problem of sorting out how the basic liberties protected by the first principle are to be defined and situated with respect to one another.³⁸ Second, if some of the motivation for the fair equality of opportunity principle comes from an interest in being treated as an equal, then the question again arises: Why is this interest represented in such a piecemeal way? Why wouldn't the parties in the original position select a more direct, thoroughgoing, general protection against discrimination and place this principle at the highest level of priority?

As I hope these interpretative arguments show, while the two principles would put into place some important components of an anti-discrimination regime, some of which are substantially further-ranging than our current legal and social practices, the impression of the absence of an anti-discrimination principle cannot be entirely dispelled by a more creative reading of the two principles. Perhaps, though, the absence of much attention to the problem of racial discrimination can be explained. It may be that the problem is not one that parties in the original position attend to because the problem is incompatible with the assumptions of a well-ordered society.

The problem of race, for Rawls, may be a problem that arises in non-ideal theory, not ideal theory. This seems to be the gist of his brief discussion in *Justice as Fairness*.³⁹ This is an appealing thought that has some plausibility. Certainly, many of the pressing issues regarding race, such as reparations and affirmative action, are intimately connected to redress for and reconstruction in the face of public failures and wrongs toward people of color. Some of the salient political and philosophical problems surrounding race are legitimately not well handled by a theoretical apparatus meant to be universal and ahistorical. For example, properly addressing specific issues about reparations and affirmative action requires sensitivity to contemporary circumstances and historical facts. This requires access to information that is unavailable behind the veil at the stage at which the theory of justice is articulated.

Perhaps Rawls had these sorts of issues in mind, for he acknowledges the absence of much discussion of race in *Political Liberalism*,⁴⁰ remarking that his intention is to focus on classical

38. See H.L.A. Hart, *Rawls on Liberty and Its Priority*, 40 U. Chi. L. Rev. 534 (1973), reprinted in Reading Rawls 230, 239-44 (Norman Daniels ed., 1975).

39. Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 64-66.

40. Rawls, *Political Liberalism*, *supra* note 6, at xxx-xxxi.

problems of political theory and the grounds of the basic liberties. He may have also believed that such public failures would dissipate were the two principles, as they stand, implemented. If the two principles were implemented, the significance of class distinctions as we know them would alter dramatically. Even if class distinctions remained, the absolute level of social stratification would recede. The effects of class on other goods, like education and political influence, would decline or disappear because of the structural forms of insulation against class influence that the two principles would install. This might both reduce the impact that racism could have, since many of its devastating effects have been associated with the linkage between class and race. It might also undercut the impetus to engage in racism, as some of the origins of racial discrimination may lie in efforts to achieve or reinforce class hierarchy.⁴¹

While these motivations may explain the omission of an in-depth discussion of race by Rawls, I do not think they fully justify the omission of explicit anti-discrimination principles. While theoretical work at this level of abstraction cannot tackle certain sorts of contemporary problems, the unsuitability of the veil to handle problems of redress or historically and culturally located features of a society does not seem to justify fully the relegation of all issues surrounding discrimination to non-ideal theory (or to locations further down the four-stage sequence). As I partially suggested above, the negative impact of racism, while severely exacerbated by its connection to class inequality, is not exhausted by its material ramifications. So, too, it seems overly sanguine to posit that the sole root of racial discrimination lies in material, class motivations and not also in other impulses to power and domination or from fear of the Other. The structural advances of a well-ordered society might reduce racism and its effects. It seems implausible to say that they would render these problems or the hazard of these problems unknown in a well-ordered society. Racial distinctions and the creation and treatment of subordinate classes of people have been enduring, if not classical, problems of democratic theory.

It thus seems strange to classify, implicitly, anti-discrimination principles along with principles of redress. Anti-discrimination principles seem more analogous to the other, already-acknowledged basic liberties: They demarcate a standard of treatment that is forward-looking and that aims to regulate a latent or explicit hazard,

41. Rawls's implicit treatment of race may parallel his treatment of envy, with respect to which Rawls takes it to be a product of unjust distributive relations. Rawls begins by assuming that envy is not a motivation of parties in the original position and is not among the motivations operating in a well-ordered society. He builds the theory around the assumption that envy is not a prevalent motivation, and then doubles back to ensure that the class structure and distributive apparatus are not such as to generate envy. See Rawls, *A Theory of Justice*, *supra* note 1, § 25, at 143/124, § 80, at 530-34/464-68, § 81, at 534-41/468-74.

by establishing terms on which equal citizens demonstrate equal respect for one another.

Still, one might argue that in a well-ordered society, the advances would include not only structural effects, but attitudinal ones as well. Its members would be well-motivated and compliant. These attitudes would be inconsistent with actions or attitudes that evinced or supported racial discrimination. While there is something to this idea, it is difficult to develop consistently with other aspects of Rawls's theory or at least with Rawls's theory as he understands it.

The thought cannot simply be that members of a well-ordered society accept the principles of justice and are compliant with them; for, as I have pointed out, the principles of justice on their face only rule out some forms of discrimination, not discrimination generally. One might make the further suggestion that the members of a well-ordered society not only accept the two principles, but they also accept the grounds for them. If they accept the justificatory apparatus, then they accept that citizens are equal from a moral point of view and that features like race are morally arbitrary. If they accept this view, they would not treat race as relevant when it is irrelevant and would not engage in racial discrimination. Parties in the original position would know this, and so they would have no positive motivation for codifying anti-discrimination principles.

There are two primary difficulties with this suggestion. First, it is unclear how to confine its reach. If members of the well-ordered society accept not only the principles of justice, but also their underlying justifications,⁴² and if this acceptance affects their personal conduct, then one runs into a version of the sort of challenge raised by G.A. Cohen about the conditions of application of the difference principle.⁴³ If members of the society accept that talent is arbitrary from a moral point of view, it is unclear why they would use their possession of talent (or others' possession of talent) as a reason for action: It is unclear why they would regard it as permissible to use

42. This is unclear in *A Theory of Justice*, but it is made clearer in *Justice as Fairness* that the aim in a well-ordered society is "mutual recognition of the complete justification of justice as fairness in its own terms." Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 121.

43. See G.A. Cohen, *If You're an Egalitarian, How Come You're So Rich?* (2000); G.A. Cohen, *Incentives, Inequality, and Community*, in 13 *Tanner Lectures on Human Values* 261 (Grethe B. Peterson ed., 1992); G.A. Cohen, *The Pareto Argument for Inequality*, 12 *Soc. Phil. & Pol'y* 160 (1995); G.A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 *Phil. & Pub. Aff.* 3 (1997). Cohen does not frame his argument in terms of the justifications that citizens accept as valid, but in terms of their being guided by the difference principle. The former formulation seems sturdier, though, for it bypasses controversial, and distracting, questions about whether the difference principle as such applies to citizens directly. For, even if it does not, the question would still remain as to how citizens could accept that talents are morally arbitrary, yet still act to use them as leverage in negotiating in a competitive labor market.

their greater or unique talent as leverage for greater access to primary goods. Many Rawlsians reject this reading of his theory, often drawing a distinction between individuals' motivations qua citizens and individuals' motivations in their daily lives, including their market activities.⁴⁴ (For instance, an individual qua citizen may be committed to religious neutrality and may not permissibly be motivated to try to institute a state-sponsored religion, but that individual need not be religiously neutral in her personal life and may be quite reasonably committed to a particular form of worship or to rejecting religious belief entirely.) But it is hard to see then why a similar move could not be made for race. Race and talent are both arbitrary from a moral point of view. If citizens in a well-ordered society may permissibly use their talents to their personal or competitive advantage in their individual interactions and in their market activities (albeit in markets that are institutionally constrained by the second principle), why can't they permissibly use race as a criterion for action in similar contexts? Either Cohen's argument is correct, or we need a further argument to see why or how race and talent will be handled differently by well-motivated citizens.⁴⁵ While I am more sympathetic to Cohen's concerns than many other commentators are, I am critical of this understanding of the well-ordered society as an interpretative maneuver to explain Rawls's omission of race, given the position it would place him in vis-à-vis talent.

Second, the argument assumes a level of ideality that may be overly high. Parties in the original position are aware, for example, of a variety of risks and hazards associated with government power.⁴⁶ A government that was in full compliance with its own rules would not behave abusively, but Rawls allows that parties in the original position may be reasonably sensitive to the potential (and historical tendency) of state power to turn abusive and of majorities to try to dominate;

44. Joshua Cohen, *Taking People as They Are?*, 30 Phil. & Pub. Aff. 363 (2001); David Estlund, Debate, *Liberalism, Equality, and Fraternity in Cohen's Critique of Rawls*, 6 J. Pol. Phil. 99 (1998); Andrew Williams, *Incentives, Inequality, and Publicity*, 27 Phil. & Pub. Aff. 225 (1998); S.A. Lloyd, Self-Interest, Citizen Virtue, and Justice in a Liberal Democracy: A Rawlsian Reply to G.A. Cohen (unpublished manuscript, on file with author).

45. One might think that the idea that the products of one's labor are inherently and specially one's own is stickier than discriminatory ideas are. So, we might have reason to think it a more utopian conception to expect the full internalization of the rejection of self-ownership in one's personal life than the full internalization of the rejection of racism. While this suggestion has initial intuitive resonance, its optimism seems hard to square with the United States' own experience of entrenched racism and the persistence of the legacy of slavery despite our official, public rejection of that historical tradition. Perhaps, though, the issues connected to talents are more complicated because they also connect to one's interest in choice of occupation. The connection between labor and one's conception of the good that I discuss *infra* may complicate the assessment of the ways and degrees in which talent is arbitrary for a Rawlsian and hence the way that a well-motivated citizen would behave.

46. See Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 34-36.

they will adopt constraints on state power that reflect this concern with this hazard, even if a more utopian state would not need such checks.⁴⁷ They are also sensitive to and concerned about the possibility of dominant religious groups trying to dictate the terms of conscience to others.⁴⁸ So why wouldn't parties in the original position know of and be cautious about the tendencies of individuals and social groups to identify some groups as Other and to develop systems of hierarchy, oppression, and discrimination around these identifications? Isn't it likely that parties in the original position would be concerned about the risk of facing discrimination and the attendant negative consequences to their self-respect, as well as to their social and economic position? Wouldn't they therefore be motivated to adopt thoroughgoing, highly ranked principles barring racial (and other forms) of discrimination, even if only to make explicit what adherence to justice requires of well-motivated citizens?

Perhaps Rawls's thought is that contingencies associated with race are not essential by-products of social cooperative activity in the way that class position and the differentials associated with talent are. In *Justice as Fairness*, Rawls identifies three contingencies—those of class position in childhood, native talent, and good or bad fortune, such as with one's health and in one's placement in economic cycles. These are the basic forces that affect individuals' life prospects and to which a theory of justice must be responsive and deal with fairly.⁴⁹ To this, he implicitly adds the influence of state power gone awry. What these all may have in common is that they are integral aspects, components, or by-products of cooperative activity (or potential weaknesses thereof); and so they represent central problems for an ideal theory of fair cooperation to address. Perhaps his implicit position is that either racism is derivative of injustice associated with one of the social forces the theory already handles, such as class and political power; or that it is a contingent, historical, evil phenomenon that is not essentially connected to the problems that a theory of justice must necessarily tackle. Hence, it would not be explicitly dealt with in the theory, although the second principle's general provisions about acceptable conditions on social inequality would apply.

This idea has more plausibility with respect to race than (at least) those aspects of gender discrimination and inequality that are connected to reproduction and the cooperative social activity of creating and providing for future generations. Nonetheless, I am not sure it has sufficient plausibility with respect to race. Even if racism is not an essential hazard of cooperative life, it may be such a persistent

47. See, e.g., Rawls, *A Theory of Justice*, *supra* note 1, §§ 36-37, at 221-34/194-206, § 53, at 354/311-12, § 54, at 356-62/313-18, § 36, at 226/199.

48. *Id.* § 33, at 207/181.

49. *Id.* § 8, at 40/36, § 10, at 55-57/47-50.

hazard of social life that parties would regard protection from it as one of the important functions of cooperative activity.

Furthermore, it is arguable that racism is a hazardous by-product of cooperative activity in much the way abuses of state power are. Although many characterizations of cooperative activity emphasize forms of economic and material cooperation, they do not provide the full picture. Our cooperation also consists in and produces interpersonal ties, as well as cultural interactions and networks. Our mode of cooperation is relational, social, and intellectual, as well as material. This is not lost on Rawls, although his acknowledgment of it is often indirect. For instance, in describing the circumstances of justice and the tensions that give rise to the need for principles that can form the basis for an overlapping consensus, Rawls highlights the tensions and dilemmas created by competing points of view.⁵⁰ The competing views he is concerned with are not merely theoretical positions or positions crafted by solitary individuals, but are ones held by and developed in groups through associations, membership in which has central importance to individuals and to Rawls's conception of a just society as a union of social unions.⁵¹ My point is not that racism is a corrupt by-product of the clash of competing intellectual ideas about the good life—a way to diminish the need to engage with a challenging alternative by diminishing the humanity of those who organize themselves differently or disagree with one's central views. No doubt cultural clash is a factor that propels some forms of racial and ethnic divide. But the point I want to make is not nearly so specific as this one about intellectual avoidance or bad faith. Rather, it is that motives of domination and identity-definition through exclusion may be corrupt by-products of our sociality, and our practices of social partiality and of constructing social identities, which are in turn aspects of our social cooperation. Racism may be one especially virulent form these motives may take. They are not inevitable or uncontrollable by-products—or at least no more than corrupt uses of power by state officials. But they do seem to be natural hazards to which parties with knowledge of sociology might well be anxious to police and to protect themselves against.

Thus far, I have only argued that the omission of an explicit anti-discrimination principle is significant. It cannot be easily argued that it or its effects are already comprehensively accommodated by the structure that the two principles would establish. This is not meant as a criticism of the Rawlsian theoretical framework, however. It would be a fairly straightforward matter to make the argument for the adoption of such a principle from the original position. Arguably, such a principle would be part of the first principle and enjoy its

50. *Id.* § 22, at 127/110.

51. *Id.* § 79, at 522-29/458-64.

priority, for most of the same reasons given for the priority of the basic liberties. Freedom from discrimination, as well as the public guarantee of insulation from discrimination, are important aspects of a framework that underwrites the social bases of self-respect. As such, they should surmount the importance of further gains in material resources.

Rawls suggests otherwise in his brief discussion in *Justice as Fairness*.⁵² There he argues that inequitable treatment based on race would be permissible if and only if it maximized the position of those disadvantaged by such treatment. In other words, he subjects discriminatory treatment to the analysis of the second principle, while registering that it would almost surely fail such a test.⁵³

It is hard to imagine much racially discriminatory treatment that would operate to the benefit of its victims. Still, there may be some hypothetical scenarios in which there is discriminatory treatment that seems to satisfy the second principle, but yet where the treatment is clearly unjust. Suppose a racist portion of the population would work more effectively if they were permitted to provide their services on a discriminatory basis; suppose further that the surplus of their increased productivity were distributed (by others) to the victims of discriminatory treatment. This might pass a difference principle test, but it seems unthinkable to permit on that basis.

It is difficult to see why citizens would insist upon equal access to the basic liberties as a marker of their equal status, even at the price of fewer other primary goods, but would not insist on a more general and explicit protection of their equal status by a prohibition on arbitrary discriminatory treatment. Notably, prohibition-focused anti-discrimination principles meet the criteria for qualifying as a constitutional essential.⁵⁴ To wit: Prohibitions on arbitrary discrimination do not require information or infrastructure more complicated than those necessary for the basic liberties; it is both urgent to settle this guarantee of equal status and a point of relatively simple consequence; and it would be readily ascertainable whether such principles are enforced.

Accounting for the selection of such a principle within Rawls's framework does not, I believe, pose any theoretical difficulty. What seems of interest here is, first, why such a principle was not provided for in the first place and why Rawls's critics have been reticent about its absence. I do not have much further to say about Rawls's omission, beyond my speculations about why he may have, I think

52. Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 65-66.

53. These remarks, however, are not fully compatible with his claim elsewhere that something like formal equality of opportunity would be a constitutional essential. *See id.* at 47; *see also supra* note 26.

54. Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 49; *see infra* text accompanying notes 85-89 (discussion of constitutional essentials).

mistakenly, thought the problems of racism were either already handled by the theory or not within an ideal, ahistorical theory's domain. As I remarked earlier, issues of race and racism were clearly important, even central, to Rawls's motivations, as evidenced by his frequent allusion to the wrongs of discrimination and the terrible history of U.S. slavery.⁵⁵ Perhaps rejecting discrimination was such an evident and central motivation that codifying it explicitly seemed unnecessary.⁵⁶ I am honestly unsure about the explanation for Rawls's relative silence on race, as well as the relative silence of the commentators. In part, I suspect that the evident necessity and obvious compatibility of anti-discrimination principles with the Rawlsian framework made the principles less than salient to commentators because, perhaps, they are seemingly less philosophically interesting. In part, I suspect the avoidance also has to do with the racial composition of the philosophical community and perhaps with some sense of pessimism that philosophy can do much more to eradicate or ameliorate our nation's sad and persistent failures in this domain.

While the framework of justice as fairness is friendly to the explicit inclusion of anti-discrimination principles within the theory, their inclusion would raise some philosophical complications. Hammering out the details of any chosen anti-discrimination principle and its relation to the other specified principles raises some well-known problems, even in ideal, non-retrospective theory. There are difficulties of wording. Should the principle be one forbidding "arbitrary discrimination" or guaranteeing "equal consideration" or "equal treatment" or something else? Will it specify suspect classifications or leave this to another step in the four-stage sequence? One will have to decide whether their application forbids both *de jure* and *de facto* discrimination. (I will touch on an aspect of that problem when considering the fair equality of opportunity principle in greater depth below.) Issues about the relationship between the basic liberties and anti-discrimination norms will have to be settled. As mentioned earlier, controversies may arise about how one is to apply anti-discrimination principles and principles of freedom of speech to the workplace. Rules forbidding discriminatory speech and other rules against racial harassment may seem both to be required by anti-discrimination guarantees and, possibly, to raise freedom-of-speech concerns. As such examples also demonstrate, decisions must be made about the scope of application of such commitments and whether they apply to some non-governmental agents, such as market actors. If so, the theory will then have to face the question of how far to extend anti-discrimination commitments (to social associations? to

55. See *supra* note 10.

56. The arguments about subjecting it to maximin analysis, however, indicate at least some ambivalence about its proper placement.

private actors in all contexts?), whether all these commitments of justice should be legally enforceable, and how to define the limits, if any are recognized.

The inclusion of an explicit anti-discrimination principle in the two principles would amplify the vagueness of the application of the first principle. Furthermore, the resolution of these issues may well be more contextual than is consistent with Rawls's ambitions of resisting intuitionist approaches to problems of justice.⁵⁷ The emergence of such further complexities may be regrettable, but does not seem like a sufficient reason to subordinate anti-discrimination commitments within the theory.

II. LABOR

Concerns about racial discrimination can, I believe, be fruitfully incorporated into the framework of reasoning of justice as fairness, although at some potential cost to the clarity and publicly ordered nature of the principles. Their incorporation would also—as I have suggested—begin to raise some other thorny issues about the relationship, within the theory, between the protection of the basic liberties and conditions of access to employment. As I mentioned when discussing the fair equality of opportunity principle, Rawls's theory is importantly ambiguous about the significance of fair equality of opportunity. This, I believe, is one aspect of a more pervasive ambiguity that the theory shows toward labor, its relation to the ideal of the person, and the motivations of people in the original position.

Even more so than with race, labor is both central and peripheral in Rawls's theory. It plays a prominent role in the following respects. For Rawls, the problem that a theory of justice is meant to tackle is how the benefits and burdens associated with social cooperation are to be fairly distributed.⁵⁸ Cooperation, at least in large part, seems to involve social and economic activity that redounds to our mutual benefit, where this is understood in terms of the production and protection of social primary goods. In part, a theory of justice is meant to tell us how to organize, writ large, a fair system of social production. Our interest in and capacity for labor, coupled with our competing demands on its product, generate the need for a theory of justice and the context in which it is supposed to be evaluated.

One way to gauge labor's centrality is to take note of how different a starting place this is than the libertarian's.⁵⁹ For the libertarian, whether to cooperate at all is a live question. We begin, theoretically,

57. Rawls, *A Theory of Justice*, *supra* note 1, § 7, at 34-49/30-36.

58. *Id.* § 10, at 54/47.

59. Samuel Freeman provides a fairly comprehensive treatment of the other major substantive contrasts between the theories. Samuel Freeman, *Illiberal Libertarians: Why Libertarianism Is Not a Liberal View*, 30 *Phil. & Pub. Aff.* 105 (2001).

with independent individuals and ask whether they should come together and on what terms, if any. This question does not come up for the liberal, or at least not for Rawls. Social organization and social cooperation are givens. This is not just because the libertarian hypothetical of independent isolated individuals rethinking their union will never be realized. It is not a grudging concession to the pragmatic realization that there is no longer a barren Western frontier (even then largely imagined) to start over or to which to threaten flight.

Rather, I believe what is implicit behind the liberal starting point of social cooperation is the assumption that social cooperation is the necessary context in which the capacity for individual autonomous development and in which the two moral powers of the individual may be developed and fully realized.⁶⁰ Autonomous, morally capable individuals of the kind liberal theory posits, and aspires to foster, could not develop in individual isolation in the wilderness. Their possibility depends on, among other things, systems of moral education that require social cooperation.⁶¹ The sorts of complex conceptions of the good that liberal theories' individuals aim at also require a background of social cooperation—to make possible certain sorts of lives whose possibility depends on the time and specialization afforded by the division of labor and on the social and technological advances that social cooperation brings about. Furthermore, many conceptions of the good do not just depend on social cooperation as an enabling condition, but are ones pursued in social settings and associations. (Again, it is interesting that the conflicts Rawls identifies as the central ones for a theory of justice to address are not between individuals, as such, but between social movements and associations in which people, together, in social groups, develop and articulate conceptions of the good.) For the liberal, justice takes social cooperation as its topic not primarily because the pressing problem is to devise measures of security and assurance to encourage the otherwise unpalatable or risky endeavor of social cooperation. Justice begins with social cooperation because social cooperation makes possible the sort of lives and persons capable of just interaction and full autonomy, as well as those capable of the sort of conflicts that a theory of justice is meant to solve.

Another sign of the centrality of labor and social cooperation, albeit one that I believe reflects a puzzling and unnecessary misstep, is Rawls's treatment of the permanently disabled. He regards them as not among the primary subjects of the theory, but as representing a

60. Rawls, *A Theory of Justice*, *supra* note 1, § 77, at 505/443.

61. *See, e.g., id.* §§ 70-72, at 462-74/405-15 (describing moral education and familial cooperation).

“special case.”⁶² It appears as though, as parties in the original position, we are to assume that we are regularly contributing members to the system of social cooperation, by which it seems to be meant that we are regularly contributing members to the workforce (where this is later articulated to include work in the home).⁶³ In this way, Rawls attempts to evade some of the difficulties for the metric of social primary goods that Amartya Sen, Ronald Dworkin, Martha Nussbaum, and others have drawn attention to by representing the disabled as secondary to the core problem of justice among cooperators.⁶⁴

While this articulation of the scope of the theory underscores my sense that social cooperation is central to Rawls’s liberal conception of justice, its interpretation by Rawls and his critics reflects a rather narrow notion of what social cooperation consists. If, as I have argued, social cooperation should be understood broadly, to include contributions to the intellectual, social, and emotional milieu and participation in relationships that foster and support moral agency, then it is not at all obvious that even the severely disabled do not participate in the system of social cooperation. Even those disabled people who are unable to participate in the system of economic production (though most are able to do so) still make contributions to the culture and to our social and emotional lives, in part through their participation in social and personal relationships of care-giving and care-receiving. Thus, I think it is unclear that the difficulties Rawls faces in dealing with the disabled stem from the assumption of the centrality of social cooperation, so much as they stem from the interpretation of what counts as cooperation. Taking such a stance may require articulating a criterion of adequate participation that is more sensitive to capability and revising the metric of primary goods. But what should prompt these adjustments in the theory seems truer to the theory’s underlying motivations and is preferable to the unattractiveness of sidelining the disabled.⁶⁵

62. *Id.* § 77, at 509-10/446; see John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. Phil. 515, 546 (1980).

63. Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 162-68.

64. See, e.g., Ronald Dworkin, *Sovereign Virtue* (2000); Eva Feder Kittay, *Love’s Labor: Essays on Women, Equality, and Dependency* (1999); Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 *Feminist Econ.* 33, 51-55 (2003); Amartya Sen, *Equality of What?*, in *Equal Freedom: Selected Tanner Lectures on Human Values* (Stephen Darwall ed., 1995).

65. These remarks only securely apply to the physically disabled and to most sorts of mental disability. I also believe they may well apply to children. I am unclear as to whether a minimal ability to understand and manifest a willingness to participate and reciprocate is a necessary condition of being a social cooperator. Certainly, the severely mentally disabled are unable to develop the moral powers and interests that Rawls identifies as securing our mutual political equality. I do not know whether it follows that Rawls’s conception of political equality is flawed; whether the joint project of social cooperation includes some parties who are not politically equal to others; or whether these parties present issues of justice outside the core conception

But while, whether objectionably or defensibly, social cooperation and workforce participation are central in some respects in Rawls's theory, the theory treats them in an ambivalent way. It is somewhat puzzling that the capacity to contribute to the joint project of social cooperation is not highlighted as an aspect of the individual's highest order interests and moral powers.⁶⁶ Nevertheless, it might be contended that the capacity for a sense of justice includes this, for one's responsibility as a just citizen is to act in ways consistent with mutual reciprocity and so to contribute, where able, to the joint project of social cooperation.

I find it more difficult to dispel my puzzlement at the un-argued for placement of the fair equality of opportunity principle. In the prior section, I argued that the justifications given for placing lexical priority on the first principle over the second principle only directly apply to the priority of the first principle over the difference principle. Strangely, there are no sustained efforts in *A Theory of Justice* to justify the placement of the opportunity principle in the schema.⁶⁷ Specifically, what is missing is an argument that both makes sense of the fair equality of opportunity principle as a distinct principle that has priority over the difference principle and that also justifies its being subordinate to the first principle. Schematically, the problem is that the features of the opportunity principle that distinguish it from and elevate it over the difference principle exert some pressure to elevate the opportunity principle to the same level of lexical priority as the basic liberties principle.

As discussed earlier, the fair equality of opportunity principle cannot be merely a principle of efficiency that connects people to that employment that makes best use of their talents and skills for the purposes served by the difference principle. If that is all that it were, then its presence would be both otiose, already provided for by the difference principle, and contradictory, for it would be prior to itself. The fair equality of opportunity principle is distinctive in two ways. It operates as a targeted anti-discrimination principle that provides protection that includes, but ranges further than, formal equality. It both forbids *de jure* discrimination and also aims for conditions of *de facto* equality of opportunity. Second, it picks out access to employment and positions of power as distinctively important to parties in the original position.

While Rawls's arguments for the priority of the basic liberties over the difference principle have some power, it is not clear that they work as well in situating the inferiority of the fair opportunity

of fair terms between cooperators.

66. See Rawls, *A Theory of Justice*, *supra* note 1, § 77, at 505/443.

67. Some remarks relevant to the priority of fair equality of opportunity over the difference principle appear in Section 46 of *A Theory of Justice*, but they are fairly sketchy.

principle. I have already argued that at least the formal equality of opportunity principle should be elevated to the first principle as a mutual manifestation of other regard and respect.⁶⁸ So let me focus on the remainder of the fair equality of opportunity principle: its commitment to the fair value of equal opportunity.⁶⁹

As Rawls argues, past a certain minima of sustaining wealth, parties would not regard increased levels of income and wealth as on a par with a secure guarantee of the formal ability to select, develop, evaluate, revise, and pursue their chosen conception of the good. Such increases would not compare with the secure guarantees of the basic liberties and so should not be possible bases for trade-offs. Furthermore, the social bases of self-respect may be better secured if these liberties are non-negotiable and publicly guaranteed at an equal level where they are taken to signify the commitment to mutual respect—whereas income and wealth cannot so easily underwrite the social bases of self-respect.⁷⁰ Inevitable (as well as some desirable) fluctuations in wealth and income distribution make income and wealth poor candidates for concrete symbols of our equal respect. Furthermore, whatever guarantees we make about economic distribution will be more difficult to verify because of the complexity of economic factors, the risk involved in economic forecasting, and because economic decisions play out over long periods of time. These are the main arguments for the priority of the first principle over the second.

But fair equality of opportunity should not be assimilated to income and wealth for three reasons. First, whereas income and wealth are typically, though not necessarily, mere means to the pursuit of a conception of the good, employment more often has a more intimate connection to people's conception of the good. While not everyone pursues meaning through their work, just as not everyone makes use of, or values, the basic liberties to pursue a conception of the good, many do.⁷¹

Second, just as with the acknowledged basic liberties, the protection

68. Rawls's remark in *Justice as Fairness* that formal equality of opportunity should be thought of as a constitutional essential is compatible with this idea, but he does not state whether this constitutional essential would have the same priority as the others, the basic liberties. See also *supra* note 26.

69. The following arguments, however, may also bolster the elevation of a focused formal anti-discrimination principle, even if they do not succeed fully in their own right to elevate a fair value version of that principle.

70. Rawls, *A Theory of Justice*, *supra* note 1, § 82, at 545-46/477-78, 542-43/475-76.

71. For recent extended discussions of the role of work in sustaining personal welfare, social and civic status, community flourishing, and social equality, see Cynthia Estlund, *Working Together* (2003); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 Cornell L. Rev. 523 (1997); Vicki Schultz, *Life's Work*, 100 Colum. L. Rev. 1881, 1886 & *passim* (2000) (characterizing work as "fundamental to our conception of the good life" and "constitutive of citizenship, community, and even personal identity").

of opportunities for a range of employment activities provides a rich context for developing and pursuing a conception of the good, a context that gives individuals' choices greater meaning, even if these opportunities are not directly pursued. Unlike primary goods like income and wealth, full-time employment necessarily occupies a large portion of individuals' time and attention. Often, work has quite substantive content. Various forms of employment are devoted to certain ends that individuals may endorse or revile. Frequently, they also involve sustained interactions with others within a variety of contexts and structures; these relationships may also bear upon one's conception of the good. It may reasonably be especially important to individuals that their employment (and its structure) at least be consistent with their conception of the good, if not a venue for its pursuit. These arguments do not, I submit, make controversial assumptions about the nature of the good for individuals; they do not, for example, depend on any ideal that work is the primary or a necessary locus for self-realization. They just depend on the weaker idea that parties motivated to promote their conception of the good may have natural and strong concerns about access to work, as well as its content and conditions.

With respect to the argument that access to work may further parties' conception of the good, Richard Arneson has objected that "job satisfaction" and "meaningful work" may not consistently surpass the importance of money and other primary goods to parties given the range of possible conceptions of the good.⁷² This objection is not unique to the goods associated with work and so does not distinguish between the first principle and the fair equality of opportunity principle. Once the veil is lifted, some parties may find that they care more for money than for civil liberties or that they care nothing for greater resources and would vastly prefer equality over the gains provided by the difference principle. Furthermore, the objection succeeds, I think, only if one believes that the parties are trying to guess at what will best match their preconceived, fixed, particular conception of the good. This implicit characterization of the agenda of the parties is mistaken, I believe. The parties identify goods the possession of which *or* the opportunity for which tend to promote conceptions of the good. They aim to identify fair methods of distribution that will protect and promote both the interests they have connected to the specific conceptions of the good they may have, but also that will protect and promote the development of their core moral interests—ones that allow for the possibility of change, deliberation, and reflection on one's circumstances. Even if a good is not of interest to a particular person, as it turns out, it may be reasonable to think that a *protected opportunity* to pursue that good

72. Arneson, *Against Rawlsian Equality*, *supra* note 4, at 98.

will tend to promote the particular interests of the person and will also ensure the party has relevant opportunities for the development, change, and meaningful choice of the conceptions she does pursue.⁷³

The Aristotelian principle would provide independent, further support for distinguishing access to employment from income and wealth—although in later works, this theme has been submerged, possibly because Rawls perceived it as overly substantive and contentious. As Rawls argues in *A Theory of Justice*, though, opportunities for training and exercising one's capacities and abilities are important elements of human flourishing and are connected to the conditions that support self-respect.⁷⁴ The tendency to prefer to train and exercise one's capacities at a challenging level, while not "an invariable pattern of choice," is "relatively strong and not easily counterbalanced."⁷⁵ While, for some, depending on the skills and curiosities in question, this interest may be realized in other contexts, such as social associations, work is a significant arena in which it can be pursued.

Third, parties would have an interest in fair conditions of access to employment because employment is, typically though not necessarily,⁷⁶ a crucial and appropriate method by which able parties participate in the joint project of social cooperation. Given the centrality of social cooperation to the theory, the protected opportunity to participate in social cooperation may serve as a source of social status as an equal and as a central locus for exercising one's

73. The argument that I am making is not one for a right to or protected opportunity for meaningful work as such, but rather to an elevated priority for fair equality of opportunity to whatever positions a market structured to satisfy the difference principle would provide. It is a related, but distinct question whether efficiency considerations directed at realizing maximin outcomes ought to exercise such a dominant role in structuring the employment market, or whether something is to be said for also making the meaningfulness of work a relevant consideration in how the difference principle is applied. Increasing job satisfaction and providing wider access to the complexities afforded in work may be worth sacrificing some efficiency when minima of income and wealth are surpassed. We may not be willing to relax the aim to ensure we select the most adept worker with respect to some forms of endeavor, such as brain surgery. But, for other social cooperative aims, there may be room to entertain some efficiency losses to achieve greater access to interesting work for a greater number of people:

While I very much care about what our product looks like, I love that so many of us get to make the doughs and bake. Sometimes the person who is making the doughs or baking isn't always the best person for the job. But I am committed to, and love, the idea that we don't just say, "Oh, these people get to do this because they are naturally good at it and these people don't get to."

Shehanna, *quoted in* The Cheese Board Collective, *The Cheese Board Collective Works: Bread, Pastry, Cheese, Pizza* 71 (2003). For an extended and somewhat critical discussion of meaningful work, see Richard J. Arneson, *Meaningful Work and Market Socialism*, 97 *Ethics* 517 (1987).

74. Rawls, *A Theory of Justice*, *supra* note 1, § 65, at 426/374-75.

75. *Id.* § 65, at 429/376-77.

76. See *supra* note 64 and accompanying text (discussing the disabled).

moral powers in community with others similarly situated and motivated.⁷⁷ As Rawls remarks, "the collective activity of justice is the preeminent form of human flourishing."⁷⁸ Having fair opportunities to contribute in ways appropriate to one's abilities may, therefore be intimately connected to individuals' core moral powers and interests.⁷⁹

Furthermore, the workplace may represent an especially important site for citizens to interact with one another and to develop the relations that support the social bases for self-respect. As Cynthia Estlund's work has recently explored, the workplace plays a "constructive role in making possible [an] extraordinary convergence of close and regular interaction and a relatively high degree of demographic diversity."⁸⁰ To be sure, voluntary associations also play an important role in a Rawlsian society in providing arenas for social congregation, as well as outlets for the exercise of skills and abilities.⁸¹ But, the workplace may be an especially important site for citizens to meet, interact, and learn about one another because they bring together people who otherwise might not meet and interact repeatedly in their voluntary associations. In the workplace, one may work closely with others who are not members of one's family or neighborhood and who do not share one's religious affiliation, moral values, or conceptions of the good. These interactions may be especially significant for generating mutual knowledge and respect and for providing secure foundations for resisting the forces of misunderstanding and ignorance that may generate social discord and disunity. Achieving these benefits, though, depends on fair means of access to workplaces, including measures that resist direct and indirect social forces that would segregate and exclude.

Fair equality of opportunity, then, may serve as more than just a protected means of access to other social resources; it may also serve as an important mode of self-expression, a marker of equal social status, and a mechanism by which respectful social relations are

77. The centrality of social cooperation to the liberal society and thus to a key component of social standing may provide reason to resist the suggestion made by some that access to employment opportunities may be fungible for other goods that contribute to a good life. See, e.g., Richard J. Arneson, *Is Work Special? Justice and the Distribution of Employment*, 84 Am. Pol. Sci. Rev. 1127, 1132 (1990).

78. Rawls, A Theory of Justice, *supra* note 1, § 79, at 529/463.

79. Fair conditions of access to the labor market may also contribute to individuals' sense of self-sufficiency and their independence. As Gillian Lester has recently stressed in discussing fair methods of structuring family leave policy, access to the public workplace and its resources may be especially important for women to provide opportunities to avoid unhealthy forms of dependence on male partners and to promote more equitable personal relationships. Gillian Lester, *In Defense of Paid Family Leave* (unpublished manuscript, on file with author).

80. Estlund, *supra* note 71, at 4 & *passim*.

81. See, e.g., Rawls, A Theory of Justice, *supra* note 1, § 37, at 234/206, § 50, at 328-29/289-90, § 67, at 441-42/388, § 71, at 467-73/409-13.

supported. As Rawls himself argued in explaining why fair equality of opportunity is not to be considered merely a principle of efficiency:

[I]f some places were not open on a basis fair to all, those kept out would be right in feeling unjustly treated They would be justified in their complaint not only because they were excluded from certain external rewards of office (such as wealth and privilege) but because they were debarred from experiencing the realization of self which comes from a skillful and devoted exercise of social duties. They would be deprived of one of the main forms of human good.⁸²

The considerations I have just rehearsed complicate any effort to extend the justification for the placement of the difference principle beneath the first principle so as to justify the similar placement of the fair equality of opportunity principle. Do they further succeed in showing that fair equality of opportunity should be treated on par with the basic liberties? Like the basic liberties, employment opportunities represent crucial opportunities to act in accordance with one's conception of the good, to develop one's capacities, and to exercise one's most basic interests. Without denigrating employment and regarding it as *intrinsically* only a chore or a mere instrumental means to other primary goods, it is hard to see *ex ante* why other basic liberties would be of lexically greater importance than fair conditions of access to employment commensurate with one's skills and interests.

Notably, with the exception of the fair value of the political liberties, though, the lexical priority of the basic liberties only applies to their formal guarantee, not their worth. This might suggest that while formal equality of opportunity should be elevated to the first principle, the fair equality of opportunity principle understandably has a lesser status since it goes beyond the formal guarantee and ensures that each person has a robust, substantively equal chance, relative to his or her talents and ambitions.

Whether the formal versus substantive distinction exerts weight here is a somewhat complex matter. On the one hand, like the political liberties, there are special reasons why substantive equality is more appropriate to guarantee here than with respect to the other basic liberties. There are analogies to be drawn between fair equality of opportunity and the fair value of the political liberties. Although the distinction cannot bear all the weight it is sometimes asked to support, there is some distinction to be drawn between basic liberties that are realized outside of a competitive setting and those that are not. As Rawls notes, the political liberties operate within a competitive climate. To guarantee the equal formal political liberties,

82. *Id.* § 14, at 84/73. The phrase "(such as wealth and privilege)" appears only in the first edition.

one must guarantee the fair value of the political liberties.⁸³ By contrast, it is less plausible to think of the right to freedom from arbitrary arrest and seizure as competitive: Its respect and realization for one citizen does not depend directly upon whether and to what extent it is realized for another. As I say, this distinction can be overstressed. Whether one is actually free from arbitrary arrest often depends upon the climate within which one lives and how others are in fact treated. The same holds for freedom of speech and conscience and the like. But, the nature of the liberty is not itself to be understood in terms of a competitive arena for its exercise, whereas political contests necessarily are. So too, are efficient employment markets. The opportunities in question are necessarily competitive and so greater worth for some parties has a direct negative effect on the worth of the opportunity for others.

Furthermore, fair equality of opportunity is immune to one of Rawls's main arguments for distinguishing between the formal basic liberties and their worth. Rawls argues with some plausibility that it is reasonable not to guarantee the equal worth of the basic liberties because what a liberty is worth to individuals depends upon their choices and their conception of the good.⁸⁴ It is reasonable to expect individuals to take responsibility for the worth of the liberties and to adjust their plans in light of how they will affect the worth of their liberties. Furthermore, one's choices and plans may have greater meaning when ramifications are attached to them than they would if the equal worth of the liberties was guaranteed no matter what one's choices were, no matter what their costs.

Paying heed to the capacity for responsibility of agents and protecting the meaningfulness of the exercise of the capacity for a conception of the good may merit some distinction (though perhaps a more tailored one) between many of the formal basic liberties and their worth. But these considerations do not have much purchase with respect to equality of opportunity. If the liberty in question were freedom of occupational choice, it might. But here, the issue is in the provision of an opportunity and its formal or its robust presence. The nexus for considerations about responsibility, action and its consequence would properly enter at the point at which the opportunity is either pursued or squandered. But to guarantee fair equality of opportunity as Rawls defines it is not to subsidize certain conceptions of the good over others or to insulate people from the

83. *Id.* § 36, at 224/197.

84. *Id.* § 32, at 204/179; *see also id.* § 16, at 94/80-81. While Rawls's argument is partly persuasive, it does not fully address objections that some variations in worth of primary goods are unrelated to choice and responsibility and reflect the impact of arbitrary differences that should not merit our respect. *See, e.g.,* Amartya Sen, *Justice: Means Versus Freedoms*, 19 *Phil. & Pub. Aff.* 111 (1990).

ramifications of the choices that flow from their conception of the good.

There is another, more institutional consideration that may be at work here. One reason why the equal opportunity principle may have a lower priority than the basic liberties principle is that its realization, like the realization of the difference principle, may involve complicated institutions and social forces. Its realization may take different forms in different times and social contexts. Furthermore, its achievement may be extremely difficult to verify and assess at any particular point in time. Moreover, its proper mode of application and the conditions that would mark its achievement may be controversial. Hence, it, like the difference principle, should not be considered a constitutional essential, to use a later term of Rawls's, and should be properly subject to legislative discretion in implementation.⁸⁵

For my purposes, I want to concede a number of the assumptions behind the position outlined in the last paragraph: that interpretation of the basic liberties principle is simpler and less contextual, requiring less discretion and flexibility than is required by the interpretation of the fair equality of opportunity principle; that the implementation of the fair equality of opportunity principle is more difficult to verify than the fair value of the political liberties; and that the degree of necessary variation, discretion, and verifiability in the implementation of a principle is relevant to whether that principle should be regarded as a constitutional essential. I do not believe any of these assumptions are obviously true and I have worries about each of them. What strikes me as more contestable is the idea that whether something is a constitutional essential or not is co-extensive with its place in the system of lexical priority.

If one has in mind something like our constitution, Rawls's mapping of lexical priority onto constitutional essentials in his later work both does and does not make sense. The U.S. Constitution does, for us, represent a set of non-negotiable commitments. This corresponds to what would be at the top of a lexical priority. But, for the most part, in our constitutional structure, we are also concerned, first, to ensure that constitutional commitments are judicially enforceable and, second, that the nature of these commitments is susceptible to

85. See Rawls, *Justice as Fairness: A Restatement*, *supra* note 2, at 48-49. The term "constitutional essential" does not appear in *A Theory of Justice*. The significance of the concept began to emerge in *The Idea of an Overlapping Consensus* [1987], in John Rawls, *Collected Papers* 421 (Samuel Freeman ed., 1999); *The Domain of the Political and Overlapping Consensus* [1989], in John Rawls, *Collected Papers* 473 (Samuel Freeman ed., 1999); Rawls, *Political Liberalism*, *supra* note 6, at 166, 243, 246. It becomes prominent in *Justice as Fairness*. See also the discussion in Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, in *The Cambridge Companion to Rawls* 394 (Samuel Freeman ed., 2003).

interpretations that are both specific and remain constant over time.⁸⁶ This concern that what is constitutional be implementable in a certain sort of way also makes sense of the idea that the difference principle and perhaps the fair equality of opportunity principle do not belong in a constitution like ours, given our emphasis on judicial review.

But while both steps here make sense, they do not warrant the conclusion that the list of non-negotiables is exhausted by those that would fit our constitutional structure. We might recognize some commitments as as important as others, but as better suited to a different mode of implementation and enforcement, namely through the legislative branch. On such a view, we would expect legislators to treat the fair equality of opportunity principle as a priority on a par with the other basic liberties. This parity could either be marked by having both principles stated in the constitution, but with the fair equality acknowledged as enforceable through a different branch of government.⁸⁷ This is the theory of the political question doctrine; although, I am imagining a structure in which legislative responsibilities to enforce provisions under the ultimate purview of the legislature would be taken far more seriously than some of the constitutional provisions under the political question umbrella have been taken in the United States. In the alternative, the fair equality of opportunity principle might not be placed in the constitution, but might (within a different system of constitutional government) be understood as operating at the same level of priority as the

86. The political question doctrine marks an exception to the general presumption that constitutional provisions are judicially enforceable. See Laurence H. Tribe, *American Constitutional Law* § 3-13, at 365-85 (3d ed. 2000). As my colleague Stephen Gardbaum has argued, it is not obvious that constitutional commitments cannot be meaningfully upheld through a system that does not give the judiciary final say but instead rests ultimate interpretative power in and *expects* interpretation and compliance from the legislature. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 Am. J. Comp. L. 707 (2001). Other recent work on the role and room for a legislative role in constitutional interpretation in some domains appears in Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 Va. L. Rev. 1105 (2003) (discussing the limits and proper justification for non-judicial but authoritative constitutional interpretation); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale L.J. 1943 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 Ind. L.J. 1 (2003) (advocating legislative role in interpreting the Fourteenth Amendment). Such alternatives are certainly worth considering and influence my thinking about how to separate constitutional essentials from the notion of lexical priority, but I will put them aside for the course of this Article and retain the assumption that our constitutional interpretative system will primarily rest ultimate interpretative authority in the judiciary.

87. Compare William N. Eskridge, Jr. and John Ferejohn's analysis of the relationship between Title VII and other statutes and Title VII and the Constitution in *Super-Statutes*, 50 Duke L.J. 1215 (2001).

constitution, whether or not its interpretation and implementation were dedicated to another branch of government.

Is the idea of a set of equally important priorities, parceled to different branches of government for ultimate interpretation, coherent and feasible? The difficulty, of course, would be in determining the boundary lines that defined the ranges of the basic liberties and the fair equality principle. Potential conflicts might arise under some interpretations of these commitments and some person or branch must issue a definitive interpretation. There are a number of possible institutional arrangements here involving different combinations of suggestion and deference with respect to the interaction between the legislative and judiciary branches.⁸⁸ One attractive possibility is that when conflict arises, the judiciary could determine what the scope of fair equality of opportunity is, with respect to its relation to the other basic liberties, but regard as unreviewable (or, alternatively, its interpretations as legislatively rebuttable) how, within this scope, the fair equality of opportunity principle is to be applied.

One consideration relevant to constitutional essentiality may be relevant to lexical priority as well—namely, the consideration of susceptibility to transparent implementation.⁸⁹ One reason that Rawls gives to justify the priority of the first principle over the difference principle is that the former may serve as a more stable foundation for the social bases of self-respect, in part, because its implementation is more publicly visible and verifiable than the difference principle. With respect to the first principle, justice can more readily and uncontroversially be seen to be done than is true of the difference principle because of the epistemic difficulties associated with observing and understanding the operation of long-term, complex economic factors and institutions. This transparency may be important to underwrite stable social bases of self-respect.

These are important considerations, but I am not persuaded that they represent sufficient grounds to subordinate the fair equality of

88. One might read the Vermont Supreme Court's decision about same-sex couples as a recent example of an effort to share the power to interpret the (state) constitution in ways that try to take advantage of the differential abilities of the different branches and the greater flexibility of the legislative branch. The Vermont court ruled that, constitutionally, same-sex couples had to enjoy the same substantive rights as were available to different-sexed couples through marriage. But the court left it to the legislature to determine how to implement its decision, whether to make marriage open to same-sex couples, or whether to create a legally recognized relationship that is the functional equivalent of marriage. The court identified a constitutional principle and a specified range of application to guide legislative decisions, but left it to the legislature to determine the mode of application. While I believe it would have been perfectly proper for the Vermont Court to have just directly desegregated marriage, it is an example of the sort of power-sharing that I have in mind. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

89. See Michelman, *supra* note 85, at 394.

opportunity principle to the basic liberties principle. In part, this is because the vagueness of the basic liberties principle and its complexities (what precisely does freedom of speech amount to?) already pose challenges to the transparency and full verifiability of the first principle. Furthermore, it is unclear that the conditions of implementation of the fair value of the political liberties pose simpler tasks of verification than fair equality of opportunity. On the positive side, many aspects of fair equality of opportunity submit to rough and ready forms of measurement—e.g., whether different school districts receive equal funding for students can be fairly readily assessed. Many measures of equal, contemporary access to education and jobs are easier to provide than reliable long term economic forecasts and counterfactuals. The difficulties of public verification do not seem as deep as with fair equality of opportunity as with the difference principle. While concerns about transparency exert force, I am not sure that the relative losses in transparency here are significant enough to justify the subordination of the fair equality of opportunity principle.

As with affording concerns about race a more prominent place within the theory, elevating fair equality of opportunity would generate a variety of institutional and interpretational complexities to the theory. But while untangling these knots may detract from the simplicity and clear ordering of the theory, these desiderata again do not seem like sufficient reasons to subordinate the importance of fair conditions of access to labor opportunities. While facing the challenges associated with race and labor may be burdensome, they are worthwhile tasks, as liberals have known for some time.