Political Liberalism and a Theory of Justice: Recasting Justice as Fairness as a Political Conception of Liberal Justice

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Political Liberalism and a Theory of Justice: Recasting Justice as Fairness as a Political Conception of Liberal Justice

A thesis submitted in partial fulfillment of the requirement for the degree of Bachelor of Arts in Philosophy from The College of William and Mary

by

George Eric Rudebusch

Accepted for Highest Honors
(Honors, High Honors, Highest Honors)

Dr. Christopher A. Freiman, Director

Dr. M. Victoria Costa

Dr. Julie A. Agnew

Williamsburg, VA
[Date of Defense]
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April 25, 2016
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Introduction

Political liberalism…does not try to fix public reason once and for all in the form of one favored political conception of justice


I disagree. This project shows that adopting a political liberal framework yields a political conception of justice with three principles: equal basic rights and liberties, fair equality of opportunity and bounded efficiency. Indeed, we can establish the right political conception of liberal justice only once the idea of political liberalism is refined. The resulting theory is a recasting of Rawls’s justice as fairness.

John Rawls introduced a new paradigm in political philosophy following the publication of *A Theory of Justice* in 1971 (and revised in 1999).¹ In this work, Rawls introduced new ways of conceptualizing social contract theory by employing novel devices to create a theory of justice. Once parties place themselves behind the veil of ignorance in the original position while also accepting basic features of persons, a clear theory of justice results, justice as fairness, which includes two principles of justice. The first guarantees equal basic liberties; the second specifies that all persons have equal opportunity for offices and positions in society and that inequalities of benefits are justified only if they advance the interests of the worst off in society. As revolutionary as it was, *A Theory of Justice* was met with significant criticism. Foremost among the charges against justice as fairness—a supposed political theory of justice—was that it derived from a particular moral view. To distinguish it from broader theories of justice, a political theory

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of justice is one that can be supported without appeal to a comprehensive moral, metaphysical or religious doctrine. The charge against justice as fairness, then, was that it appealed as a right theory of justice only to those who affirmed the underlying doctrine. In response to this worry, Rawls published *Political Liberalism* to ground justice as fairness exclusively as a political conception of justice.²

Groundbreaking in its own right, *Political Liberalism* fails in its stated purpose of providing strict political justification for justice as fairness. In fact, Rawls undermines his work in *A Theory of Justice* in *Political Liberalism*. Most significant, a slight refinement of the political liberal framework Rawls establishes in *Political Liberalism* undercuts the difference principle, which was first devised in *A Theory of Justice* and later revised in *Political Liberalism*.

Unfolded over two parts, this project sets out to recast justice as fairness as the right political conception of liberal justice. Part I establishes a political liberal framework used to develop the political conception of liberal justice in Part II. Part I begins by introducing Rawls’s idea of political liberalism (see § 1.1). The discussion transitions to fix terms and basic features of political liberalism (see § 1.2). Once fully introduced, a Rawlsian political liberal framework is argued for and justified (see § 1.3). Part I concludes with presenting the justificatory device of an overlapping consensus and public reason. Here, I refine the political liberal framework as conceived by Rawls by dissolving the barrier between public and nonpublic life and by placing more emphasis on democratic essentials throughout all justificatory stages of a political conception of liberal justice (see § 1.4).

Part II devises a political conception of justice from a political liberal framework. After a presentation of justice as fairness (see the Comment before Part II), the discussion opens by

presenting and arguing for the two principles of justice as fairness left largely as-is—the principle of equal basic rights and liberties and the fair equality of opportunity principle (see §§ 2.1 and 2.2 respectively). The focus then shifts to distributive justice. Here, I argue that the difference principle fails on two grounds: first, it fails to guarantee the stability of the basic structure underlying society over time; second, it disrespects the autonomy of citizens. As an alternative, I argue for the bounded efficiency principle, which holds that society should operate as close as possible to efficient production within the bounds of an absolute social minimum and a relative maximum of inequality (see § 2.3). After determining the three principles comprising the political conception of liberal justice, Part II concludes by rejecting a lexicographic ranking of the principles. Instead, the principles are weighted equally. An appeal to Rawls’s modified general intuitionism adjudicates situations when the principles conflict. The Conclusion presents all three principles in full, including a description of the rule specifying how they interact systematically. Here, I summarize my recasting of justice as fairness. My summary also reiterates the differences between my view of liberal political justice and the view Rawls presents in *A Theory of Justice* and *Political Liberalism*. 
Part I: Establishing a Political Liberal Framework

1. The Idea of Political Liberalism

In his seminal *A Theory of Justice*, John Rawls attempts to offer a superior account of justice to utilitarianism. He designed this account, justice as fairness, not only to reflect our considered convictions of justice, and morality in general, but also to supply fundamental principles underlying the basic institutions of a just constitutional democracy. Ambitious as this project was, Rawls realized justice as fairness as specified in *A Theory of Justice* failed to compel many because, like utilitarianism, it presupposes a comprehensive metaphysical framework in order to reach its conclusions.

Rawls accordingly embarked on a new project to motivate justice as fairness without presupposing a prior comprehensive moral view. In *Political Liberalism*, Rawls begins by distinguishing between a political conception of justice and a conception contained in or specified by a comprehensive philosophical doctrine—a distinction he failed to provide in *A Theory of Justice*.

To distinguish: a comprehensive doctrine is one that specifies “all recognized values and virtues within one rather precisely articulated system.”\(^3\) Moreover, a comprehensive doctrine is general “if it applies to a wide range of subjects, and in the limit to all subjects universally.”\(^4\)

For example, Kant presents a comprehensive doctrine in his moral theory. Kant believed we have moral knowledge, and feel compelled to abide by such knowledge, through reason and conscientiousness. His theory is comprehensive, then, because it provides a moral epistemology

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\(^3\) *Political Liberalism*, 13.

\(^4\) *Political Liberalism*, 13.
(i.e., where moral knowledge is acquired and by what means), the moral knowledge itself (i.e.,
the content of morality) and an account of why we must align our action with moral requirements
derived from our moral knowledge. His moral theory is general, too, in that it is said to hold for
subjects universally, across familial, associational, social and political bonds. Importantly,
comprehensive doctrines are not limited to moral theories; indeed, they can include philosophical
and religious theories as well. In fact, a fully comprehensive doctrine encompasses all three.
For example, Medieval Christianity as a doctrine incorporated religious (e.g., sacraments,
religious ritual), moral (accounted for in the Bible among other sources) and philosophical
components (e.g., metaphysical beliefs from canonical religious lore). Moreover, given its
universally broad scope, it was general as well. Using Rawls’s definition, it serves as a fully
comprehensive doctrine.

In contrast, a political conception of justice delimits itself to the basic structure of society;
it involves “no wider commitment to any other doctrine.”5 Because politics concerns only public
features of society, the content of a political conception of justice involves only the political
institutions (e.g., the political constitution, the legislature) and public traditions (e.g., the
judiciary, the historical texts) of a constitutional society. This corpus of institutions and
traditions distil into the notion of what Rawls terms the “political culture” of society, or simply
public society.6

To clarify the distinction, then: a political conception relates strictly to public society,
whereas a comprehensive doctrine relates to public and civil, nonpublic society. Therefore, the
project Rawls undertakes in *Political Liberalism* is to provide an alternative motivation for

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5 *Political Liberalism*, 13.
6 *Political Liberalism*, 13.
justice as fairness that leaves it strictly as a political conception of justice, avoiding commitments to any other doctrine rooted outside the scope of public culture.

As a matter of background clarification, we may wonder why we need a political conception that cleans its hands of commitments to any comprehensive doctrine. The reason is quite simple:

A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines.\(^7\)

This irreconcilable pluralism results in a constitutional democratic society whose social unity fractures, whose justice undermined and ultimately whose existence over time becomes threatened. We can find our way out of this quandary first by affirming the notion of political liberalism, which

assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional regime.\(^8\)

Political liberalism essentially assumes that irreconcilable pluralism is a normal feature of a constitutional democracy. Besides this, it assumes but one more thing: “a reasonable comprehensive doctrine does not reject the essentials of a democratic regime.”\(^9\)

\(^7\) Political Liberalism, xvi.  
\(^8\) Political Liberalism, xvi.  
\(^9\) Political Liberalism, xvi.
Supported by political liberalism, a political conception of justice becomes freestanding in that it is self-contained in the political and public domain. Though a political conception may garner justification from a comprehensive doctrine (or many), it is never derivable exclusively from one. Hence, someone cannot dismiss a political conception of justice by charging that it reflects or belongs to a different, competing comprehensive doctrine than the one she affirms. In effect, she can affirm a political conception of justice without undermining her belief in a different and more substantive worldview. In this way, political liberalism respects the coherency and integrity of competing views.

In sum: an unavoidable feature of a constitutional democratic society is a pluralism of incompatible yet reasonable comprehensive doctrines. To account for this inevitability, we need a political conception of justice that “is practical, and not metaphysical or epistemological.”¹⁰ And two practical options exist: devise a theory of justice founded on the principle of toleration and mutual respect or rely on the autocratic authority.¹¹ I assume throughout that a truly just political conception relies on the former and not the latter principle; those unconvinced with the merits of the principle of toleration need not continue further. Put differently, to respect the essentials of democracy (e.g., toleration), a political conception of justice needs to avoid committing itself to one comprehensive doctrine over another in order to avoid destabilizing the society over time. The stability of a political conception is not just a practical matter. Rawls demands stability for the right reasons—i.e., each person can affirm the political conception of justice underlying society from a personal perspective. Therefore, if a political conception of justice is to be perceived as just and thus persist in perpetuity, it must be rooted in and respect the notion of political liberalism.

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⁹ Political Liberalism, xvi.
2. Additional Basic Features Underlying a Political Conception of Justice

Before fleshing out the content of a political conception of justice, we need to consider five additional fundamental ideas on which Rawls relies to support his political conception of justice, justice as fairness. The first feature provided is the notion that society is a fair system of cooperation. Features two and three develop this notion of society. The fourth feature underlying a political conception of justice distinguishes a society from a community and an association. The fifth and final basic feature is a political conception of justice results from an overlapping consensus, an idea that becomes critical as we devise our own political conception of justice.¹²

To begin, Rawls indicates that society can be conceived “as a fair system of cooperation over time, from one generation to the next.”¹³ Such a system reduces into three elements. First, members of the system recognize, accept and abide by a set of rules and procedures. As a system of cooperation, members implicitly create these rules; they exist neither a priori nor by mandate from an influential person or group. Second, members know the general goods each member of the system pursues. Goods are desiderata pursued for rational advantage (either for the individual person or a group). Scaled to modern society, it would be implausibly difficult for each member to know the goods each other member pursues. To accommodate this fact, members could be grouped according to the broad set of goods pursued. For example, we all know that there are groups of persons in our society who pursue, say, religion or honor as goods. Conceivably, members of a society could profile the goods pursued by each general group within society. Third, the system is fair insofar as it specifies reciprocity, which avoids the poles of

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¹² The discussion presented in § 1.2 refers to Political Liberalism, 15–43 and A Theory of Justice, 340.  
¹³ Political Liberalism, 15.
altruism and egoism. Reciprocity creates conditional cooperation: a member is obliged to contribute if and only if other members contribute. The system is fair by equality of procedure, which insures basic interests for all. This insurance restricts the legitimate means by which members pursue their own goods.\textsuperscript{14}

Now, with a clearer conception of society, we need a clearer conception of its members. Political liberalism ascribes only relevant qualities of moral personality to citizens—members of a democratic regime. A comprehensive definition of the person necessarily relies on a comprehensive doctrine; the person is a moral category in its own right. As such, to accord with the notion of political liberalism, a political conception of justice ought to respect certain fundamental powers of moral personality without endorsing a theory of the person deriving from a particular comprehensive doctrine.

Rawls notes that citizens in a constitutional democratic regime view themselves as free in three respects, which ultimately shed light onto the relevant moral qualities of persons that relate to a conception of political justice. First, citizens are free in that they recognize in themselves and in others the capability of having conceptions of the good and committing to political and nonpolitical means to pursue their final ends. Provided the inevitability that these final ends will conflict, citizens must respect others’ pursuit for their own ends. Precisely in this way, then, are members of a constitutional democracy conceived as free and equal. Second, citizens are free in that they are sources of self-authenticating claims on their institutions in order to pursue their own conception of the good. To be explicit, any citizen has a claim on his institutions to help him achieve a good $G$ so long as $G$ is included in his (reasonable) conception of the good. This feature permits citizens as free to make claims with weight on the social system in order to promote their conceptions of the good. Third, citizens are free in that they are capable of taking

\textsuperscript{14} Political Liberalism, 15–17.
responsibility of their ends. This allows them to adjust their expectations of their claim(s) to goods generated by the system to reflect reasonable expectations; it also allows them to realize the relative weight of their own claims in relation to others.\textsuperscript{15}

These three ways in which persons view themselves as free citizens in a constitutional democracy determine “their possessing to the requisite degree the two powers of moral personality, namely, the capacity for a sense of justice and the capacity for a conception of the good.”\textsuperscript{16} Stated differently, since citizens of a constitutional democratic regime regard themselves and each other as free and equal, they have a capacity for a sense of justice. Or, as Rawls puts it, persons are reasonable. Likewise, since citizens have conceptions of the good and can make valid claims on society to pursue these ends, they have means to rationally advance their own interests. Thus, persons are rational.

According to Rawls, when we conceive of society as a system of fair cooperation, we allow citizens to view themselves as free in ways whereby they resultantly possess requisite degrees of the two moral, albeit limitedly political, powers of moral personality: reasonableness and rationality. Viewed as an interconnected system, the features that specify society as a fair system of cooperation and that persons are reasonable and rational insure the equality and liberty of each citizen in a constitutional democratic regime.

Another feature developing the notion of a constitutional democratic society as a fair system of cooperation is that a society is well-ordered, which insures just respect for claims made by citizens on society. Rawls argues that this feature conveys three things. First, “it is a society in which everyone accepts, and knows that everyone else accepts, the very same

\textsuperscript{15} Political Liberalism, 29–34.
\textsuperscript{16} Political Liberalism, 34.
principles of justice.”

Second, it is publicly known the basic institutions of society satisfy these principles. Third, its citizens regard the basic institutions as just and thus exercise “a normally effective sense of justice” to comply with them.

Specifying a constitutional democratic society as well-ordered is not a trivial point. As Rawls notes, a society that is not well-ordered denies the flourishing of pluralism through injustice. Worse, only oppressive state power can sustain such injustice. Since respecting political liberalism leads to inevitable pluralism, a society that is not well-ordered destabilizes over time. Recall that our goal is to devise a political conception of justice that endures for posterity. With this as our stated goal, well-orderliness of society becomes essential.

A fourth feature underlying a political conception of justice is that “[a] well-ordered democratic society is neither a community nor, more generally, an association.” It is distinct from associations in at least two ways: first, it “is to be viewed as complete and closed social system.” Unlike associations, a society accounts for all human purposes in life and can only be entered into through birth and exited through death—i.e., you cannot join a society in the ways someone joins an association. Second, “a society has no final ends and aims in the way that persons or associations do.” Rather, a society establishes institutions through which persons and associations advance their own ends. A just society has ends only insofar as they are within the purview of “a political conception of justice and its public reason.” Importantly, Rawls—and I agree with him on this crucial point—does not say that a political conception of justice cannot assign value to some particular end(s); in fact, both he and I make some value judgments

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17 Political Liberalism, 35.
18 Political Liberalism, 35.
19 Political Liberalism, 40.
20 Political Liberalism, 40.
21 Political Liberalism, 41.
22 Political Liberalism, 41.
as we conceive our own liberal theories of justice. Instead, a political conception of justice assigns value to ends only if doing so is essential to advance all citizens to their own individual final end(s). For example, the theory of justice I develop here values dignity and self-respect as particular final ends; that is, I maintain that dignity and self-respect are necessary but not sufficient for a person to realize any conception of the good life. If a democratic society is not an association, then perhaps it could be a type of community? No, this, too, is incorrect. A well-ordered democratic society is distinct from a community: by definition, a community affirms a shared comprehensive doctrine among its members. A community qua community denies public reason, and thus disrespects political liberalism.

The final fundamental feature underlying a political conception of justice is its justification from a reasonable overlapping consensus. A public acceptance of the principles of a political conception of justice, and the basic institutions these principles establish, allows for “considerable differences in citizens’ conceptions of justice provided that these conceptions lead to similar judgments.” All shared by reasonable comprehensive doctrines, these similar judgments center around a focal point that comprises a political conception of justice. This process of arriving at a shared conception of political justice from differing premises describes the notion of justification from a reasonable overlapping consensus.

In contrast to strict consensus, an overlapping consensus allows for a multiplicity of reasons as to why a conception of political justice receives affirmation from any particular comprehensive doctrine. Furthermore, affirmation from any particular comprehensive doctrine

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23 Rawls does not explicitly recognize the justification of a political conception of justice by a reasonable overlapping consensus as a fundamental feature. Instead, he implies this as a fundamental feature of a political conception of justice in his discussion in I: 6.4 of *Political Liberalism*. More important, if a political conception of justice necessarily respects political liberalism, it almost by definition needs justification from an overlapping consensus defined as such in § 1.2.

functions independently from the affirmation of any other competing view; affirmation results from a political conception of justice internally and approximately according with the views associated with any reasonable comprehensive doctrine. Equally important, an overlapping consensus allows for similarity in judgments about such a conception. A strict consensus would mandate that judgments about justice from one reasonable comprehensive doctrine are substantively equivalent to the judgments from another. This substantive equivalence is not so with a reasonable overlapping consensus: such judgments only need to be substantively similar so that they coalesce around a shared political conception of justice.

In sum: there are five fundamental features underlying a political conception of justice. The features—(1) conceiving of society as a system of fair cooperation, (2) defining the political conception of the person (‘the citizen’) as possessing certain moral powers, (3) requiring that a constitutional democratic society is well-ordered, (4) distinguishing a society from an association and a community and (5) justifying a political conception of justice by a reasonable overlapping consensus—dovetail into the view that a political conception of justice necessarily is liberal in nature. By respecting political liberalism, a political conception of justice incorporating these features insures procedural fairness and citizens’ liberty and equality. It also provides stability for the society over time, as well as the framework for persons or groups to advance their own ends. And it allows the political conception of justice to be freestanding—a self-contained theory delimited to the political and free from commitments to any particular comprehensive doctrine.
3. Justifying a Political Liberal Framework for a Political Conception of Justice

In this section, I justify why a political liberal framework is vital for structuring a political conception of justice. The discussion proceeds in three stages. I begin by specifying why persons enter into society in the first place. Next, I provide essential properties associated with a political society that a framework view underlying a political conception of justice cannot violate. I conclude by testing two competing frameworks against these properties to determine which view to adopt as the framework of a political conception of justice.

Assuming a contract theorist perspective, persons enter into society to advance their own interests. Recall that a society is distinct from associations and communities in at least one crucial way: a society aims at no final ends. Instead, society provides a system of cooperation whereby members amplify the fruits of their individual effort to such an extent that it is in the rational interest of each member to remain a part of the system. Contract theorists from Hobbes to Rousseau recognize this—the promotion of the interests of each individual member—as the purpose, and indeed legitimacy, of society.

In fact, the importance of legitimacy cannot be overstated. To fix terms, legitimacy, here, is taken as the justified moral right society has to impose coercive laws. The liberty principle prioritizes liberty over coercion. Just because a cooperative system generates fruits beyond the sum of individual effort does not entail its legitimacy. In fact, legitimacy of power is necessary for political justice. In many respects, political power is the ability to coerce citizens, the members of the system. Since the design of cooperative systems—including society—is to advance the interests of its constituent members, coercion must be accepted by each (reasonable)

25 Joel Feinberg provides a paradigm definition of the liberty principle: “[we] have endorsed a kind of ‘presumption in favor of liberty’ requiring that whenever a legislator is faced with a choice between imposing a legal duty on citizens or leaving them at liberty, other things being equal, he should leave individuals free to make their own choices. Liberty should be the norm; coercion always needs some special justification” (Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (New York, NY: Oxford University Press, 1984), 9).
member. In the context of society: if citizens do not accept the use of political coercion, they will view political institutions as illegitimate. Over time, illegitimate use of power erodes the stability of society.

Society as such imports one of the two essential properties associated with a political society. Since a just society as a whole necessarily advances the individual interests of its members, the political aspect of a society—political society—must do the same. The purpose of political society therefore is to establish public constitutional principles and institutions that advance the individual interests of its citizens, whatever these interests may be. Thus, the first property of political society is that it must support human endeavor however defined, a property peculiarly liberal in nature.

The second property of political society roughly defines what human endeavor entails. The one—and in my opinion, the only—good political society secures is self-realization. As Rawls suggests, an essential feature of citizenship is the capacity for rationality. An aspect of rationality is the capability to determine our own individual conception of the complete good. To be explicit, self-realization is a necessary component of the complete good, but the two concepts are by no means equivalent. Rationality also allows us to realize that we are situated freely and equally to other persons, to other rational beings. That is to say, and in the vein of Kant, we recognize that other persons qua rational have the ability to determine their own conception of the complete good. Citizens of political society are self-legislators in the kingdom

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26 Rawls refers to my idea of self-realization as self-respect or more broadly the unity of the self in § 85 of *A Theory of Justice*, 491–496. I instead refer to it as self-realization, because, as is hopefully shown in the subsequent discussion in § 1.3, I believe this term describes the true nature of this good—realizing your own personhood and respecting the dignity of other persons as beings of intrinsic worth.

27 The term “complete good” is a technical one and approximates what Rawls had in mind when he refers to “an index of goods.” The content of the complete good is indeterminate. The only good necessarily included in the complete good for persons is self-realization; an individual person determines all remaining goods for herself. The complete good is the set of the goods and ends at which an individual directs action. As an example, a person’s complete good may include pleasure, beauty, spirituality and fraternity, in addition to self-realization.
of ends, and also legislators in political society. The constitution of political society must be
established such that each citizen has the ability to self-legislate their own conception of the
complete good, while also legislating society so that others are afforded this same ability.

And thus we have arrived at the two moral personalities Rawls associates with a political
conception of the person, or a conception of the citizen: the capacity to decide one’s own
conception of the good—rationality; and the capacity to recognize others as free and equal—
reasonableness. In addition to these two personalities, I add a third: autonomy, or a freedom of
constraints on (reasonable) action to pursue the good. Rationality and autonomy go hand-in-
hand: while rationality is the *subjective capability* of persons to determine a conception of the
complete good, autonomy is then the *objective ability* persons have to freely pursue that
conception of the good. The political conception of the person requires autonomous action in
order to realize the other two moral personalities.

Furthermore, a citizen can attain self-realization if and only if a citizen can exercise her
rationality, reasonableness and autonomy. The goal of a political conception of justice is to
structure institutions that respect these features as inviolate, while also maximizing the individual
interests of citizens. A political society, then, is a fair system of cooperation whereby each
citizen is afforded dignity and the opportunity to pursue their rational self-interest.28

An alternative way of conceiving political society therefore is as a set of institutions
safeguarding essential goods valued by persons qua citizens; these institutions also serve as the
infrastructure directing each citizen toward achieving her conception of the complete good.

Political society is analogous to the bumpers at a bowling alley. The bumpers perform a twofold

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28 I adopt J. David Velleman’s conception of dignity throughout: “[an interest-independent] value of this
kind, which a person has in himself but not for anyone, is the basis of Kantian moral theory. Kant’s term for this
value is ‘dignity’, and he attributes dignity to all persons in virtue of their rational nature” (J. David Velleman, “A
Right of Self-Termination” *Ethics* 109(3), 611; emphasis in original).
purpose: they restrict the movement of the ball in order to preserve the ball’s essential purpose (i.e., knocking down pins); they also guide the ball toward achieving its particular end (i.e., the number of pins the bowler attempts to knock down on that particular bowl). Political society restricts the liberties of its citizens in order to preserve each citizen’s essential purpose (i.e., self-realization); by guaranteeing rationality, reasonableness and autonomy, it also guides each citizen toward achieving her own particular end (i.e., her conception of the complete good).

With a clearer idea of political society, we can now test the superiority of a liberal framework—one that supports the flourishing of a pluralism of competing reasonable comprehensive doctrines in society—over two alternatives. First is utilitarianism. A utilitarian framework for a political conception of justice structures public institutions so that they maximize the greatest good. Though it need not necessarily, this framework could clearly result in a theory of justice that violates the rationality, reasonableness and autonomy of its constituent citizens. In fact, if the optimized good is defined as (or merely inclusive of) pleasure, the resulting political conception of justice clearly violates the rationality and autonomy of its citizens: it presupposes citizens ought to value pleasure as their final end, and furthermore should seek to maximize this end. Such a presupposition clearly disrespects the capacity of each citizen to determine her conception of the complete good, and to thereby freely pursue the achievement of that end. For example, we can imagine a democratic society with a group of citizens who engage in ritual self-flagellation. This group of people performs extremely painful acts merely for their own sake, not out of duty to a metaphysical being or as means toward a larger expression of the self. A pleasure-optimizing utilitarian society would disallow such behavior, because it reduces the net utility of that society. And, to be explicit, such disallowance is akin to that society determining for this group what ends they should not value: painful acts of self-
flagellation. In short, a utilitarian framework fails: it yields a political society that dictates the ends for its citizens to pursue and limits their action to maximize its pursuit; it yields a political society that holds neither the rationality nor the autonomy of its citizens inviolate.

Second—and rival to liberalism—is conservatism. A conservative framework for a political conception of justice establishes public institutions according to tradition, not reason. Traditional conservatism derides rationalism as metaphysical, rendering “human actions…stripped of every relation, in all nakedness and solitude of metaphysical abstraction.”

Indeed, with his brand of conservatism, Burke advocated for political empiricism rooted in educated prejudice, which

is of ready application to the emergency; it previously engages the mind in a steady course of wisdom and virtue, and does not leave the man hesitating in the moment of decision, skeptical, puzzled, and unresolved. … Through [educated] prejudice, his duty becomes a part of his nature.

By this account, a political conception of justice would rest entirely on empirical contingencies. That is, ‘if it ain’t broke, don’t fix it’: a society guided by educated prejudice will be both stable and just—at least according to Burke.

Like its utilitarian counterpart, the conservative framework for a political conception of justice is easily rejected. It, too, could result in a theory of justice that is utterly unjust. The antebellum south in America exemplifies this point: southern society was structured according to

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29 Edmund Burke, “Abstract Theory of Human Liberty” Selections from the Speeches and Writings of Edmund Burke (Project Gutenberg, 2002); heretofore referred to as Selections. See also § 1.2 of Andy Hamilton’s “Conservatism” The Stanford Encyclopedia of Philosophy (2015).

30 “British Stability” Selections.
the educated prejudice that the past economic advantages afforded by a system of slavery trumped future respect for persons. In fact, it resulted in stable institutions that lasted hundreds of years. It was not until an exogenous shock revolutionized the society, replacing the stability of traditionalism with one of rational democracy. The example highlights that the conservative framework was not entirely misguided: educated prejudice can indeed result in stable public institutions. But conservatism as such is utterly mistaken in a crucial aspect: by virtue of the fact that it has, and thus theoretically could, perpetuate horribly unjust institutions (e.g., slavery), the conservative framework could result in a theory of justice that violates the rationality, reasonableness and autonomy of persons. Consequently, as we devise our own political conception of justice, we cannot begin from conservatism.

It does not follow that just because two competing frameworks fail we should automatically adopt a liberal framework. Yet, liberalism can in fact hold the three features of public personhood inviolate; it can afford dignity to citizens. Any political society comprised of institutions that respect political liberalism necessarily allows its citizens to determine their complete good, because it encourages a multiplicity of comprehensive doctrines; thus it respects rationality. Furthermore, the fact that it encourages reasonable pluralism, political liberalism respects reasonableness. According to Rawls, an essential feature of political liberalism is that a conception of political justice must receive support from an overlapping consensus. Such consensus empowers each group, indeed each citizen, for settling constitutional essentials; thus political liberalism respects autonomy as well.

This section explicitly defined the features of citizenship—rationality, reasonableness and autonomy—that will assist us as we subsequently devise a political conception of justice. It also clarified what political society is, as well as what it is designed to do: advance human endeavor
however defined by securing the three characteristic features of personhood and establishing institutions that provide a framework for each citizen to pursue her conception of the complete good. Finally, it was shown that, rather than a utilitarian or conservative one, a political liberal framework provides sound footing to ground a political conception of justice.\textsuperscript{31}

4. The Overlapping Consensus, Public Reason and Justification

Adopting a political liberal framework for a political conception of justice is not without controversy. Here, two concerns are addressed. The first anticipates an objection non-liberals may levy. The heart of my response is that public justification is all that a liberal political conception needs for justification. The second objection builds from this response: public justification comes in many forms. My response here modifies Rawls’s sense of public justification. Specifically, I expand the idea of an overlapping consensus to include democratic procedure. The expansion ensures legitimacy and stability across generations. I also dissolve Rawls’s boundary between public and nonpublic life. This allows for our political conception of justice to equally respect liberalism and republicanism.\textsuperscript{32}

Let us begin with the response from a non-liberal objector: ‘Central to a liberal political conception of justice is the notion that it is limited to political society. It avoids any commitment to a comprehensive doctrine so that it receives support from an overlapping consensus of competing comprehensive doctrines. Yet, political liberalism inextricably attaches to non-

\textsuperscript{31} The justification for a political liberalist framework for a political conception of justice presented here supplements the justification Rawls provides, which was summarized above in § 1.1.

\textsuperscript{32} Defining republicanism remains a contested debate in political philosophy. To fix terms, I take adopt a version of republicanism put forth by Philip Pettit: i.e., republicanism is non-domination, where domination is “subjection to an arbitrary power of interference on the part of another…even when one chooses not actually to exercise that power” (Philip Pettit, “Keeping Republican Freedom Simple: On a Difference with Quentin Skinner” \textit{Political Theory} 30(3), 340). Here, I interpret republicanism as non-domination to mean that political authority originates ultimately from the citizen \textit{en masse}. A republican government serves as an agent of the people.
political views: it defines personhood, and it supplies desideratum (self-realization). Indeed, political liberalism is so deeply rooted in comprehensive doctrines that any political conception of justice it yields loses its 
\textit{strictly political} flavor.'

Though an important concern, this objection is misguided. Indeed, Kantianism informs many of the concepts that form political liberalism. But there is a critical difference between a political conception of justice committing to a comprehensive doctrine and merely citing one. The former lives and dies by the doctrine. If the doctrine to which the conception of justice commits is not fully endorsed, the conception itself cannot be rationally endorsed. Consider the \textit{Ancien Régime}: if a Parisian at the time denied Divine Command Theory and instead endorsed atheism, she could not rationally endorse the Bourbon hereditary monarchy. It would be irrational to endorse political institutions of the \textit{Ancien Régime}, because the word of God ultimately insures their coercive force. Further, if she did endorse the political society, she could do so only by undermining her own beliefs and values. In the abstract, this example is equivalent to a citizen simultaneously believing that $\phi$ is true and believing that ‘the belief that $\phi$ is true’ is false—an absurdity indeed.

By merely citing not committing to comprehensive doctrines, political liberalism avoids this problem. One could reject that self-respect and dignity—self-realization—are non-exchangeable and necessary components of the complete good and still endorse political liberalism. As a liberal view, the conception of justice devised respects a plurality of competing comprehensive doctrines. That is, it would not be self-undermining to endorse a liberal political conception of justice but not endorse the justification provided above. The reason why is simple: political liberalism goes hand-in-hand with a constitutional democracy. A liberal political conception of justice receives its force not from a comprehensive doctrine (e.g., a philosophical
justification like the one provided in § 1.3) but in virtue of its public justification, or what Rawls calls an overlapping consensus. For Rawls, the fact that an overlapping consensus in a well-ordered society can affirm the substantive principles of the political conception of justice legitimizes his theory, justice as fairness.

Here, the critical aspect of the overlapping consensus is its publicity, which consists of three “levels.” The first is that a political conception of justice contains public principles: “citizens accept and know that others likewise accept those principles, and this knowledge in turn is publicly recognized.” Citizens do this as parties to a shared set of beliefs derived from appropriate methods of inquiry related to questions of political justice. The second level concerns the content of the shared “general beliefs about human nature and the way political and social institutions generally work, and indeed all such beliefs relevant to political justice.” To what this content may specifically relate includes “the procedures and conclusions of science and social thought, when these are well established and not controversial.” These first two levels produce pro tanto justification, or one from a collective body of judgments. Finally, the third level of publicity “has to do with the full justification of the public conception of justice as it would be presented in its own terms.”

In contrast to committing to, merely citing a comprehensive doctrine (as is done when devising a liberal political conception of justice) grants that people can affirm the same political theory but for different reasons. A political conception is a limited doctrine. So, assuming publicity obtains, public justification circumvents the objection raised: a liberal political conception of justice does not regress into a comprehensive doctrine.

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33 Political Liberalism, 66.
34 Political Liberalism, 66.
35 Political Liberalism, 66.
36 Political Liberalism, 67.
37 Political Liberalism, 67.
Now, there are many ways to conceive the notion of public justification—which one is right? This raises the second controversy surrounding political liberalism: since a comprehensive doctrine cannot, a public reason must justify a liberal political conception of justice. But the idea of public reason comes in many forms, two of which are examined here. The Rawlsian idea of public reason is considered first. Thereafter, Habermas’s communicative reason and deliberative democratic view is compared to Rawls’s account. Ultimately, Habermas’s criticism informs a modified account of public reason, which I thereby use to develop a political conception of justice.

For Rawls, justification of a political conception of justice is a twofold process. The first step involves representatives selecting and affirming principles comprising the theory. Justification, here, begins with pro tanto justification. In this stage, parties, all of whom represent opposing comprehensive doctrines, recognize shared conceptions and principles. These collective judgments delimit the political conception: if a conception oversteps these boundaries, it toes the line of becoming unreasonable in the eyes of a particular comprehensive doctrine. The candidates for a political conception of justice must first pass this hurdle. Citizens proceed to fully justifying a conception of justice. Full justification requires that parties expose the reasons for why they endorse the substantive principles of justice. Representatives of each comprehensive doctrine must publicize their reasons for support. Full justification tethers the site of the overlapping consensus. It also illustrates why the consensus is not strict: each doctrine may justify the political conception for entirely different reasons. However, an overlapping consensus—built from pro tanto justification, full justification and publicity—legitimize and stabilize a political conception of justice.
Constitutional conventions approximate an overlapping consensus. Representatives of various interests convene to build a constitution that frames the society, and specifically its public institutions. Parties begin by identifying common ground, which sets the boundaries for reasonable resolution. They progress by individually affirming a single constitution, which gains theoretical support from the special interests each represent. Parties debate the constitution, its articles, amendments and sections. The debate publicizes the justification of the constitution for all parties to consider. The constitution that results from such conventions reflects the overlapping consensus reached. Importantly, this consensus is neither compromise nor *modus vivendi*; all justifies it, each for their own reasons and made public to the whole of society.

If the first stage of public justification for Rawls produces the political conception of justice itself, the second stage regulates it. Citizens do this from the idea of public reason, which includes five features: (1) the fundamental political features of a society and (2) its citizens; (3) its content as specified by a plurality of reasonable views of justice; (4) the instantiation of these views to legitimize societal institutions; “and (5) citizens’ checking that the principles derived from their conceptions of justice satisfy the criterion of reciprocity”\(^\text{38}\).\(^\text{39}\)

Features one and two plus the *ideal* of public reason help explain the democratic nature of political liberalism. The ideal of public reason occurs when public officials—politicians, judges, chief executives—act in full accordance with public reason, especially respecting publicity. In so doing, Rawls claims these officials are upholding their duty of civility. Civility, though, is a two-way street. Citizens must uphold their own end of the bargain. Not only must

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\(^{38}\)Rawls defines the criterion of reciprocity to incorporate the idea that “our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions” (*Political Liberalism*, xlv). In other words, the criterion of reciprocity appeals to our powers for reasonableness, asking us to imagine whether perspectives different from our own would reasonably accept our political conception of justice. If they can, political power is legitimate.

\(^{39}\)*Political Liberalism*, 442.
they partake in democratic processes—caucusing, voting, informing themselves and rationalizing their views to others—they must also hypothetically situate themselves as legislators and “ask themselves what statutes…they would think it most reasonable to enact.”40 The idea of public reason promotes ideal democracy whereby all citizens—including public officials—uphold their duty of civility and respect the reasonableness of their fellow citizen. What this creates is a political society that accords both with the political conception of justice produced from an overlapping consensus and a political society reflective of the reasonable political views of modern constituents. For Rawls, only when this reciprocal consideration for others’ views and the duty of civility is universally respected is political power legitimate. Public reason as such not only creates the political conception of justice; it regulates it. It builds a just constitution, and legitimizes the coercive political power it sanctions.

Public reason, to reiterate, comes in many flavors. We can ask whether the Rawlsian conception is correct: what are our alternatives? Habermas’s communicative reason serves as useful comparison; it also motivates a modification I argue Rawls needs to make to his idea of public reason.

Habermas identifies three general areas of human inquiry that generate knowledge: the technical, the practical and the critical interests of humanity. Habermas develops his discourse theory from the practical interest of human inquiry, which relates to interpersonal understanding and sociological questions. This theory adopts a notion of discourse as a process whereby speakers assert claims, and through debate, the authenticity or validity of the claims are revealed.

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40 *Political Liberalism*, 445.
Discourse theory presupposes persons are reasonable to the extent that they can engage in fruitful, civil debate and rational in that they can formulate (subjectively or contextually) valid claims.\(^{41}\)

And it is here Habermas begins his criticism on Rawls’s project of devising a pluralist and liberal political conception of justice in *A Theory of Justice* and *Political Liberalism*.\(^{42}\) Habermas makes two theoretical criticisms that combine into an overall remark against Rawls’s justice as fairness. First, the original position fails to secure the impartiality of a deontological theory of justice.\(^{43}\) This first criticism lies outside the scope of discussion.\(^{44}\) Second, Rawls sacrifices the cognitive validity of his principles of justice for their neutral acceptance by citizens.\(^{45}\) Cognitive validity expands beyond empirical validity. It captures the notion that in discourse, a listener understands from where the speaker is coming in making a particular claim and sees these as good reasons for justification (but does not necessarily agree with them).\(^{46}\) By way of an empirical example, if a speaker utters ‘the United States is located in North America’ and a listener understands the justification of this claim and sees the justification as fitting for the claim, then the claim has cognitive validity. Contextually, the claim ‘all persons irrespective of race deserve equal rights’ is a cognitively valid claim if its justification is understood and seen as good or fit for the claim. Hence, Habermas’s charge against Rawls is that neutral acceptance—acceptance without full discourse—fails to cognitively validate the principles of justice after they have been initially established. Both these criticism dovetail to

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\(^{43}\) Habermas, 110.

\(^{44}\) It lies outside the scope of discussion as follows: we are progressing from the framework Rawls specifies in *Political Liberalism* to reach our political conception of justice. To avoid comprehensiveness, Rawls uses an overlapping consensus to justify a political conception of justice—namely, justice as fairness—and does so in place of the original position, which is the justificatory method he employs in *A Theory of Justice*. Since we, too, are using an overlapping consensus in place of the original position, we do not need to focus on Habermas’s first theoretical criticism of Rawls’s principles of justice.

\(^{45}\) Habermas, 110.

\(^{46}\) Bohman and Rehg, § 3.
result in a construction of the constitutional state that accords liberal basic rights primacy over the democratic principle of legitimation. Rawls thereby fails to achieve his goal of bringing the liberties of the moderns into harmony with the liberties ancients.\textsuperscript{47}

Habermas claims justice as fairness unjustifiably prioritizes liberty over justification. Moreover, the distinction between the liberties of the ancients and the liberties of the moderns deserves discussing. Benjamin Constant, a Swiss-French political theorist, first distinguished between the liberties of the ancients and that of the moderns in the early nineteenth century.\textsuperscript{48} The liberties of the ancients are roughly political liberties—including rights of communication, cooperation and participation—that give rise to the value of public life. Republicanism captures the essence of the liberties of the ancients. The liberties of the moderns are roughly personal liberties—including the rule of (commercial) law and rights of expression and association—that give rise to subjective, private value. Liberalism captures the essence of the liberties of the moderns. Rawls argues that the moral power of persons for reasonableness accords with the liberties of the ancients, whereas the power for rationality accords with the liberties of the moderns.\textsuperscript{49} Thus, in both projects—\textit{A Theory of Justice} and \textit{Political Liberalism}—Rawls attempts to treat both the liberties of the moderns and liberties of the ancients equally. Neglecting one would thereby neglect either the reasonableness and public autonomy or the rationality and nonpublic autonomy of persons.

\textsuperscript{47} “Reconciliation through the Public Use of Reason,” 110.
\textsuperscript{48} Benjamin Constant, “The Liberty of the Ancients Compared with that of the Moderns” \textit{Athénée Royal of Paris} (1819).
\textsuperscript{49} Cf. \textit{Political Liberalism}, 5 and 299; “Reconciliation through Public Use of Reason,” 127.
In his second criticism, Habermas, in particular, takes issue with the second stage of justification, or what Rawls refers to as public reason. Public reason uses rational deliberation among citizens of a political society to justify, and thus stabilize, principles of justice and settle questions about constitutional essentials. Rational deliberation locates the political conception of justice in an overlapping consensus of extant views, which provides the justificatory force of the theory. But Habermas notes, “the overlapping consensus merely expresses the functional contribution that the theory of justice can make to the peaceful institutionalization of social cooperation.”\textsuperscript{50} Though he does not necessarily disagree with Rawls that it is a compromise or resultant of a \textit{modus vivendi}, he does believe the overlapping consensus merely expresses “an index of the utility”; it expresses mere acceptance, not justification.\textsuperscript{51} Unlike acceptance, justification requires cognitive validation. Accepting the principles of justice for, say, their utility does not guarantee persons actually understand the reasons justifying the principles and see these reasons as good or fitting.

Beneath this criticism is the sense in which Rawls uses reasonable. In one sense, Rawls uses reasonable when describing the moral personalities of citizens. Here, he uses reasonable to point “to the discursive redemption of a validity claim”—i.e., the discursive process whereby a \textit{reasonable} person validates claims. When Rawls supplies the political conception of persons, he uses reasonable in a morally and propositionally true sense. The second sense in which Rawls uses reasonable is when he refers to reasonable disagreement existing among competing comprehensive doctrines. He uses this power persons’ share to get the idea of an overlapping consensus off the ground and to thereby stabilize justice as fairness. But this second sense of reasonable roots itself in the principle of toleration. The moral validity of this principle, however,

\textsuperscript{50} Habermas, 121.
\textsuperscript{51} Habermas, 121–122.
appeals to a comprehensive doctrine. In other words, the method Rawls uses to justify his principles of justice, while also avoiding commitment to any one comprehensive view, commits itself to a comprehensive view; Rawls compromises the “epistemic status” of justice as fairness by using this sense of reasonable.\(^{52}\) By making such a move, the freestanding status of his conception of justice is untenable; its acceptance becomes questionable.

And on my reading of Habermas and Rawls, the public justification of justice as fairness results from empirical contingencies; the content of Rawls’s political conception of justice is indeterminate if justified from an overlapping consensus as he defines it. When Habermas argues that the overlapping consensus expresses ‘an index of utility’, it implicitly expresses comprehensive views endorsed by citizens here and now. In this way, the political conception of justice it produces is empirical. And if it is empirical, it is not difficult to see how it is indeterminate. If a just political conception is merely the output of a particular society’s overlapping consensus, two societies could produce vastly different political theories, and both of which could also be just. Though a political liberal framework may produce several political conceptions of justice—indeed, it does by definition produce prudentially, and not purely just theories—it is not a logical impossibility that the overlapping consensus could produce two conflicting just theories: one would be ‘just in society \(x\)’, whereas the other would be ‘just in society \(y\)’. Less abstract, the overlapping consensus could justify both of the following political conceptions: first is a despotic theocracy, a society in which all members are assumed to share in the same religious doctrine and affirm the institutions established by the ruling class of religious elites. In this instance, the theocracy and its institutions could be rendered just if the principles underlying the society’s basic institutions are affirmed by an overlapping consensus in this society. At the same time, its neighboring society is a Rawlsian constitutional democracy, whose

\(^{52}\) Habermas, 124–126.
institutions are founded on principles affirmed by an overlapping consensus. This conflicting theory of justice could also be just according to the overlapping consensus as stated. But, it seems wrong to me to think that these two fundamentally different societies are both practically just; it seems that more is at play in justifying a political conception of justice than that the theory garners support from an overlapping consensus in a particular society. This criticism as well as Habermas’s assertion that Rawls commits to a comprehensive view reveal that Rawls’s public justification needs revising.

As Habermas notes, the upshot of these criticisms is to develop substantive principles of justice “out of the procedure of the public use of reason.” In Rawls’s first justificatory stage of public reason, representatives of each comprehensive view build the substantive principles of justice from a recognized set of shared conceptions and beliefs. Habermas notes that only members of the representatives’ generation—the founders of a political society—enjoy the fruits complete democratic participation in civic life offer. Moreover, to approximate this collective knowledge, Rawls places a “rigid boundary between the political and the nonpublic identities of the citizens.” Habermas argues that this boundary buys liberal rights at the cost of the democratic process, that Rawls emphasizes the liberties of the moderns over those of the ancients. If so, Rawls implicitly values rationality greater than reasonableness—an unacceptable move if the goal of political society is to support the flourishing of all human endeavor. Instead, Habermas replaces this boundary with a “dialectical relation” between public and private life to equalize the liberties of the moderns with those of the ancients. To do this, the critical step toward legitimization of the principles of justice is democratic procedure. Each citizen must jointly author the laws to which all members of society are subject.

53 Habermas, 127.
54 Habermas, 128.
55 Habermas, 130.
This requires citizens—in my opinion—to expand the overlapping consensus to capture democratic essentials seriously: procedures of voting, protesting, public debate, free speech, open press and—most important—the institution of one person, one vote must be respected by citizens and the substantive principles forming their constitution. Rawls approximates these essentials with his ideal of public reason; however, not only do I hold democratic procedure as a necessary feature of public reason (i.e., it is not an ideal for which we strive, but rather a necessary albeit difficult procedure we must fully perform) but also enumerate it in the principles associated with our own political conception of justice to be devised in Part II. Democratic procedure leads to a true political community guided by communicative reason. The upshot of Habermas’s critique rebalances political liberalism so that it safeguards these democratic essentials as much as it does so for personal liberties.

Indeed, I believe the idea of public reason should be modified so that it fully respects democratic procedure as such; it should also dissolve the boundary citizens have between political and nonpublic life when addressing political questions. These modifications produce four benefits once we ultimately arrive at our political conception of justice.

First, adding discursive elements to the overlapping consensus allows citizens to realize their three characteristic features of citizenship—features I maintain essential for self-realization and attainment of the complete good, however broadly defined, as the end of human endeavor. Democratic procedure allows citizens to engage in open debate and principally argue for their conception of the good. In doing so, they realize their rationality. Democratic procedure also legitimizes coercive law by empowering the community of self-legislating citizens to institutionalize contemporary issues into codified law. This thereby allows them to realize their
reasonableness. Democratic procedure situates citizens equally as joint authors of the law. And thus: it allows them to realize their autonomy.

Second, founding citizens must establish only the substantive institutions of political society and answer the most essential constitutional questions during the constitution convention. Moreover, representatives at the convention must have knowledge of their public and nonpublic life to inform their selection of the principles of justice. This will secure republicanism aside liberalism: the intuitions for both are indeed “nourished by the same root.”

Citizens in situ must settle everything else, including many substantive questions. And they, too, must inform decisions regarding political society by appeal to their political and nonpublic life.

Third, stipulating respect for democratic procedure restricts the principles of justice forming our political conception of justice. Delimiting the principles of justice in such a way ensures that the rational engagement of citizens, here and now, legitimizes the political conception of justice, here and now. This move allows citizens of all generations to “reignite the radical democratic embers” of civic society.

It also further stabilizes a political conception of justice.

Last, expanding the overlapping consensus to fully adopt democratic procedure permits citizens both vertically and horizontally to enjoy the fruits complete democratic participation of civic life offers. Political society includes citizens situated vertically and horizontally in the following sense. Vertically, citizens are situated as members of the same political society across generations. Horizontally, citizens are situated as members of the same political society concurrently but in different positions (e.g., socioeconomic status). A political conception of justice must ensure justice in both directions.

56 “Reconciliation through the Public Use of Reason,” 130.
57 “Reconciliation through the Public Use of Reason,” 128.
A summary of our modified account of public reason, which justifies a political conception of justice, follows. Public reason includes the five features Rawls specifies: (1) the fundamental political features of a society; (2) the citizens of this society; (3) a plurality of reasonable views of justice produce the content of the political features of society; (4) societal institutions as instances of these views; and (5) regulative reason about the conception of justice among citizens. My modified account of public reason includes these features, but also expands it to include full adoption of democratic procedure in all justificatory stages, as well as the dissolution of the boundary all citizens have between political and nonpublic life—even the founders selecting the substantive principles of the political conception of justice.
Comment

As we proceed in constructing our own political conception of justice, we must keep in mind the framework established in Part I. Our theory must derive from political liberalism. Doing so requires establishing principles that accomplish two things: first, the principles must recognize the fact that a plurality of competing comprehensive doctrines inevitably exists in a democratic regime; second, as the foundation for the basic institutions forming the constitution of society, these principles must neither inhibit nor promote the development of any one of these doctrines.

Respecting the idea of political liberalism may seem vague. This explains why Part I continued by explaining the relevant moral personalities citizens have in political society; it also clarifies the need for a public conception of justice. In order to originate from political liberalism, then, the principles comprising our political theory of justice are justified by determining whether they respect the rationality, reasonableness and autonomy of citizens. If the principles fail to respect any of these personalities, citizens will not be able to lead a full human life, one in which they exercise the capabilities of their personhood thereby granting them the capability for self-realization.

Furthermore, the principles must garner justification from public reason. Recall the revisions made from Rawlsian public reason. Like Rawls, my account of public reason includes five features: fundamental political features of society, its citizens, the plurality of views these citizens endorse, the notion that institutions are reflections of these views and the ability of citizens to reflect whether the principles satisfy the demands of reciprocity. Unlike Rawls,
however, my account of public reason dissolves the boundary between political and nonpublic life; it also requires democratic essentials in all stages of justification.

In *A Theory of Justice*, Rawls identifies two principles of justice in his justice as fairness. Rawls embarked on a similar project in *Political Liberalism*; however, in this work he justifies the principles not by appeal to a comprehensive moral doctrine but through public reason, an overlapping consensus and a political liberal perspective. The resulting theory, he argued, was unchanged; it still contained the two principles comprising justice as fairness, and neither one of which needed revision. Rawls presents a statement of the two principles of justice in *Political Liberalism* as follows:

a. Each person has an equal right to a fully adequate scheme of equal basic liberties compatible with a similar scheme of liberties of all.

b. Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged member of society.\(^{59}\)

Although Rawls states justice as fairness in two principles, the second can be stated as two separate principles, one dealing with fair equality of opportunity and the other with the distribution of benefits in society.

\(^{59}\) *Political Liberalism*, 291.
In general, I maintain that justice as fairness as stated is largely adequate. Rawls was right to include principles of justice in his political conception that guaranteed basic rights, ensured fairness of opportunity and governed the distribution of goods in society. And for this reason, I use justice as fairness as the starting place for our own political conception. Indeed, I include largely Rawlsian principles of equal basic liberties and fair equality of opportunity in our political conception of justice. In Section 1 of Part II, I explicitly formulate and justify the principle, while also specifying the basket of liberties that a just political conception must provide to its citizens. In the following section, I embark on a similar project for the principle of fair equality of opportunity. In both discussions, I highlight in what way Rawls’s formulation of the principle in question proves inadequate, contrasting it with the revised principle I provide.

The major difference between Rawls’s view and mine, however, is a total rethinking of distributive justice. His difference principle will not do. This principle holds that the benefits in a society are to be distributed such that the interests of the worst off are maximized. In the third section of Part II, I present an argument for an alternative distributive justice principle, the principle of bounded efficiency.

The final section of Part II concludes by proposing equal weighting of the principles as opposed to a lexicographic ranking. An appeal to general intuitionism suffices to adjudicate conflicts between the principles.
Part II: Devising a Political Conception of Liberal Justice

1. Equal Basic Rights and Liberties

As a starting point, let us begin with a restatement of the first principle included in justice as fairness—the principle of equal basic rights and liberties—and examine precisely what the content of this principle entails. After sufficiently summarizing the principle, I examine whether its Rawlsian formulation is justified according to my revised conception of public justification. Checking the principle against public reason reveals that it is insufficient as Rawls states it: as a principle included in an ideal theory of justice, it is too vague to provide any normative force to those sympathetic to liberalism; it also prioritizes liberties of the individual over political liberties.

To restate the principle of equal liberty: “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.”\[^{60}\] With this principle, Rawls intends to preserve the equality of persons as such, while also granting citizens the freedom to decide for themselves the final ends for which they strive and to pursue those ends freely. The constitution is precisely the institution that reserves the liberties to which each citizen is entitled; it ought to specify “the best total system of liberty.”\[^{61}\]

But what is liberty? We all may have similar inclinations about what liberty is and what liberties are; however, the general concept is indeed hard to pin down. At a most basic level, a liberty constrains or frees a person to do x. For example, freedom of public expression frees an

\[^{60}\]A Theory of Justice, 220.
\[^{61}\]A Theory of Justice, 178.
agent to express herself in public fora, while a duty not to interfere constrains other agents from preventing her self-expression. Liberty, at least as defined by Rawls, is a holistic system, not simply a package of liberties. The goal is to optimize individual liberty by constitutionally preserving a system of liberties interacting with each other. And for this reason, Rawls argues a person’s (or group of persons’) system of liberties can be limited only if doing so optimizes liberty itself, i.e., “to insure that the same liberty or a different basic liberty is properly protected and to adjust the one system of liberties in the best way."\(^{62}\) Here, it is obvious that Rawls allows for adjustments to liberty so that the system of liberties is the most extensive from the perspective of an unbiased, representative citizen. Less obvious, though, is that the ability to limit a person’s (or group of persons’) claim to equal basic liberties becomes critically important when arguing for and against principles of distributive justice.

Yet, does allowing for limitations on the extension of the liberties flout the notion that *each person* has an *equal right* to the system of basic liberties? No, it does not. It is true that each citizen has an equal claim to rights of citizenship. Equally true is the fact that other liberties have different worth to different persons, depending on each person’s station in life. Recall that one of the central goals of a right political conception of justice is that it grants persons the capability of self-realization, a necessary but insufficient good. Another central aim of a right liberal theory recognizes that citizens ought to decide the final aims that form their conception of the good life. And this leaves a clue as to the justification of the principle of equal liberty: it facilitates citizens in pursuing their final ends. Inequalities in wealth or simple ignorance by some produce inequalities in the worth of liberties; those with greater wealth and authority have

\(^{62}\) *A Theory of Justice*, 179.
“greater means to achieve their aims.”63 Thus, we allow for differences in the extension of the system of liberties to different groups of persons in order to create equality among citizens so that each shares a legitimate chance of living the good life. The principle of equal basic rights therefore is equal in only two ways: first, each citizen enjoys the equal liberties of citizenship; and second, each citizen is entitled to the most extensive scheme of liberties such that each is equally positioned to achieve their aims.

Now, having made remarks about liberty as a system and the extent to which it is equal, we can focus on the basic liberties Rawls includes in the first principle of justice. Rawls enumerates a list of important liberties included in the principle of equal liberties:

Political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.64

This list is by no means exhaustive. Instead, the list provides what Rawls views as necessary liberties included in the most extensive scheme of basic liberties.

However, a few worries arise from this list formulated as such. First, Rawls devotes an entire chapter of *A Theory of Justice* fleshing out the equal liberty principle. And much of this

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63 *A Theory of Justice*, 179.
64 *A Theory of Justice*, 53.
chapter characterizes the equal basic liberty as the most extensive scheme of liberties for all, as was discussed above. Yet, when he enumerates the list of basic liberties, Rawls offers no insight as to how the list coheres as a system. The relevant worries become: how extended are each of these liberties, as well as what is the order of priority of these liberties? The extension issue may not be relevant to, e.g., freedom of the person as this appears to extend maximally and equally to all persons in society. But the extension issue does become quite relevant for others—say, freedom of speech. Furthermore, the priority issue arises when two liberties conflict; e.g., the right to (and presumably use) personal property oftentimes conflicts with political liberties.

What are we to do in cases in which one citizen has a claim to exercise a liberty that impinges on another’s claim to a different liberty? Rawls’s statement of the equal liberty principle is too vague to provide definitive answers here. Instead, Rawls should have provided a systematic account of liberties, specifying rules to adjudicate situations when two persons have a claim to two competing liberties.

To illustrate my worries, let us first turn to the content and extension of the freedom of speech. There is no doubt Rawls values freedom of speech and assembly. Not only does he enumerate this freedom in the list of basic rights and liberties, but he also devotes nearly an entire section of *A Theory of Justice* to elaborate its important. Readers of this section learn Rawls stresses the freedom of speech for two reasons. First, freedom of speech guarantees the principle of equal democratic participation and ensures that elections are free and fair. That is, the justice of a democratic constitution demands freedom of speech. And recall that a just constitution secures procedural justice after the formation of the democratic society (the

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65 Hereafter, I use ‘freedom of speech’ to refer to all of the freedoms of speech, assembly, expression, etc. and the liberty to form political associations.
Stable societies are just over time. Therefore, freedom of speech plays an essential role in maintaining the stability of a just constitutional democracy; it performs a vital role in the functioning of society. The second reason Rawls includes freedom of speech focuses on its effects on individual persons, not the whole of society. Freedom of speech is necessary, although not sufficient, for persons to realize their rationality and autonomy. Without it, special interests trump those of the individual person. In its absence, the ideal of a government of the people and by the people becomes a mere chimera. In other words, freedom of speech guarantees equality of influence in public fora and allows persons to assess and promote public policy that advances their pursuit of the good life.

No doubt, Rawls convincingly frames how we are to think about freedom of speech; it is essential both as a political liberty and a personal one. But once he situates it as an equal element in the set of basic rights and liberties, the freedom of speech loses its content. Viewed as a system, the principle of equal basic liberties includes a set of liberties with each checking and balancing the extension of others. We are all familiar with the checks and balances we have on our liberties in daily life. For example, the right to avoid psychological oppression, which is included under the umbrella of freedom of the person, checks our freedom of expression when that expression is defined as hate speech. Nevertheless, why should we assume that every basic right and liberty ought to operate in this way? Instead, why not separate basic rights and liberties into zones of priority? Each zone would serve as a subsystem reflecting the larger scheme of basic rights and liberties; the liberties within the same zone could check and balance the extension of others, establishing a two-way interaction among them. However, the interaction of

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liberties across zones is limited to a single direction; the liberty associated with the higher priority zone overrides the extension of the liberty associated with the lesser zones.

Institutionalizing this zoning system prevents the freedom of speech from losing its content. This becomes clear once we consider the effect the right to personal property has on freedom of speech. Rawls included a right to personal property in his list of basic rights and liberties. If the goal of our political conception of liberal justice is to advance the interests (however defined) of each citizen, then a right to personal property is required. Presumably, a right to personal property grants persons freedom to use personal property to advance their final ends and respect their moral personality of rationality.

So far, so good. The problem with personal property, however, arises once a person or an association uses personal property in such a way that it limits others’ right to free speech. In fact, money provides a ready example of personal property threatening free speech. And with free speech vulnerable, so too are the assurances of dignity and equality it provides. The rise of corporate and special-interest monies in elections impinges on the vital democratic institution of one person, one vote. Here, property rights trounce equality. Freedom of speech also facilitates the free development of ideas, influencing how citizens conceive of the good life. The public forum of ideas is akin to a marketplace. Yet, as legal scholar Lincoln Caplan notes, “In the marketplace of ideas…the greater your resources, the likelier your success, just as in the marketplace of goods and services.”69 Money corrupts citizens’ conception of the good; it

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69 Lincoln Caplan, “The Embattled First Amendment” American Scholar Spring 2015. In this article, Caplan also presents an exciting history of the First Amendment throughout American history, beginning with the Alien Sedition Act and up through the modern era. His powerful argument centers on the Supreme Court’s preference for liberty over equality when deciding constitutional questions related to the First Amendment, a preference that has amplified following its Citizens United ruling.

Although I cannot offer a full argument here, I agree with Caplan’s general assessment that drafters of the Constitution and the early interpreters of American jurisprudence intended for the First Amendment to foremost secure the equality of citizens ahead all else, including commercial and political liberties. The individual American,
disrespects their capability for rational thought. Personal property rights needs to be reined in. Freedom of speech needs greater emphasis.

The discussion above illustrates that some rights and liberties clearly perform a more critical function for political justice, social stability and personal self-realization than others. And our scheme of basic rights and liberties needs to respect this fact. The system of zoning clearly adjudicates which right cannot be curtailed when two liberties of unequal importance conflict. A correct principle specifying a system of equal basic rights and liberties will (e.g.) assign freedom of speech to a higher-priority zone than a right to personal property.

(Unfortunately, a description detailing the specifics of the zoning system, including the content filling each zone, is beyond the scope of this project; further work is required in this area).

There is but one more worry stemming from the equal liberty principle as stated: Rawls’s list appears to emphasize the liberties of the moderns over the liberties of the ancients. Recall that liberties of the moderns are largely individual liberties, whereas liberties of the ancients are roughly political liberties. Citizens need both liberties reserved in order to have an equal opportunity of achieving self-sufficiency, self-realization and ultimately the complete good. No doubt, not all citizens will fully exercise the expansive political liberties argued for below, and many may not exercise them at all. Nevertheless, citizens ought to have the ability to exercise these rights if doing so will advance their pursuits toward the good life.

To equalize the system of liberties accorded by the equal liberty principle, political liberties of the ancients must play a more prominent role. This is not to say that some of the

as citizen and consumer, deserves protection from tyranny, special interests and corporations; the powerless ought to be protected from the powerful. And up until the modern era of Supreme Court judicial history, the First Amendment was interpreted as doing just that: protecting the person before anything else. This, I believe, precisely captures the point of free speech.
individual liberties enumerated by Rawls need revision or exclusion; rather, the inclusion of a more robust set of positive political liberties bolsters the total system, transforming it into a closer approximation of the most extensive scheme of liberties of which all citizens equally share.

Isaiah Berlin’s famous distinction between positive and negative liberties serves as a point of departure for highlighting the importance of political liberties.\(^{70}\) Berlin notes negative liberties essentially free a person from interference by others. Classical thinkers ranging from Mill and Locke to Constant and Tocqueville sought to carve out a space of nonpublic life for each citizen, a space in which personal freedom is inviolable. The argument favoring these liberties is quite familiar: Coercion stifles persons from achieving their ends; persons, as rational agents, differ in the ends for which they strive; each person has equal worth as ends in themselves; thus, coercion out to be minimized so that each person can pursue final ends to the greatest extent possible without interfering others’ similar pursuit. Negative liberties provide freedom from external forces; they allow each person to guide their life toward achieving their ends. A quick scan over Rawls’s enumerated liberties reveals that most fit the conception of negative liberty.

Yet Berlin notes the insufficiency of limiting the notion of liberty to only just “the ability to do what one wishes.”\(^{71}\) Taken to the extreme, each person escapes all forms of coercion by internalizing life. As rulers of their own individual kingdom, each person faces threats to their ability to achieve their ends. Berlin notes in order to eliminate obstacles blocking them from the good life, persons contract their ends; they strive only for that which they can be guaranteed to achieve. This process of adjusting ends stops only at a total retreat to that which we all


\(^{71}\) Berlin, 139.
absolutely control: our reason and inner self. The result: ascetic self-denial. Berlin offers a less abstract example to motivate his point. We would be remiss in thinking that a tyrannical despot, who erects enough obstacles to force his subjects to amend their ends to conform to his own conception of the good life, has liberated his people even if every member of this society dies having achieved all of ‘their’ ends. These people are in no way free in the political sense precisely because they are no longer authentic sources of the system molding and shaping their ends. 

A system of negative liberties “is principally concerned with the area of control, not its source.” A truly extensive system of basic liberties needs to encompass both the area of control and its source; it must prominently feature both negative and positive liberties.

A conception of positive liberty reflects our desire to feel in control over our own life outcomes. The degree to which persons feel they are the originator of their own ends corresponds with the degree they free in the positive sense. Traditional notions of slavery trade on this conception of liberty; we all share in wanting to be the masters of our own selves. Yet, slavery can come in forms beyond human ownership. In a certain (albeit innocuous) sense, we are slaves to nature: laws of physics and limited intellect bound our behavior in numerous ways. More worrisome is the fact that we are slaves to our environments, including our political and legal systems: our government and laws oftentimes prescribe, or at the very least influence, the ends for which we strive. Positive political liberties grant persons, as a collective, the freedom to shape the system itself. By exercising these liberties, persons regain control of their own lives by constructing environments that reflect their ends.

Our goal in devising a political conception of justice takes root in each citizen’s rationality, as originator of ends. In order to truly respect the rationality of persons, a political

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72 Cf. Berlin, 135–141.  
73 Berlin, 129.
conception of liberal justice must accord sufficient positive political liberties to all citizens so that each has the ability create political institutions that reflect their conception of the good life.

Immediately, a worry of paternalism may arise: does granting positive political liberty foreclose on some negative liberties? Not necessarily. We cannot forget what the rationality of citizens actually entails. With the right procedures, the collective will institutionalizes only that which is rationally of interest to them in a purely self-interested sense (if we assume away their reasonableness). But what is rational to institutionalize for each citizen has to be sufficiently general to allow for the possibility that ends are not fixed—persons do in fact value different things at different times over the course of their lives. Furthermore, Rousseau’s *volonté générale* protects against paternalism: a citizen, who equally sacrifices with other members of the collective, creates a society in which she cannot harm any other member; the interests of all members override concerns for paternalism, because it is in no one’s rational interest to impinge the rights of anyone else. Indeed, buying positive political liberties does not entail sacrificing negative liberties.

Positive and negative liberties demonstrate that the extensive system of liberty associated with the equal liberty principle must feature both if the principle is to fully respect the rationality of citizens as legitimate sources of their own ends. Interestingly, Constant’s liberties of the ancients largely correspond with the conception of positive political liberties. Thus, the task now becomes incorporating the political liberties Constant identified into the broader scheme of equal basic liberties.

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74 Berlin, 148.
Constant lists several liberties of the ancients, which, to reiterate, broadly empower the individual person to participate effectively in governmental affairs. These liberties afford each person the right to come together in public fora to discuss and make decisions about war and peace; form alliances with foreign governments; vote on new laws; pronounce judgments; examine the accounts, acts, and stewardship of the magistrates; call the magistrates to appear in front of the assembled people; accuse the magistrates and then condemn or acquit them.  

It would be unacceptable to include Constant’s list of the liberties of the ancients as such; some of these liberties are unnecessary or need revision to accord more closely with the modern age. Nevertheless, the list does provide a useful starting place to construct a robust set of positive political liberties to include alongside the individual liberties emphasized in Rawls’s principle of equal basic rights.

In general, the liberties Constant identified here largely deal with rights of participation in democratic government. These rights are not only important for self-realization, as was noted by Berlin; they are also essential to reignite the ‘democratic embers’ in citizens of subsequent generations to the one present at the constitutional convention (see § 1.4). In other words, the political liberties of the ancients serve a twofold purpose: first, they facilitate citizens achievement of the ends for which they strive by allowing them to control the system that influences what goods they actually seek; and second, they satisfy the justificatory worries of

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75 Constant, 2.
76 Cf. Berlin, 133–134 and 141–144.
public reason related to vertical justice over numerous generations and sufficient democratic participation among all citizens.

Our set of political liberties therefore must include all of those argued for in A Theory of Justice, for these largely relate to satisfying the principle of participation that Rawls views as necessary for any democracy. These liberties include: liberty to form political associations; liberty of dissent; liberty of to form reasonable and loyal oppositional bodies; equal rights to participation in all government affairs; and—arguably most important of all—equal freedom of speech and assembly, liberty of conscience and strict institutionalization of one person, one vote. Added to these liberties are those identified by Constant that allow us to institutionalize deliberative democratic procedures as well as reinforce the principle of participation and self-determination at the behest of Habermas and Berlin respectively. These necessary political liberties are: a right to discuss and meaningfully impact foreign policy decisions; a right to vote directly on laws affecting a large portion of the population; a right to examine audited government accounts, records, minutes, etc., which must be published frequently; a right to question public officials; and a right to accuse and, if necessary, vote on the acquittal of public officials. All of these liberties largely reflect the liberties of the ancients enumerated by Constant.

There is a final political liberty to include, but one that deserves special attention: the right to revise the constitution, including a right to convoke a new constitutional convention to redraft the constitution. Although exercised (hopefully) less frequently than the freedom of speech, this right is situated beside it as one of the most important liberties provided in the scheme of basic rights and liberties. As the fundamental institution of a society of reasonable persons, the constitution must be open for review. Some may fear that citizens may abuse this

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right, revising the constitution once a dominant comprehensive doctrine forms. Without a doubt, this could indeed happen. However, preserving this principle in our political conception of justice provides the ultimate test of how truly liberal the persons of a constitutional democracy are—how much they truly affirm the principle of reasonable pluralism, of tolerance and the moral personalities of rationality and reasonableness of themselves and their fellow citizens. A truly correct liberal political conception of justice will always provide its citizens the right to exit from the system. And should it need alteration, so too must it allow its citizens to refine the theory through empirical trial and error. Furthermore, including this principle provides a firm response to the justificatory worries Habermas levies against justice as fairness as a political conception; if citizens ever feel that their government fails to reflect their views and opinions, they can correct the system by exercising this very right of democratic procedure.

To conclude: this section began by calling for the inclusion of a principle of equal basic liberties in our political conception of justice. The basic liberty principle from justice as fairness was used as a starting point. Our principle supplies each person with an equal claim to the most extensive scheme of basic rights and liberties. These liberties include: “Political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.” Our principle revises the basic liberty principle as formulated by Rawls. First, the scheme of liberties is expanded to include a more robust set of political liberties, which are as follows: a right to discuss and impact foreign policy decisions; a right to

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79 A Theory of Justice, 53.
vote on important laws; a right to review government accounts, records, minutes, etc.; a right to question public officials; a right to accuse and acquit public officials; a right to revise the constitution; and a right to hold a constitutional convention. These liberties provided do not operate as one basic scheme; rather, they are partitioned into zones ranked according to priority. Liberties interact reciprocally within zones, but liberties of a higher zone overrule the liberties of a lower zone when in conflict.

In making these revisions, the equal liberty principle fully respects the moral personalities of citizens by equalizing positive political rights with the individual liberties on which Rawls wrongfully focused. The revisions also institutionalize key democratic procedures to provide more justification of the political conception of justice over generations while also making it more deliberative. In short, the revisions create a more just, stable principle of equal basic rights and liberties than the one presented in *A Theory of Justice*.

2. *Fair Equality of Opportunity*

A key distinction between libertarianism and liberalism lies in that the former attempts to maximize liberty, whereas the latter optimizes liberty with equality. Our liberal conception of justice, therefore, must balance the principle of equal basic rights and liberties with concerns for equality and fairness. The following two sections specify two principles of justice designed to balance equality with liberty in our political conception of liberal justice.

Both principles developed in the following two sections also manage inevitable social and economic inequalities found in a constitutional democracy. It is assumed that liberal democratic pluralism, a characteristic feature of political liberal societies, institutes a form of
democratic capitalism as its economic system. Since it treats persons as a free and equal and respects their rationality, reasonableness and autonomy, capitalist institutions associated with a private-sector market economy receive support from an overlapping consensus of conflicting views and full public justification. Social and economic inequalities unavoidably result in a society with such an economic system. Our political conception of justice, then, ought to address these inequalities. The first principle specified requires fair equality of opportunity; the second principle (see §2.3) deals with distributive justice.

Since justice as fairness has been our guiding conception of political justice throughout, let us begin with a summary of Rawls’s principle of fair equality of opportunity. Rawls presents the principle in *A Theory of Justice* as: “Social and economic inequalities are to be arranged so that they are…attached to offices and positions open to all under the conditions of fair equality of opportunity.” Rawls notices the ambiguities lurking behind the principle; indeed, he cites four interpretations one could take of it.

Before presenting each interpretation, it is important to note that Rawls presents his formulation of the equal opportunity principle and distributive justice principle as two parts to the same principle controlling for social and economic inequalities. His initial presentation of both parts of his second principle of justice reads: “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.” The four interpretations of the equality principle arise from the ambiguity Rawls sees in the phrases ‘everyone’s advantage’ and ‘equally open.’ Rawls posits two interpretations for each phrase: ‘equally open’ could mean “equality as careers open to talents” or “equality as equality of fair opportunity”; likewise, ‘everyone’s advantage’

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80 *A Theory of Justice*, 266.
81 *A Theory of Justice*, 53.
could specify structuring economic configurations according the principle of efficiency (see footnote 83) or a principle maximizing the interests of the least well off. Plotted as a matrix, the two interpretations of the two ambiguous phrases in Rawls’s initial presentation of the second principle of justice as fairness yield the four interpretations presented subsequently. I settle on a largely similar interpretation of the equality of opportunity principle as Rawls. But I do so for different reasons (presented subsequently below). For now, however, it is illustrative to proceed assuming that our political conception of justice favors the difference principle over the principle of efficiency without having introduced the principle of bounded efficiency as a third alternative (see § 2.3).

Now the four interpretations: first, the “system of natural liberty” understands fair equality of opportunity as opening positions “to those able and willing to strive for them.” Subject to the efficiency principle, it requires equality of opportunity only in the most formal sense: all citizens have equal “legal rights of access to all advantaged social positions.” Rawls points out that natural and social contingencies (e.g., socioeconomic class) strongly influence the distribution of goods and services in society. By emphasizing morally arbitrary factors—at the cost of neglecting considerations of just desert—the system of natural liberty permits unjust levels of inequality and thus is an unacceptable interpretation of the principle.

The second interpretation Rawls considers is the liberal one. It corrects the system of natural liberty by maintaining “positions are not only open in a formal sense, but that all should

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82 A Theory of Justice, 57.
83 The efficiency principle holds that a configuration of two goods among several persons is efficient when redistributing does not improve the interests of one person without comprising the interests of another; see § 2.3 for more.
84 A Theory of Justice, 62.
have a fair chance to attain them." Persons with the same natural talents, abilities and skills and the same motivation to work ought to have the same chances of success. This interpretation downplays the relevancy of natural and social contingencies for the economic distribution. Yet it, too, is defective. It still permits inequalities due to differences in talent and ability. The morally arbitrary natural lottery continues to play a determinative role influencing economic inequalities. Because the system of natural lottery fails for the same reason, the liberal interpretation likewise must go.

Third is the natural aristocracy, which Rawls views as so unstable that he neglects to give it due consideration. This interpretation captures the aristocratic ideal. Positions are open in the formal sense. However, social contingencies are left unchecked, while the distribution of natural talent and ability are limited. Thus the historical aristocracy would continue to dominate advanced offices and positions irrespective of their (or others’) talents, abilities and motivation. No doubt, such a formulation of fair equality of opportunity appears misguided at best.  

Last, Rawls settles on the democratic interpretation. This interpretation provides equality of opportunity irrespective of the distribution of natural and social contingencies. Socioeconomic factors as well as talent and ability play no determinative role in the prospects of economic success for all.

Rawls defends the democratic interpretation, as it is the only conception that safeguards pure procedural justice, which obtains when “there is a correct or fair procedure such that the outcome is likewise correct or fair.” The fact that, after an unfruitful night at the roulette wheel, a gambler who still feels her losses are just illustrates the idea of pure procedural justice. In

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85 A Theory of Justice, 63.
86 A Theory of Justice, 64.
87 A Theory of Justice, 75.
contrast, allocative justice disregards distributional procedures and instead holds that justice obtains when benefits are distributed according to the known desires and needs of all participants in a scheme. He goes on to argue that a liberal conception of justice centers on the former over the latter kind of justice: pure procedural justice secures equality, a liberal concern, while allocative justice guarantees efficiency. Furthermore, allocative justice “leads to the classical utilitarian view.”

Since our political conception of justice is liberal rather than utilitarian, allocative justice will not do; thus, our interpretation of fair equality must capture the notion of pure procedural justice.

It is important to note that the democratic interpretation entails the difference principle, which Rawls contrasts with the efficiency principle. Although I ultimately reject the difference principle (see § 2.3), the democratic interpretation of the principle of fair equality of opportunity stands as the most plausible of the four surveyed here. The democratic interpretation of this principle mitigates two inequalities influencing opportunities and by extension the distribution of rewards and benefits of society: (a) socioeconomic contingencies and (b) the distribution of natural talent and ability.

An appeal to basic intuition proves the injustice socioeconomic contingencies have on opportunity. Imagine that you and I are two runners in a championship one-mile race. We both have similar natural talents and abilities. Additionally, we have devoted similar levels of effort training and cultivating our natural abilities. In fact, we are so similar as competitive runners that you and I are ranked number one and number two respectively in the all-county runner’s league. The only relevant difference between us lies in the fact that my father is the (unscrupulous) commissioner of the league. As commissioner, he wields absolute power in

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88 A Theory of Justice, 77.
changing and amending the rules of the race. Tired of seeing his son relegated to the number-two ranking, he administers a one-time rule change for the championship race: my starting blocks are situated one-half mile from the finish line, whereas your blocks are placed the full mile from the finish line. In effect, the outcome of the race is decided before the starting gun even fires. However, intuitively you and I would both recognize that the race was anything but fair, even though we are equally talented runners. The deciding factor of the race is entirely arbitrary: indeed, if you were born the commissioner’s son instead of me, the results would have been entirely different. Reasonable spectators would see the injustice committed too. And rational runners in the league would see that it is in their advantage to curtail the commissioner’s influence so that future rule changes do not arbitrarily affect the results of races in which they compete.89

This example mirrors socioeconomic contingencies in society at large. The fact that I share a filial bond with the commissioner of the league is just as arbitrary as someone born into a position of privilege. It is widely known that socioeconomics plays an instrumental role in determining life outcomes, as wealth and social status directly influence everything from education and health care to job opportunities (through social connections among many other reasons) and housing. Why should some citizens of the same society arbitrarily have their starting blocks in life placed at the half-mile mark while others must begin at the starting line? If reasonable and rational people spot the injustice in the race example, they no doubt notice the injustice resulting from the influence socioeconomic contingencies can have on a citizen’s life prospects. Consequently, our political conception of justice must include a principle of fair equality of opportunity mitigating the effects socioeconomic contingencies.

89 This example is an expanded adaptation of the one Robert Nozick uses to illustrate his views on fair equality of opportunity (Robert Nozick, Anarchy, State and Utopia (New York, NY: Basic Books, 1974), 235–236).
The second feature of the democratic interpretation of the principle of fair equality of opportunity is that it mitigates the influence of the distribution of natural talents and abilities. Justifying this feature requires appeal to the notion of just desert. In order for procedural justice to obtain, a system must distribute rewards, including advanced positions and offices, according to the notion of just desert. This notion operates in the background of our intuition that an injustice has occurred in the race example. I did not *deserve* to win the race, because I did nothing when I was born in advanced social position; it is an arbitrary fact of the matter. If the notion of just desert motivates an intuition of injustice for allowing socioeconomic contingencies to influence life outcomes, so too should it motivate the same intuition for granting similar influence by the distribution of natural talents and abilities. It was granted that liberalism entails instituting a form of democratic capitalism, which presumably includes the institution of free markets. In a liberal market system, supply meets demand to determine an equilibrium price that establishes the worth the economic system assigns to a particular good or service. It is entirely an empirical question what goods and services a liberal democracy will value more highly than others in the marketplace. Put differently, the value of a particular good or service in a democracy is contingent on the arbitrary tastes and preferences of the citizens of that society. In this way, the value of any good or service in a capitalist democracy is arbitrary.

Now, provisioning goods and services requires talents and abilities. Building a house demands a particular skillset, both physical and mental. So too does waiting tables at a restaurant. Whether someone has the capacity to cultivate the skills to perform either of these functions at a professional level depends on his natural endowment of talents and skills. And just as persons cannot influence their socioeconomic position when entering into life, they cannot
select the set of talents and skills with which they are endowed. Both are arbitrarily determined by the natural lottery.

Putting things together: (1) If the particular value of a particular good or service in a market economy is arbitrary and (2) if whether someone has the requisite talents and abilities to provision any particular good or service is arbitrary, it follows that whether this person is rewarded poorly, well or not at all for her natural endowment is equally arbitrary. Since arbitrariness is incompatible with the notion of just desert, a reward system distributing benefits according to the distribution of natural talents and abilities is arbitrary and thus is incompatible with the notion of just desert. Therefore, the system of rewards in a just liberal democratic regime cannot be structured according to the distribution of natural talents and abilities.

The upshot: the principle of fair equality of opportunity must mitigate the influence both socioeconomic contingencies and the distribution of natural talents and abilities have on the availability of advanced positions and offices in society. In other words, the democratic interpretation of the principle of fair equality of opportunity is correct and can be justified without also accepting the difference principle.

In addition to the different justification, the fair equality of opportunity principle developed here diverges from Rawls in its specific content. Rawls never attaches concrete institutions to the principle of fair equality of opportunity. Presumably, Rawls avoids such proposals, because they are empirical questions left open for policymakers living in a particular society structured according to the political conception of justice as fairness. Nevertheless, some institutions and policies could readily be attached to the principle of fair equality of opportunity.

90 I heretofore refer to both socioeconomic contingencies and the distribution of natural talents as ‘the natural lottery’ for convenience. The term captures the meaning of both because, like the lottery, both are arbitrary. They are also natural insofar as they are fixed by birth.
opportunity that transcend above empirical reasoning. In fact, there are at least two such additions to make to Rawls view, both of which elucidate the intent of the principle itself while also filling in its content in specific ways.

Formally, the principle of fair equality of opportunity needs expanding to mitigate all arbitrariness from the system of rewards (including employment). This expansion at least includes (a) instituting an inheritance tax and gift tax at an appropriate rate, and (b) eroding the barrier between public and private spheres of life to ensure equal opportunity for women (and perhaps children as well).

Equal opportunity and desert are inextricably linked. Socioeconomic influences should play as little a role possible on the life prospects of persons born into society. A major factor giving rise to the determinative role socioeconomics plays is the transfer of wealth. Vertically, wealth transfers occur through inheritance; horizontally, persons transfer wealth through another vehicle, gifts. Both inheritance and gifts create inequalities in wealth that disrespect the notion of just desert and thus violate the principle of fair equality of opportunity. The arbitrariness of inheritance is likely already apparent. Whether a person is born as a beneficiary of a large estate or trust is just as arbitrary as whether a person is born impoverished. The recipient lacks a just claim to the inheritance, simply because they did nothing to deserve the wealth. Gifts are no different. By definition, gifts presuppose that nothing is given in return for the reward; otherwise they would be categorized as, e.g., remuneration or compensation. Consequently, it would be odd, even contradictory, to say that someone deserved a gift. Let me be clear. By no means should the principle of fair equality of opportunity prevent inheritance and gifts outright. Doing so would unlikely garner public justification and thus could not be included in the political
conception of liberal justice. Inheritance and gifts as sources of inequality, however, must be limited so that only just forms of both occur.

But what exactly would constitute justified inheritance and gifts? The discussion thus far has focused on the effect wealth transfers have on the relative position of the beneficiary to other citizens. Wealth transfers disrespect the notion of citizens as equal members of society by arbitrarily advancing the interests of the beneficiary relative to others. From this perspective, it appears inheritance and gifts could never be just as they are always arbitrary. But instances of just wealth transfer arise only if the perspective shifts from the beneficiary to the benefactor. Even though wealth transfer occurs within the same society, let us separate the beneficiary and the citizens the transfer affects as occurring in a different society than the one of the benefactor. Call the former society $S_t^b$ and the latter $S_t^f$. If the competition for an advanced office or position is viewed as a zero-sum game, advancing the positioning of one relative to others necessarily disadvantages the others relative to the one in attaining the particular position. Thus, wealth transfers disadvantage all citizens in $S_t^b$ except for the beneficiary—a bad outcome resultant from the transfer for sure. In $S_t^f$, however, no wrongdoing has occurred to anyone. Presumably the benefactor bequeaths the inheritance or gives the gift as an expression of how this person conceives of the good life, so the loss of material prosperity is compensated with the achievement of some greater end. Moreover, the benefactor wrongs no other citizen of $S_t^f$: to them, there is no relevant difference between the benefactor bequeathing their assets and, say, burning them.

An immediate wrongdoing would, however, occur in $S_t^f$ if wealth transfers were outlawed. Disallowing inheritance and gifts would infringe upon the right to personal property of the benefactor; it would also disrespect this person’s rationality and ability to determine an
independent conception of the good life. Indeed, banning wealth transfers is illiberal. But so too is permitting transfers that unjustly advantage some while also disadvantaging others in achieving the final ends for which each strive. A concern for the life prospects of citizens of $S_{1/2}$ and $S_{1/2}$ (excluding the benefactor and beneficiary) ultimately tips the scale in favor of permitting wealth transfers only so long as they are just. A mediate wrongdoing in both $S_{1/2}$ and $S_{1/2}$ of blocking wealth transfers arises from the fact that wealth often results from actions of the benefactor leading to innovation and investments that benefit the whole of society. Entrepreneurs inventing new technologies that save lives or increase efficiency often are motivated partially by the prospect of gaining material wealth. Capitalist economies incentivize and reward such hard work, risk-taking and inventiveness. And preventing wealth transfers could stifle the economic development generated by these activities, development which ultimately improves the life prospects of all members of $S_{1/2}$ and $S_{1/2}$. It is indeterminate which projects, ideas and investments ultimately bear fruit and provide material benefits for society. Surefire ideas have failed their expectations, and neglected inventions have gone on to provide substantial benefits. To incentivize all forms of new economic activity, wealth transfers must remain an open prospect for anyone to utilize as a benefactor in the future. A full ban on wealth transfers is too unjustly strong. Yet unrestricted wealth transfer is unjustly arbitrary.

Auspiciously, a middle ground exists. The most plausible corrective mechanism involves instituting an inheritance and gift tax with the proceeds devoted toward improving the material lives of the worst off. The optimal level of these taxes is an empirical question left open for policymakers and economists alike. However, the political philosopher realizes that the rate must be set at the point not where tax revenue is maximized but where the tradeoff between incentives and fair equality of opportunity is optimized.
Restricting wealth transfers may immediately strike some as an overextension of the state. Some may object that disallowing any wealth transfers, including ‘unjustified’ ones, infringes on the rights and liberties of persons to conduct their private financial affairs and fully use their private property as they see fit. Ultimately, sympathizers with this position may charge that construing the fair equality of opportunity as such would not garner support of an overlapping consensus of views in society. They may even go so far as to claim that regulating wealth transfers misconstrues liberalism.

But this worry dissipates once liberalism is fully understood. As has been said, liberalism does not maximize liberty; it optimizes liberty and equality to the greatest extent. Maximizing the former favors the conception of the good life for some (e.g., libertarians), and so too does it with maximizing the latter (e.g., egalitarians). On the other hand, optimizing liberty and equality provide equal chances for libertarians and egalitarians to attain the ends they desire.

Additionally, if society is viewed as a system of fair cooperation, one into which persons enter for rational advantage, entitlement rights (say, to personal property) fail to motivate. Citizens as reasonable persons understand that enjoying most, but not all, of their rewards generated from a cooperative system suits their rational interests as much, if not more, than enjoying the complete set of all rewards generated individually without such system. Citizens understand and respect the principle of reciprocity because of their moral personalities. And, in association with this principle, citizens are willing to ‘lose’ some of their rewards as a price of admission to the very system that allows them to receive an abundance of goods, much more so than they could enjoy should they go at it alone. Liberalism, as it recognizes citizens as free and equal participants in cooperative society, does not clash with the formulation of the principle of fair equality of opportunity as presented here.
A few more comments about the principle of fair equality of opportunity bear mentioning. Rawls is not clear in his description of the principle as to how and to what extent the principle applies. Are citizens afforded equal opportunity to pursue offices and positions only at birth, free of contingencies that affect their life outcomes throughout childhood and adolescence? If not, is there a point in citizens’ lives at which they are no longer entitled to equality of opportunity? Would extending the effect of the principle to death be possible or is it a mere utopian ideal? Intuitively, the principle is perhaps best understood as mitigating social and natural contingencies up to some point in early adulthood. Doing so allows persons to develop and cultivate a sense of self to determine, by and large, their final aims in life. Implicitly, then, our political conception of justice must establish social policies to ensure that children and young adults are unaffected by unjust socioeconomic contingencies and inequalities that alter their life prospects.

Besides the extension issue, another aspect of the principle, as well as justice as fairness in general, lacking clarity is equality between women and men. To be fair, Rawls devises justice as fairness as an ideal theory. Nevertheless, his narrative in *A Theory of Justice* switches between gender-neutral and masculine phrasing, never addressing the possibility that inequalities could exist between men and women in ideal society. His use of the original position may explain why he makes no such recognition. Behind the veil of ignorance, representatives (taken to be heads of households) lack knowledge of whether they are men or women. Parties to the original position cannot access knowledge of one’s gender, like religion, conceptions of the good, social position and other morally arbitrary features. Presumably, the reader assumes that parties would not select principles of justice that recognize differences between genders. However, given the fact that almost all societies in all ages of history recognize gender differences,
inequalities between genders seem to be an issue that a theory of justice needs to address. Additionally, it is an undeniable fact that inequalities favoring men and the powerful over women render the principle of fair equality of opportunity meaningless.

The problems of inequalities effecting women and children need addressing. Luckily, the solution for both goes hand-in-hand. Susan Moller Okin resolves these issues by positing a humanist conception of justice, one that recognizes all persons—man, woman or child—as possessing an equal chance to achieve their final ends. In *Justice, Gender, and the Family*, Okin stresses (1) minimizing gender to the greatest extent, and (2) if such minimization still includes traditional hierarchical familial roles, then protective measures should be instituted into the basic structure of society to protect equal opportunity for women and children raised in unequal gendered environments.\(^91\) It is not hard to see how a genderless society benefits women. Gender immediately becomes yet another arbitrary physical feature of persons, akin in its effects on life prospects to eye and hair color or the shape of one’s fingernails. More difficult to grasp is how a genderless society secures equality of opportunity for children. Here, Okin’s argument becomes particularly insightful. A genderless society enhances both parents and society as “nurturers” of moral development in children.\(^92\) Male and female children raised in a genderless society constantly have their status as free and equal persons reinforced by their environments. Okin envisions a genderless society as leading “to less distinct ego boundaries and greater capacity for empathy in female children, and to a greater tendency to self-definition and abstraction in males” than what occurs in a gendered society.\(^93\) Although the precise psychological impact a

\(^{92}\) Okin, 185.
\(^{93}\) Okin, 186.
genderless society would have on children is an empirical question, there is no doubt such a society would better approximate equality of opportunity than our currently gendered one.

Some may object to a genderless society on numerous grounds. Some may cite the barrier between public and nonpublic life, arguing that gender and family structure fall into the latter category, thereby placing it beyond the scope of a political conception of justice. If the idea of public reason is taken seriously, a society deemphasizing gender may not receive support from followers of this belief. Moreover, in promoting hierarchical family structures, certain religions perpetuate inequities between men and women.

To respond: both of these objections fail to appreciate the profound impacts gender and family structure have on society. Indeed, at the very outset (see § 1.1), I remarked that a political conception establishes the basic structure of society, which Rawls defines as “the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.” By and large, the institutions and traditions comprising the basic structure are incontrovertibly political: the constitution, judicial history, historical texts, and so on. But nonpublic institutions could be included in the basic structure—and thus subject to a political conception of justice—if their effects have a determinative impact on the distribution of rights, duties and rewards of society. Given the extant inequities prevalent in nearly every society throughout history, gender evidently does fundamentally alter the distribution of (at least) rights of person, fair equality of opportunity and economic resources.

Now, allow me address each specific objection. To the first: though nonpublic in nature, gender and family are parts of the basic structure of society; thus, they are within the scope of a political conception of justice (as opposed to exclusively falling within the scope of thicker

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94 A Theory of Justice, 6.
theories, like comprehensive views of justice). The second objection requires more attention. As has been shown, gender and the family are subject to a political conception of liberal justice, which ensures only but two things: the legitimacy of just public institutions and the stability of these institutions over time. Deemphasizing gender should be limited only to achieve these two goals of liberal justice. This would leave open the possibility for persons of hierarchical religions to structure their families according to traditional gendered roles. In granting this exception and others similar to it, stipulating a genderless society as incorporated in the principle of fair equality of opportunity would gain public justification and thus legitimacy as well.

In this section, I have argued for the inclusion of a generally Rawlsian formulation of the principle of fair equality of opportunity in our political conception of liberal justice. However, two features were added to this principle: limitations on wealth transfers and instituting a genderless society. An important upshot follows from these two additions: a liberal conception of justice need not imply a minimal state. In fact, these two additions show that the state can pierce the veil separating nonpublic life from public. Wealth transfers, gender and the family ordinarily are thought of as nonpublic aspects of life. Though individual persons may choose to keep these matters private, choices in these areas undeniably have a profound impact on the whole of society, particularly on the life prospects of others. Not only can the state legislate in these areas of nonpublic life, it can also legislate in other nonpublic areas, if those areas involve actions that (1) produce inequalities based on natural or socioeconomic contingencies or (2) have a profound impact on the basic structure of society.
3. Distributive Justice

Were all humanity a single nation state, the present North/South divide would make it an unviable, semi-feudal entity, split by internal conflicts. Its small part is advanced, prosperous, powerful; its much bigger part is underdeveloped, poor, powerless. A nation so divided within itself would be recognized as inherently unstable. A world so divided would likewise be recognized as inherently unstable. And the position is worsening not improving.

– The South Commission, *The Challenge of the South*, 2

The fair equality of opportunity principle serves as the first part of the second principle of justice as fairness. Part two of this distributive justice principle is the difference principle, which formally stated reads, “Social and economic inequalities are to be arranged so that they are...to the greatest benefit of the least advantaged, consistent with the just savings principle.” In tandem, fair equality of opportunity ensures that offices and positions in society are open to all by mitigating socioeconomic and natural contingencies, and the difference principle determines the extent to which the distribution of wealth can deviate from egalitarianism. Besides the original position, the difference principle is perhaps the most famous and widely commented on aspect of Rawls’s justice as fairness. Though lauded as a novel defense of egalitarianism, the difference principle may not do enough by way of curtailing wealth inequality. Indeed, as will be argued, the difference principle does not accord with public reason and thus could not be included in our political conception of justice.

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95 *A Theory of Justice*, 266.
To state the problem another way: Rawls wrote *Political Liberalism* to untether it from a comprehensive doctrine in response to criticism. *Political liberalism* established a political framework from which justice as fairness could derive without relying on any single comprehensive doctrine; it proved justice as fairness is a political not a metaphysical theory of justice. But if the difference principle is not justified according to the political liberal framework, Rawls could be seen as undermining a major contribution *A Theory of Justice* made to distributive justice with his work in *Political Liberalism*. In this sense, Rawls undermines himself. To avoid this, I propose the bounded efficiency principle as replacement for the difference principle.

But first, the difference principle needs due consideration. Rawls views the difference principle as a more just alternative to the principle of efficiency. In the political sense, the efficiency principle satisfies Pareto optimality with respect to the basic structure of society. An efficient theory of distributive justice (e.g., utilitarianism) structures institutions to optimize advantages of social cooperation so that “no redistribution makes [any] person better off without making [others] worse off.” Additionally, it focus on efficiency in production, so that, given a fixed stock of inputs, the output is maximized. Thus an efficient distributive justice principle maximizes production and distributes the outputs to the point where making any person better off requires making others worse off. Note an efficient principle states no preference between a society in which one person controls all of the social rewards and a completely egalitarian one, so long as both societies function on the efficiency frontier (see Figures 2.3A and 2.3B). In contrast to efficiency, the difference principle defaults to egalitarianism and deviates only when

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96 *A Theory of Justice*, 59.
“there is a distribution that makes [everyone] better off.” Applied to society, inequalities are justified only if they benefit everyone. Or in the case of social class, inequalities in life prospects are justified only if lowering the expectations of highest class “would make the [lowest] class even more worse off.” Arbitrary features from socioeconomics and the distribution of natural talent are therefore permissible so long as they benefit everyone; to allow arbitrary features to play a larger role in determining the life prospects of persons would go against the notion of desert. Hence, the difference principle prioritizes justice (or fairness) ahead of efficiency.

The principle of just savings underlies the difference principle. The context in which the difference principle should be viewed is “that of the long-term prospects of the least advantaged.” To ensure that society always has the interests of the worst off at heart across all generations, Rawls stipulates the just savings principle. This principle determines the minimum

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98 *A Theory of Justice*, 68.
99 *A Theory of Justice*, 252.
level of investment for each generation in order to: (1) “preserve the gains of culture and civilization”; (2) maintain institutions previously established; and (3) invest sufficiently for real capital accumulation to occur. Any savings above the established minimum is permissible and would increase capital accumulation benefitting society at a future time. In this sense, the level of savings approximates the preference the current society places on the future. But savings could not reach a level at which the interests of the worst off diminish. Thus Rawls assumes that persons are time-preference neutral. Savings must be sufficient for the benefit of future generations of the worst off; but the current social minimum must also be maintained and thus establishes a limit for justified savings in society.

Systematically, the difference principle permits two types of inequalities. First, inequalities are permissible if they make everyone in society better off. They are necessary to adequately incentivize persons to invest time and effort cultivating their skills and ingenuity leading to innovation, technological progress and economic development. Second, inequalities are required to a certain extent in order to maintain institutions over time. They ensure justice across generations, thereby limiting the rate at which wealth transfers can be taxed (but again, the precise rate remains an empirical question; see § 2.2).

In spite of these permissible inequalities, Rawls believes the difference principle tends toward equality, because it incorporates the principles of redress, mutual benefit and fraternity. Redress forces society to focus more attention to those situated on the lower bound of the distribution of natural talents and born into less favorable socioeconomic positions. Mutual

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\(^{100}\) *A Theory of Justice*, 252.
\(^{101}\) *A Theory of Justice*, 259.
\(^{102}\) Cf. *A Theory of Justice*, 86.
benefit captures the notion that social cooperative schemes require reciprocity. According to the difference principle, the well off cannot further their interests unless they reciprocate by advancing the position of the worst off; society “should operate only on the upward rising part of the contribution curve” (see Figures 2.3C and 2.3D). Finally, fraternity, an ideal in democratic theory, involves “equality of social esteem” leading to “civic friendship and social solidarity.”

Indeed, I agree with Rawls that two of these three principles demonstrate the necessity of a distributive justice principle. Conceived of as a scheme of social cooperation, society must

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103 *A Theory of Justice*, 89.
104 *A Theory of Justice*, 90.
ensure that the scheme is working to the advantage of all. Distributive justice guarantees that society does not transform into a system propagating special interests while everyone else is left behind. Redress, too, is important for the integrity of society as a social system, because it communicates to the worse off that their interests are of utmost importance. Redress perhaps is more important than mutual benefit, for it does two things: (1) it dampens the effects of inequalities of natural talent and social positioning, and even differences in psychologies that alter distributional outcomes (e.g., “superior character”\textsuperscript{105}); and (2) it reaffirms the notion that persons are equal in that the state invests in the interests of the worst off to elevate them to a similar welfare stratum of the best off.

Fraternity, on the other hand, should be replaced with a principle of social cohesion. Rawls worries about the impracticality of fraternity in political affairs. Many think that it involves “ties of sentiment and feeling” and, consequently, would be “unrealistic to expect between members of a wider society.” In light of the notion of reasonable pluralism, fraternity would not gain traction in a constitutional democracy. Without common bonds of history, religious and cultural traditions, and even language, democratic citizens would doubtfully share in fraternal sentimentality. However, if one of the goals of a political conception of liberal justice is to establish stable institutions from public reason, some sort of social cohesion is necessary. A stable theory requires common bonds of citizenship. A just distributive principle fosters social cohesion and thus the stability of the basic structure and its institutions over time. In fact, the importance of social cohesion cannot be stressed enough. Not only must a just

\textsuperscript{105} Superior character, for Rawls, encompasses personality traits like industriousness, ambition, work ethic, etc. “that enable[] us to make the effort to cultivate our abilities” (\textit{A Theory of Justice}, 89). Like natural and socioeconomic contingencies, superior character creates problems vis-à-vis distributional advantages as it depends “upon fortunate family and social circumstances in early life for which we can claim no credit” (\textit{A Theory of Justice}, 89). It, too, is an arbitrary factor influencing the life prospects of persons and must be mitigated in similar vein to socioeconomic and natural factors.
distributive principle satisfy the principles of redress and mutual benefit to respect the integrity of society as a social system; a principle of distributive justice must also *unquestionably* ensure the stability of the system itself. And stability stems directly from social cohesion.

Besides certifying the stability of society, distributive justice plays another essential function within a political conception of liberal justice: it respects citizens’ autonomy. Recall autonomy is essential for self-realization and thus demands respect from a right political conception of liberal justice (see § 1.3). Without autonomy, citizens lack the ability to determine their own conception of the good life as well as to pursue it. In order to take the notion of autonomy seriously, each citizen must have adequate life prospects and sufficient economic resources. This fact produces three rights of citizenship related to distributive justice. First, citizens have a right to open positions; the principle of fair equality of opportunity protects this right. The second and third rights are a right to income from work and a right to wealth respectively; a principle of distributive justice defends both of these latter two rights.

To accord with public reason, a distributive justice principle must incorporate the principles of redress, mutual benefit and social cohesion, as well as preserve the rights to wealth and income from work. And with a just distributive principle in place, the political conception of justice is complete. The goal of a political conception of liberal justice is to allow for self-realization, which entails respecting citizens’ rationality, reasonableness and autonomy. The principle of equal basic liberties corresponds with freedom and rationality; the principle of fair equality of opportunity with equality and reasonableness; and a principle of distributive justice with equality and autonomy. The role a distributive principle plays within the broader theory is that it places the autonomy of citizens on equal footing with their liberty (rationality) and equality (reasonableness). Moreover, a just conception of liberal justice gains support from
public reason and is stable over time. By preserving the integrity of society as a scheme of social cooperation, distributive justice is supported by public reason. Hence, it nurtures social cohesion that stabilizes society over time.

With the criteria to judge a principle of distributive justice in place and in light of the necessary function it plays within the broader conception of liberal political justice, we can now evaluate the justice of the difference principle. The difference principle adequately satisfies the first two criteria of a just distributional principle, i.e., the principles of redress and mutual benefit. Although Rawls admits the difference principle does not fully satisfy that of redress, it does capture much of intent of the latter by representing “an agreement to regard the distribution of natural talents as in some respects a common asset.”¹⁰⁶ ‘Common asset’ here seemingly suggests that the fruits derived from the advantaged positioning of the well endowed are enjoyed by the whole of society. Read in this way, the difference principle achieves the first intent of the principle of redress: to reduce the effects of natural, socioeconomic and psychological contingencies in creating inequalities. A worry arises, however, that the difference principle fails to capture the second intent of redress, which equalizes the best and worst off through state investment, lifting the latter to a similar position of the former. Rawls explicitly prevents the difference principle from fully discharging this requirement of redress when he states, “it does not require society to try to even out handicaps as if all were expected to compete on a fair basis in the same race.”¹⁰⁷ While a curious quote for a theory of justice as fairness, it is of no matter. Let us assume the difference principle adequately satisfies the redress principle. Furthermore, the difference principle incontrovertibly satisfies the principle of mutual benefit. Indeed, the difference principle appears to have been designed with mutual benefit and reciprocity in mind.

¹⁰⁶ A Theory of Justice, 87.
¹⁰⁷ A Theory of Justice, 86.
The nature of the principle operates such that inequalities are justified only if they benefit the worst off. And once the “lexical difference principle”—the most formal statement of the principle Rawls provides—is considered, it becomes apparent that reciprocity is the focus of the principle.\textsuperscript{108}

The difference principle, however, fares much worse relative to the principle of social cohesion. In fact, the principle is too indeterminate with respect to permissible inequalities to unconditionally guarantee social cohesion. Consider two societies, one distributing rewards according to the principle of efficiency, another according to the difference principle and consider these societies over two points in time, \( t_1 \) and \( t_2 \). Assume that the efficiency frontier at \( t_1 \) yields 100 units and that it shifts to 120 units at \( t_2 \). While the level of output for the efficient distribution is determinate at both \( t_1 \) and \( t_2 \) (100 units and 120 units respectively), the distribution of rewards at both points in time is entirely indeterminate; (e.g.,) the Gini coefficient in this society could range from 0.0 to 1.0 at either point in time.\textsuperscript{109} In contrast, the situation is much less elegant for the society distributing according to the difference principle. Neither the level of output nor the distribution of rewards is determinate; they depend on the conditions of the society. This society could operate at maximum output if doing so maximizes the interests of the

\textsuperscript{108} Rawls formally states the lexical (or, more accurately, lexicographic) difference principle only once, concluding that generally institutions forming the basic structure will be such that a need for the lexicographical form of the principle would not arise; more often than not, the general form of the difference principle suffices. Nevertheless, to prove the deep concern the difference principle has for mutual benefit, consider the lexicographical form as stated (\textit{A Theory of Justice}, 72):

\begin{center}
in a basic structure with \( n \) relevant representatives, first maximize the welfare of the worst-off representative man, maximize the welfare of the second worst-off representative man, and so on until the last case which is, for equal welfare of all the preceding \( n-1 \) representatives, maximize the welfare of the best-off representative man.
\end{center}

\textsuperscript{109} Named after Italian sociologist Corrado Gini, the Gini coefficient represents inequality between 0.0 and 1.0, where 0.0 represents egalitarianism and 1.0 represents maximum inequality (i.e., one person owns and/or receives the entire wealth and/or income distribution in a society). Although the Gini coefficient is by no means a perfect measure of inequality, assume here for the sake of simplicity that it is.
worst off; however, it could also operate at less-than-maximal output, again, if doing so maximizes the interests of the worst off. This illustrates the indeterminacy of output in society under the difference principle. To illustrate the indeterminacy in inequality, consider that the difference principle minimizes the Gini coefficient given the economic constraints of society. Since the economic constraints of a given society are empirical facts, the difference principle cannot offer a determinate level of permissible inequality. Instead, it merely defines permissible inequality as a Gini coefficient of less than 1.0. The difference principle, therefore, can be described as a function seeking to maximize economic output while minimizing the Gini coefficient. But of course, such a function could produce an optimal point with widespread inequality, say with a Gini Coefficient of 0.99 (see Table 2.3 for a summary of distributional outcomes under both principles). According to the difference principle, this distribution is perfectly just, but this result seems odd. Is it right to consider a society just if its wealth is almost entirely owned by a few persons?

The point of this discussion is that the difference principle offers little by way of establishing clearly what constitutes permissible inequality. For Rawls, this fact presents no problems, because he does not view inequality as inherently bad. Rawls permits justified levels of inequality so long as the level accords with the difference principle. Stated another way, a society in full accordance with the difference principle faces no problems from inequality. This is due to the fact Rawls stipulates away facts of human psychology (e.g., parties are mutually

### Table 2.3: Distributional Outcomes According to the Efficiency and Difference Principles

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<td><strong>Efficiency Principle</strong></td>
<td>Output 100</td>
<td>Output 120</td>
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<tr>
<td><strong>Difference Principle</strong></td>
<td>Gini Coefficient (0.0, 1.0)</td>
<td>Gini Coefficient (0.0, 1.0)</td>
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<td>Gini Coefficient &lt;1.0</td>
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disinterested and thus lack feelings of envy). However, such stipulation becomes problematic in highly unequal societies. In fact, the financial crisis of 2008 and the subsequent economic recovery reveal the toxic effects inequality has in and of itself on society. Pierre Rosanvallon recently documented the notion of democratic equality is

under serious attack thanks to various forms of separation and withdrawal. The secession of the rich into their private havens is the most visible and shameful of these, but it is not the only one; regional separatism, for example, is also on the rise.

The withdrawal of the rich has produced “homogeneity and identity politics, the driving force behind many populist movements.” Martin Wolf reached a similar conclusion about the damming effects inequality has had on equality: the divergent attitudes toward society’s basic institutions between the elites and the wider public has led to populist politics across western democracies. The net effect of this great inequality “hollows out realistic notions of democracy.” Indeed, inequality matters precisely because of its destabilizing effects on liberal society, its democratic politics and ultimately on whether individual persons have adequate resources to truly author their own life.

Rawls anticipates problems of absolute and relative inequalities possible under the difference principle. To dispel these worries, he stipulates away the issues (e.g.) envy pose for

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110 Cf. §§ 80 and 81 in *A Theory of Justice* for Rawls on envy.
112 Rosanvallon, 22.
114 Wolf, 9.
Rudebusch 80

He argues instability would not occur in society ordered according to justice as fairness, because the three conditions necessary for hostility would not obtain. In brief, the three principles determining the stability of society are whether: (1) the worst off lack self-worth as a result of their socioeconomic positioning; (2) their positioning is painful and humiliating; and (3) “they have no choice but impose a loss on the better placed.” The first condition fails to obtain, Rawls holds, because the worst off recognize their equality with the best off in public fora and in basic rights and liberties according to the liberty principle and equality of opportunity. Regarding the second condition, justice as fairness as a systematic theory will result in inequalities “probably less than those that have often prevailed [under existing distributional principles].” Permissible inequality under the difference principle will implausibly be excessive enough to generate pain and humiliation. And finally the third condition, justice as fairness presents as many “constructive alternatives” to hostility as any other theory of justice. His conclusion: because hostility would not obtain, envy and the problems it poses with regard to the stability of justice as fairness can be assumed away.

Yet when Rawls stipulates away the problems stemming from special psychologies, he does so in disregard for empirical fact. For example, persons have in fact reported that although they feel the economic distribution is procedurally just, they also feel the consequence of this distribution—inequality itself—is unjust. Rawls’s argument that conditions one and two trade

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116 A Theory of Justice, 469.
117 A Theory of Justice, 470.
118 Implicit in Rawls’s argument here is a premise that effectively states ‘since the worst off in societies that operate according to prevalent distributional principles do not express feelings of humiliation or their pain, it is doubtful such feelings will be expressed by the worst off in a society that distributes according to the difference principle’. Although Rawls never states this premise, it appears that it serves as a necessary bridge between his first principle and his conclusion.
119 A Theory of Justice, 471.
120 Consider Rosanvallon summary of a recent survey that “found that nearly 90 percent of respondents thought income disparities should be reduced. … Yet 57 percent also felt that income inequalities were inevitable in
on the notion of justice as fairness as a theory of procedural justice. But if empirically persons can feel that the economic distribution is unjust in spite of it being procedurally just, then both the first two conditions of hostility could obtain. That is, persons may feel a lack of self-worth and feel humiliated by it as result of their indigence even though their economic rewards were distributed according to procedurally just principles. Indeed, Wolf agrees when he notes, “Large numbers of the people feel disrespected and disposed.”121 As for the third condition, Rawls’s argument likewise fails. As was noted, inequality has led to the rise of populist politics across western democracies. Among their many illiberal messages is a call for national protectionism and identity politics—i.e., cries for policies seeking to divide rather than unite a democratic society of (supposed) equals. Hostility, no doubt, can and has formed as a consequence of inequality. Rawls cannot insulate the problems inequality pose for the difference principle merely by assuming away the very problem itself.

Worse, due to the fact that it theoretically “permits indefinitely large inequalities,” the difference principle fails to unconditionally support the principle of social cohesion.122 Recall that without social cohesion, the stability of the basic structure and its institutions becomes threatened. A political theory of liberal justice must be stable over time (see § 1.4). Consequently, the difference principle cannot serve as the distributive justice principle in our political conception of liberal justice.

In its place, I propose a different distributive justice principle, the bounded efficiency principle. The principle operates by incorporating three principles of justice. The first is a principle of egalitarianism: social rewards are to be distributed equally to all citizens of a society.

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121 Wolf, 9.
122 A Theory of Justice, 470.
This principle guarantees each citizen a right to enjoy an absolute level of basic social benefits, including a right to income from work by assured employment. The second is a principle of efficiency: social rewards are to be distributed in order for society to operate at optimal output—the efficiency frontier—given a fixed stock of inputs. The third principle establishes a maximum level of inequality: social rewards are to be distributed such that they do not exceed unstable levels of inequality on a relative basis determined empirically. The principle of maximum inequality operates according to ratios. Assuming the Gini coefficient is a perfect measure of inequality, this principle would disallow both income and wealth inequalities from exceeding a maximum Gini coefficient respectively for each.

These three principles operate according to a particular prioritization. The principle of egalitarianism sits prior to both of the other principles. However, once every citizen receives a specified minimum of social rewards, the principle of efficiency overrides egalitarianism. That is, the egalitarian distribution holds only to a certain level, beyond which inequalities are permissible to incentivize citizens to push social output to its efficiency frontier. In effect, this establishes a floor, below which no citizen’s standard of living may fall. This floor ensures inequality will not rise to excessive levels in absolute terms, where (e.g.) one person controls all of the wealth at the expense of wider society. Even with a strict social minimum, inequalities could still theoretically rise to destabilizing levels once the principle of efficiency kicks in. And should inequalities rise to excessive levels, the principle of maximum inequality overrules efficiency. Hence, while the principle of egalitarianism focuses on permissible inequality in absolute terms, the principle of maximum inequality centers on permissible inequality in relative terms. Taken together, the principle of bounded efficiency distributes social rewards toward optimum efficiency but is bounded by a social minimum (egalitarianism to a certain extent) and
a maximum level of inequality; i.e., the distribution of rewards is subject to a lower bound and upper bound of inequality. For this reason, I call this distributive justice principle the principle of bounded efficiency.

THE PRINCIPLE OF BOUNDED EFFICIENCY

Society ought to distribute social benefits and rewards so as to maximize output at a given level of inputs subject to an absolute minimum standard of living and a maximum level of relative inequality.

Unlike the difference principle, bounded efficiency satisfies all four criteria required for a just distributive principle. First, it satisfies the principle of redress by foremost focusing on the interests of the worst off. The social minimum communicates to the worst off that no one can prosper until everyone has their basic needs and interests satisfied. In other words, the function of egalitarianism within the bounded efficiency principle corresponds with redress.

Second, bounded efficiency fulfills the principle of mutual benefit by incorporating the principles of egalitarianism and efficiency. The best off in society would accept bounded efficiency, because it permits them to enrich themselves through prudent investment and smart management of resources. But it also encourages the best off to do so for the benefit of the worst off too. The best off cannot enjoy the fruits of their labor (and their natural and social advantages) until the worst off have their basic interests provided for by society. Bounded efficiency assures that society mutually benefits all citizens.
Bounded efficiency assures social cohesion as well, the third criteria of distributive justice. Specifically, it prevents excessive inequality from occurring both in the absolute and relative senses. This allows each citizen to view others as equal in both the political and economic sense. This forms a common bond of citizenship, a bond all too important in a society that cannot be united by religious, moral or other doctrinal beliefs. Bounded efficiency ensures social cohesion in another way. Associated with the principle of egalitarianism is a right to income from work. In the event a person is unemployed and unable to find work within a reasonable timeframe, the state must serve as an employer of last resort. Guaranteed employment plays two roles. Income from work affords the individual person a certain degree of self-worth and dignity, both necessary for self-realization. It also mitigates free rider concerns from the better off in society; even with a social minimum, persons are not entitled to social rewards without contributing to society itself. Thus, a right to income from work reduces a loss of dignity on the lower end of the distribution and, on the upper end, worries of entitlement.

Finally, bounded efficiency facilitates persons living autonomously, the third and final moral personality that must be respected for self-realization to occur. The principle of egalitarianism provides an absolute social minimum of rewards to each citizen in society. This minimum should be set at the level at which citizens are fully capable of living the good life. Though this level is an empirical fact, it guarantees that each citizen avoids the bondage of poverty and social immobility. It breaks ceilings the worst off set on their life prospects. And it liberates persons to pursue the life they deem worth living, without concern for whether it pays enough to support themselves and their dependents. The social minimum truly puts the pen in the hand of each citizen, freeing them to author a personal, unconstrained conception of the good life.
Now, the bounded efficiency can be met with objection. As a recipient-oriented distributive principle, it likely entails some redistributive activities. Although a theoretical possibility, it is improbable that a society can operate at the efficiency frontier while also avoiding excessive inequality. Left to its own devices, an entirely free market will most likely produce distributions with too much absolute and/or relative inequality. If that happens, the state intervenes. It steps in to provide resources and benefits to the worst off to narrow inequalities within justified levels according to the bounded efficiency principle. Since a state ordinarily does not participate in the market economy by producing goods or providing services, it does not generate resources on its own. Instead, states acquire resources through taxation. Hence, the principle of bounded efficiency as an end-state, “patterned” principle requires redistributive activities involving tax and transfers to align reality with its intended outcome.\textsuperscript{123} And to some, “Taxation of earnings from labor is on par with forced labor.”\textsuperscript{124} More fundamental, Nozick notes an inevitable feature of patterned principles: they necessitate “continuous interference with people’s lives.”\textsuperscript{125} As a superior alternative to patterned distributions, Nozick proposes the entitlement principle of distribution:

From each according to what he chooses to do, to each according to what he makes for himself (perhaps with the contracted aid of others) and what others choose to do for him

\textsuperscript{123} To fix terms, Robert Nozick refers to a recipient-oriented, end-state principle as a ‘patterned’ principle of distribution, because it specifies that a distribution is to vary according to “some natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions” (156). By natural dimension, Nozick means dimensions that contain information relevant to the distribution but “not contained in the distributional matrices” (156). For example, distribute according, e.g., moral desert, need, utility are natural dimensions.

\textsuperscript{124} Nozick, 169.

\textsuperscript{125} Nozick, 163.
and choose to give him of what they’ve been given previously (under this maxim) and haven’t yet expended or transferred.\textsuperscript{126}

The principle of entitlement is un-patterned in the sense that any particular pattern may result when it is realized. It is random whether a strand of patterns appears in the distribution.

To motivate the entitlement principle, Nozick charges, “maintaining distributional patterns is individualism with a vengeance” because:

Patterned distributional principles do not give people what entitlement principles do. … For they do not give the right to choose to do with what one has; they do not give the right to choose to pursue an end involving (intrinsically, or as a means) the enhancement of another’s position.\textsuperscript{127}

No doubt, deriding patterned principles as individualism with a vengeance is strong. But to Nozick, these principles disallow transfers enhancing another and thus (e.g.) prevent loving interactions within families—buying spouses gifts, contributing to a child’s college education, establishing a trust for future generations, even investing in your family members’ welfare. And without the family, society loses an important model of relationships predicated on love and care. Patterned principles force one into oneself; persons can only willfully expend their resources on themselves and no one else (but the state can, however, intervene for the benefit of others). Not

\textsuperscript{126} Nozick, 160.
\textsuperscript{127} Nozick, 167.
only is this illiberal—an infringement of property rights—but it also produces a society of collective individuals devoid of deep psychological ties to others.

As a patterned principle authorizing redistribution, Nozick could object the bounded efficiency principle is illiberal on three serious grounds. First, by seizing one’s resources and transferring them to another, the principle forces persons to take partial ownership over others’ and their actions; this is a departure from the liberal “notion of self-ownership.” Second, it ignores “any right a person might have to give something to someone.” Last, it differentially treats varying conceptions of the good life: a person who values wealth as an end and thus works long hours is taxed more than a person who values leisure as an end and thus works the bare minimum for sufficiency.

To respond: all three of these concerns about the liberalness of the bounded efficiency principle dissipate by changing the perspective one views redistribution. Our project here is one of devising a political conception of liberal justice, not a libertarian one. As a libertarian, Nozick views justice as a function of liberty. The more liberty, the better. It comes as no surprise, then, that our liberal theory strikes libertarians as unjustly illiberal. But the point of a liberal conception is not to maximize liberty per se; rather, it is to place liberty and equality on equal footing, maximizing each to the greatest extent. From his libertarian perspective, Nozick sees redistributive activities as inherently illiberal in virtue of their interference with persons. Blinded by the inviolability of negative liberties, Nozick ignores that democratic citizens fundamentally view themselves are free and equal. Democratic society, therefore, is not libertarian society; it is liberal society. And it is so, precisely because democracy respects that

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128 Nozick, 172.
129 Nozick, 168.
130 Nozick, 170.
all persons—whether white or black, young or old, male or female, Christian or Muslim, rich or poor—are free and equal. All persons equally share in a rational, reasonable and autonomous pursuit of their particular conception of the good life.

Of course, Nozick could just as easily assert that we are mistaken from adopting a liberal framework over a libertarian one. In other words, the objections Nozick could levy against my view hinges on the grounds for accepting a liberal perspective. Superficially, liberalism and libertarianism seem like closely related cousins stemming from classical or continental liberalism from the Enlightenment. Both regard liberties as fundamental for a good life; both guard against tyranny, illegitimate use of political authority. Many libertarians assert that their view secures the same fundamental rights and liberties as liberal theories do, but go on to add two additional basic liberties: freedoms of contract and of property. As such, libertarians commonly claim that they secure greater liberties, value liberty more than liberals do. Indeed, the fundamental principle underlying libertarianism is “that each person is absolute owner of herself, body and powers.”

To secure self-ownership, a person controls rights in things, controls personal property including its possession, transfer and use. Thus the libertarian appears more concerned with property rights than liberty per se.

At this point, the libertarian will likely agree, scratching her head at why adopt liberalism if it supplies fewer liberties. However, because it features freedom of property as a fundamental basic right, libertarianism actually secures less liberty than liberalism does. Unlike libertarianism, liberalism affirms inalienability, the idea that basic rights are essential for maintaining moral personality that they cannot be relinquished even if consensual. According to

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132 Freeman, 128.
133 Freeman, 127.
libertarianism, each person starts out fundamentally owning oneself but may secondarily have come to acquire other entitlements through transfer. This person might then contract any of these entitlements in return for different entitlements with more perceived value. In this way, the liberty of contract “determines the procedural mechanism for distributing rights and powers” in a libertarian society.\(^{134}\) Taken to the extreme—and the crux of why libertarianism is inadequate—one person (or class) owns all of the property in society, and since libertarians regard self-ownership as most fundamental property, all but this one person (or class) lacks freedom, lacks autonomy, lacks liberty.\(^{135}\)

Paradoxically, libertarianism values basic liberties less than it values property rights and thus could lead to societies where power is concentrated in the hands of the few at the expense of the many. In fact, the supremacy of contracts delegitimizes political authority for libertarianism. Rather than representing the will of the people as an agent, the libertarian state “establishes political power in a web of bilateral individual contracts.”\(^{136}\) This is precisely why a right theory of justice cannot be constructed from a libertarian perspective: not only is the exercise of political authority illegitimate, but also those who exercise it do so not for the common good but for their own personal interest. These consequences of libertarianism are unacceptable if a political theory of justice seeks to maintain society as a fair scheme of mutual cooperation.

When the perspective is shifted away from libertarianism and back toward liberalism, we can approach Nozick’s anticipated objection of the bounded efficiency principle in new light. As has been shown, liberal constitutional democracies entail a basic structure of institutions that strongly affect persons, their life prospects and their relationships with others. With its

\(^{134}\) Freeman, 133.  
\(^{135}\) Cf. Freeman, 133.  
\(^{136}\) Freeman, 149.
significant barriers to and costs associated with emigration, society is non-voluntary. Yet, through the democratic process, citizens share in the ability to govern these institutions. Their government truly is a reflection of their collective will. For these reasons, liberal democratic society demands justificatory respect among citizens. Justificatory respect incorporates respect for the inherent dignity of persons. Hence, the basic structure of a liberal democracy fully values the worth of citizens, fully values their dignity. If it fails to accord dignity to all, the basic structure becomes unjust.\(^\text{137}\)

In virtue of justificatory respect, excessive absolute inequalities are impermissible. If too much wealth is concentrated in too few hands, a large and perhaps majority group of citizens would be party to a system of cooperation that disrespects their dignity. Since an un-patterned principle (e.g., the entitlement principle) produces random distributions, it very well could result in a distribution such as this. Since this distribution could result from the entitlement principle, it violates the demands of justificatory reason. Therefore, it becomes unjust. Since the entitlement principle sanctions such highly unequal distributions, it is not a just distributive principle. Un-patterned principles will not do. Justificatory respect requires a patterned principle. In other words, out of concern for absolute inequalities—for dignity—patterned principles are necessary. Therefore, redistributive activities can be just despite their illiberalness, at least when they are implemented to prevent indigence.

Justificatory respect also justifies redistributive activities engaged in to curtail relative inequalities. As Moellendorf notes, “Justificatory respect establishes presumptive egalitarianism.”\(^\text{138}\) Taking view of the basic structure, especially the economy, as a mutually

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\(^\text{137}\) This discussion on inherent dignity and justificatory respect as features of the basic structure was adapted from Darrel Moellendorf, “Cosmopolitanism and Compatriot Duties” *The Monist* 94(4), 535–554.

\(^\text{138}\) Moellendorf, 545.
beneficial cooperative scheme, justificatory respect maintains that participants cannot claim entitlements over benefits or rewards to which they did not have a pre-cooperative claim.\footnote{139} Put differently, no citizen is entitled to rewards generated as a byproduct of society—yet another reason to reject the entitlement principle. Additionally, justificatory respect demands justification for deviations from egalitarianism. Under the bounded efficiency principle, inequalities are justified only when the social minimum is provided and relative inequality is held in check. The principle itself is justified according to public reason partly because of the fact it prevents inequality rising above a maximum level. Implicitly, then, when inequalities rise to relatively excessive levels, justificatory reason demands redistribution. When this happens, inequalities have deviated unjustifiably far from the egalitarian presumption. And the only recourse is redistributive activities. Though illiberal, redistribution when done for the right reasons—for dignity and for equality—is just.

Once we reassert our liberal (not libertarian) conception of political justice and view society as a system generating justificatory respect, Nozick’s objection to the illiberalness of the bounded principle theory and redistributive activities disappears. Nozick is correct in much of his analysis: redistribution and patterned principles are illiberal in a limited sense. Weighing the costs of the sacrificed liberty against the benefits of equality, dignity and social stability reveals the truly just nature of the bounded efficiency principle.

The upshot of the bounded efficiency principle limits inequality, a feature neglected by the difference principle and the principle of entitlement. With inequality held within reasonable limits, bounded efficiency fosters a more cohesive democratic society despite its extant plurality of comprehensive views. It sows a common thread connecting all with all in society.

\footnote{139 Adapted from Moellendorf, 540.}
4. Priority of the Principles

So far, our political conception of justice incorporates three principles of justice, each of which correlates to the three moral personalities of citizens recognized by the political liberal view of society as a system of fair cooperation. The principle guaranteeing equal basic rights and liberties ensures each citizen has sufficient liberties—in the negative and positive senses—for the rational determination and pursuit of the good life. Fair equality of opportunity situates all citizens equally with respect to each other, thereby allowing citizens to realize their reasonableness. The bounded efficiency principle provides a distributive share of the rewards and benefits of society to each citizen that is sufficient to allow him to autonomously engage in his conception of the good life. Moreover, it establishes that the procedure by which the rewards and benefits are distributed is just. When the distributive procedure is just, citizens of all socioeconomic positions and across all generations affirm the basic structure of society over time. Systematically, the three principles respect the liberal notion that all persons are free and equal and ensure the stability of the basic structure of society over time. That is, our conception of liberal justice embeds in the basic structure of society the notion that each citizen is capable of conceiving of a life worth living and that each citizen possesses dignity.

One final issue remains: assigning weights to the principles when in conflict, or what Rawls refers to as “the priority problem.”

The beauty of single-principle theories of justice is that they avoid situations where one principle conflicts with another. Egalitarianism, a single-principle theory, offers a clear solution to questions related to the basic structure of society: *always* maintain strict equality among citizens. Conversely, there is never a situation when

\[ \text{Cf. § 8 in } A \text{ Theory of Justice.} \]
deviating from absolute equality is permitted. As a recasting of justice as fairness, our theory lacks such clarity. There inevitably are times when one principle conflicts with another or with both. What are we to do when equality of opportunity conflicts with equal basic rights and liberties? The account of fair equality of opportunity settled upon here (see § 2.2) would (e.g.) disallow an organization to institute a human-resource policy that discriminates against non-whites. For example, it denies the Knights of the Ku Klux Klan, a contemporary offshoot of the historic racist rightwing extremist group, from only hiring white executives of the organization.\textsuperscript{141} Overtly racist, this hiring practice clearly violates the equality of opportunity of non-white persons seeking advanced office within this organization.\textsuperscript{142} Yet, prohibiting this policy according to the fair equality of opportunity denies the freedoms of assembly and speech to members of the organization. Integral to self-realization, freedoms of assembly and speech are provisioned under the principle of equal basic liberties. Hence, this situation presents a conflict between the fair equality of opportunity of non-white persons and the basic liberties of the members of special-interest groups. Our theory must provide a systematic account that assigns weights to each principle. In doing so, it provides clarity for cases when the principles compete with the others.

To overcome the priority problem, Rawls stipulates a plurality of principles must be serially or lexicographically ranked. A lexicographical ranking of principles holds that the first principle must be maximally satisfied before moving to the next principle in the series.\textsuperscript{143} Rawls provides two priority rules determining the ranking of the end principles of justice as fairness.

\textsuperscript{141} I am indebted to Dr. Christopher A. Freiman for this example of conflict inherent within justice as fairness and thus my recasting of it.
\textsuperscript{142} It, however, remains dubious at best why a non-white person would seek an executive position within an organization seeking to situate whites ahead of other races. Nonetheless, assume there are non-white persons interested in holding executive positions within racist rightwing extremist organizations for the sake of an obvious case when one principle conflicts with another.
\textsuperscript{143} \textit{A Theory of Justice}, 37–38.
The first rule establishes the priority of liberty. A liberty provided by the principle of equal basic rights and liberties can be restricted only for the sake of other liberties. The second rule establishes the priority of procedural distributive justice over efficiency and welfare. On the whole, procedural distributive justice precedes operating at the efficiency frontier; and within justice as fairness, fair equality of opportunity precedes the difference principle.

Although a lexicographic ordering provides clarity in cases of conflict, it values some principles ahead of others. In the case of justice as fairness, the first priority rule of liberty over all else values freedom over equality. To motivate the problem this poses, consider the case of a traditional country club. An association of well-to-do men establishes a country club. Besides offering facilities of the usual leisure sports, the club creates a haven for men to fraternize with other men entirely free from the company of women. The club maintains the all-male atmosphere by only hiring male employees; women need not apply. Under the first priority rule, the freedom of association trumps the fair equality of opportunity. The rule values the right of the association of men to disrespect the notion of women as equal, at least in the country club environment. Recall too that lexicographic orderings require the maximal satisfaction of one principle before satisfying another. Thus, proponents of the first rule are left with two choices: they can either deny that there is an injustice here or recognize lexicographic priority of liberty over all else is too strong.

Furthermore, the second part of the second priority rule values equality over the dignity of citizens and the stability of society. Applied to our recasting of justice as fairness, it values fair equality of opportunity over the bounded efficiency principle. To motivate the issues this

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144 Cf. § 39 in A Theory of Justice.
145 Cf. A Theory of Justice, 266–267
146 Here, too, I am indebted to Dr. Christopher A. Freiman for this example.
rule poses, assume there is a society faced with two distributional choices, \( c_1 \) and \( c_2 \). \( C_1 \) offers absolute equality of opportunity according to our formulation (see § 2.2), but the distribution of benefits and rewards results in a significant percentage of the population living in destitution, unable to afford anything besides that which is required to meet the most basic needs. On the other hand, \( c_2 \) approximates equality of opportunity; however, its distribution of benefits and rewards fully satisfies the bounded efficiency principle—everyone has sufficient resources to live with dignity, able to pursue the good life. Faced between only these two options, citizens as reasonable persons would stomach marginal inequality of opportunity for the assurance everyone (including themselves) enjoys sufficient wealth; they would opt for \( c_2 \). Intuitively, too, \( c_2 \) appears to be the better option of the two. Yet the second priority rule denigrates the reasonableness of citizens and flouts intuition by instead opting for \( c_1 \). It appears neither the first nor the second priority rule stands. To fully respect the notion that citizens are free and equal and to accord dignity to all citizens, we must discard the lexicographic ranking Rawls incorporates into justice as fairness.

Instead, the principles in our conception of liberal justice ought to stand freely, with the interests of one able to override the interests of the others. The three principles receive equal weighting with respect to the others. Put into Rawls’s terminology, the priority of the principles fits largely within a general intuitionist doctrine, which holds “there is an irreducible family of first principles which have to be weighed against one another by asking ourselves which balance, in our considered judgment, is the most just.”\(^{147}\) Even Rawls recognizes general intuitionism may in fact be true.\(^{148}\) However, general intuitionism as such does need slight modification. First, our political conception of liberal justice limits the irreducible set of first principles to three:

\(^{147}\) A Theory of Justice, 30.  
\(^{148}\) Cf. A Theory of Justice, 35.
equal basic rights and liberties, fair equality of opportunity and the bounded efficiency principle. Moreover, the procedure for determining the weights is not a personal endeavor whereby each individual citizen considers which weighting is most just. Rather, the process is iterative in the following way. First, citizens settle upon our three principles of justice once a political liberal framework is adopted. Next, they create institutions that optimize the total scheme of primary goods provided by each principle of justice. In effect, the basic structure is configured to optimize the capability of each citizen to achieve the complete good however defined. Then, existing institutions should be adjusted once new policies have been empirically validated to advance society closer to the optimum scheme. The examples related to the priority problem examined in this section highlight that in situ which policies tend toward the optimum might not be hard to find using intuition as a guide. Though vague, the iterative process may be sufficiently prescriptive over time to generate optimal institutions.

However, even modified general intuitionism may still lack the clarity associated with single-principle and lexicographic-ranked theories. Nonetheless, a limited set of first principles and the iterative adjustment of the basic structure over time allow general intuitionism to be more action guiding than Rawls credits it. By and large, general intuitionism sufficiently adjudicates scenarios where principles of justice conflict.
Conclusion

Part I presented and refined the political liberalism of Rawls. Political liberalism begins with the assumption that a pluralism of competing comprehensive moral doctrines inevitably arises in a constitutional democratic regime. In contrast to liberalism as such, political liberalism pertains only to public life. Since democratic society can be conceived as a system of cooperation that affects the life prospects of its citizens, political liberalism seeks a political conception of justice affirmed from reasonable pluralism. Such overlapping consensus establishes public justification for the theory of justice, which underlies the institutions comprising the basic structure of society.

Besides the aforementioned, Rawls also demands regulative reasoning as a necessary feature of public justification. However, my modification of public reason posits two additional required features. My first addition necessitates full adoption of democratic procedure in all justificatory stages, not just the original position or the constitutional convention. The second added requirement dissolves the boundary between public and nonpublic life when citizens discuss and reflect on principles of justice and the institutions that represent them. My expansion to Rawlsian public reason equalizes republicanism with liberalism. This equation respects the liberal notion that all persons ought to be the authors of their own life including their conception of the complete good. For some, the complete good correlates with realizing their rationality best found in nonpublic life. Yet for others, the good life involves realization of their reasonableness corresponding to republican virtues attainable only with democratic participation and a life committed to public affairs. My refinement of Rawlsian political liberalism takes seriously the notion that all persons should be empowered to pursue the life they deem worth
living. The upshot of my expansion endows public-minded citizens this capability as much as Rawls did for private-minded ones.

With the justificatory mechanism in place, Part II built a conception of justice from a political liberal framework. The resulting theory recast justice as fairness to accord with my more democratic and liberal interpretation of political liberalism than the Rawlsian one. Fully stated, the principles comprising my recasting of justice as fairness follows:

**The Principle of Equal Basic Rights and Liberties**

All citizens are entitled to an equal claim to the most extensive scheme of basic rights and liberties. The scheme of rights and liberties are partitioned into zones of priority: competing liberties interact internally within a zone as a scheme to optimize total liberty; competing liberties interact lexicographically across zones with liberties of higher priority zones trumping ones of lower priority.

**The Principle of Fair Equality of Opportunity**

All citizens are entitled to open conditions of fair equality of opportunity designed to mitigate socioeconomic and natural contingencies to the greatest extent.

**The Principle of Bounded Efficiency**
Society ought to distribute social benefits and rewards so as to maximize output at a given level of inputs subject to an absolute minimum standard of living and a maximum level of relative inequality.

THE SYSTEMATIC RULE TO OPTIMIZE SELF-REALIZATION

The three principles of justice interact systematically to optimize the capability of each citizen to achieve self-realization. All of the principles are weighted equally. Appeals to general intuitionism adjudicate situations of conflict among the principles.

My recasting of justice as fairness differs from the Rawlsian formulation in several ways. Unlike Rawls, my liberty principle includes a robust set of political liberties authorizing citizens of all generations and in all walks of life to effect political change. Simply put, my formulation of the principle accords adequate personal (negative) and political (positive) liberties while the Rawlsian principle largely supplies the former. Moreover, my liberty principle partitions rights and liberties into zones of priority, capturing the idea that some basic liberties are more fundamental than others. Rawls fails to make this distinction, and the entire set of liberties his principle contains operate as an unstructured scheme. My principle specifying fair equality of opportunity pierces the veil separating public and nonpublic life. In general, Rawls ignores the profound impact nonpublic choices have on the basic structure of society. Although restricted to political institutions, a political conception of justice includes nonpublic features of life that, in aggregate, affect the life prospects of others. This explains why my theory, unlike Rawlsian justice as fairness, calls for more limitations on wealth transfers and recalibrating both public and
nonpublic institutions to foster a genderless society. Note that dissolving the public–nonpublic boundary may demand more changes in society than the two discussed here. The point is to show that changes in these two areas are at least required by my stronger version of fair equality of opportunity. Next, I replaced the difference principle with the bounded efficiency principle. Read as an assurance for the stability of the basic structure of society, public reason fails to justify the difference principle because it allows for too much absolute and relative inequality. On the other hand, the bounded efficiency principle provides an absolute social minimum and establishes a relative maximum of inequality to prevent destabilizing disparities in wealth and income. Yet, bounded efficiency deviates from egalitarianism in that it operates according to the efficiency principle once society distributes rewards within permissible levels of inequality. Last, my recasting of justice as fairness discards the lexicographical ordering of the principles of justice. Instead, it equally weights each principle. And when they conflict, general intuitionism adjudicates so as to optimize the capability of each citizen to achieve the complete good.

The upshot of my recasting of justice as fairness is that it more truly reflects liberalism than the version provided by Rawls. Liberalism treasures that persons are free and equal, authors of their own life and each a source of dignity. Unlike strict egalitarianism, it recognizes just inequalities can work to the advantage of all. And dissimilar to strict libertarianism, it recognizes that society is a cooperative venture in which parties are equal. Rawls focuses on the rationality, the nonpublic aspects of life and the (negative) freedom of citizens at the expense of their reasonableness, their public life and their equality. Dignity—a necessary but insufficient good for self-realization—demands equal focus on all of these essential features of the good life. And that is precisely what I have done here: dignify citizens as free and equal.
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