

FAIR VALUE OF POLITICAL LIBERTY AND OWNERSHIP OF THE MEANS OF PRODUCTION

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Unlike lesser thinkers, John Rawls readily accepted criticism and openly made adjustments in his positions, while steadfastly defending what he believed could withstand criticism.

Thus, both continuity and change are evident in the thirty-year interval between *A Theory of Justice* (1971) and *Justice as Fairness: a Restatement* (2001).¹ One of the most important changes is the later Rawls's insistence that what he called welfare-state capitalism could not satisfy the two principles of justice as fairness. The importance of this change is underscored by the fact that a number of commentators had understood *A Theory of Justice* to have been designed as a defense of welfare-state capitalism. Rawls accepted responsibility for leaving the possibility of misunderstanding his view, and in later writings argued that welfare-state capitalism would be rejected at the constitutional stage of the four-stage sequence by which the requirements of political justice are determined (*JF* 135-38).

Rawls rejected welfare-state capitalism mainly because it does not guarantee, or even try to guarantee, the fair value of the political liberties. The fair-value guarantee was already

¹ Citations to Rawls's works are abbreviated: *TJ* = *A Theory of Justice*, 1999 rev. ed.; *PL* = *Political Liberalism*, 1996 paperback ed.; *CP* = *Collected Papers*; *LP* = *The Law of Peoples*; *JF* = *Justice as Fairness: a Restatement*; *LHPP* = *Lectures on the History of Political Philosophy*; *BI* = *A Brief Inquiry into the Meaning of Sin and Faith*. Full citations appear in the references list.

present in *A Theory of Justice*, and over time it assumed a central role in Rawls's defense of the difference principle. But Rawls did not believe that justice as fairness could decide at the constitutional stage between two other ideal types of regime: property-owning democracy and liberal democratic socialism.

Rawls understood the fundamental difference between property-owning democracy and liberal democratic socialism in terms of the right privately to own significant means of production. Property owning democracy allows and may even guarantee that right, but seeks to disperse ownership of productive means widely throughout society. Liberal democratic socialism guarantees a right to a share in the means of production, all of which are ultimately publicly owned. By "guarantee," I mean guarantee in the same strong sense as that in which justice as fairness guarantees a right to own personal property. "Means of production" is a concept that Rawls takes from Marx but does not further elaborate. What Rawls surely had in mind² was only the "commanding heights of the means of production," a

²There is not space to explore Rawls's awareness of the debates within the British Labour Party over its constitution's Clause IV, drafted by Sidney Webb, and adopted in 1918, which aimed

To secure for the workers by hand or by brain the full fruits of their industry and the most equitable distribution thereof that may be possible upon the basis of the common ownership of the means of production, distribution and exchange, and the best obtainable system of popular administration and control of each industry or service.

This was a matter of controversy from the 1950s onward. This is unsurprising, especially if Clause IV is read (with unnecessary rigor) as stating "a commitment to the eventual abolition of private enterprise in total" (Coates 1975, 93).

term that can be traced to Lenin's New Economic Policy in the 1920s.³ As such, the means of production would not include means applied in small-scale production. I will use the term "means of production" without repeating this restriction: it is to be understood.

My claim is that the fair value of political liberty cannot be guaranteed unless the means of production are publicly owned.⁴ The "fact of domination" that necessitates the fair-value guarantee must be addressed at the level of constitutional design, and not deferred to the legislative stage. To allow private ownership of productive means would be to take a risk that prudent framers would not take. Thus, Rawlsians must either relax the fair value guarantee (and reconsider welfare state capitalism) or accept liberal democratic socialism as the only type of regime capable of realizing justice as fairness.

I. WIDER CONCEPTIONS OF PROPERTY AND FIVE IDEAL-TYPES OF REGIME

Rawls denied the existence of any natural, pre-political right to property, but he argued that choosers in the original position would insist upon a right to own personal property, as

³ "What is the plan or idea or essence of [the New Economic Policy (NEP)]? (α) Retention of the land in the hands of the state; (β) *the same* for all commanding heights in the sphere of means of production (transport, etc.); (γ) freedom of trade in the sphere of petty production; (δ) state capitalism in the sense of attracting private capital (both concessions and mixed companies)" (Lenin 1971, 585-87).

⁴ In line with Rawls, I do not equate public ownership with state ownership in the sense of unmediated central control. See Roemer 1994 for discussion of how the allocative efficiencies of "free" markets can be had without compromising core socialist commitments. Roemer proposes that private goods and wages be allocated by market pricing, and private goods produced by profit-maximizing firms, whose net earnings are distributed as a social dividend to all, rather than retained privately. The state supervises these aspects and manages the financial "commanding heights" by offering easier credit to democratically preferred enterprises.

essential to personal independence and self-respect, and thus to “adequate development and exercise of the exercise of the moral power to select and pursue a conception of the good” (*JF* 114; see also *PL* 298). But the choosers would not insist of either of two “wider” conceptions of property: a) a right privately to own productive means and natural resources, and to give or bequeath them, and b) an equal right to participate in the control of means of production and natural resources, which are all to be socially, not privately, owned.

Rawls gave two reasons why not. One, neither would be recognized as essential to the exercise of the moral powers or as an essential social basis of self-respect. Two, he surmised that an intelligent choice between the two would depend “in large part upon the traditions, institutions, and social forces of each country, and its particular historical circumstances” (*TJ* 242) —information not available in the original position (but made available at the stage of the constitutional convention). This left open the possibility of justifying one or other of these two, contrary wider conceptions of property at a later stage of the “four-stage” sequence (original position-constitutional convention-legislative-adjudicative) by which matters of just governance are settled.

At the constitutional stage, institutions of the basic structure that are necessary to implement the two principles are chosen. At this stage, the later Rawls canvasses five “ideal types” of regime, and judges each solely on the basis of its suitability to the task, under the assumption that it could be “effectively and workably maintained” (*JF* 137). Two of the five

ideal types—laissez-faire capitalism and state socialism under a command economy—would be rejected out of hand, under the assumption that what does not at least aim to realize the two principles will not reliably succeed in doing so (*JF* 137).

A third ideal type, welfare-state capitalism, survives the rough first cut as a possible implementation of the two principles because it is defined as committed to honoring the bundle of political rights and liberties featured in the first principle. Under welfare-state capitalism, productive assets are privately owned, and the state's role in the economy is—broadly speaking—restricted to two roles: assuring the functioning of free markets and assuring an adequate safety net for citizens who do not fare well in the market. Rawls rejected welfare-state capitalism because it does not guarantee the fair value of the political liberties and is not serious enough about fair equality of opportunity. Welfare-state capitalism allows unbounded inequalities of wealth and, even if it were generous in guaranteeing a minimum income, it would not honor the idea of reciprocity. Losers in the economy would come to be regarded not as equal participants in a common enterprise, but as dependents (*JF* 137-38).

The two surviving ideal types, property-owning democracy and liberal democratic socialism, both aim to fulfill the two principles of justice. Both types of regime are taken to be constitutional democracies in which the basic liberties, fair valued political liberties, and fair equality of opportunity are guaranteed, and some principle of reciprocity for the division of the social surplus, such as (but not necessarily) the difference principle, is in place. What

distinguishes them? The distinction between these two is not merely a matter of degree and emphasis;⁵ but there are conflicting ways of interpreting the essential difference between them.

One way of understanding the difference is that each opts for one of the two wide rights of property—which were considered but not chosen in the original position—while rejecting the other. Liberal democratic socialism rejects any private right to own productive means, while property-owning democracy assures it (subject of course to adjustment with other first-principle rights).⁶ Liberal democratic socialism guarantees that all have an equal

⁵ In asserting this, I deny that “The key difference between a liberal socialist state and a property-owning democracy is that the former has much more extensive public ownership of the means of production and natural resources than the latter” (MacLeod 2014, 181 n. 3). Admittedly, Rawls referred to a “classical distinction” of this kind (*TJ* 235), but only as preface to further clarification. Rawls pointed out that market devices are equally available to both socialist and property-owning regimes, and keyed on the difference between the allocative and the distributive function of market prices, including those for labor. The allocative function uses market pricing to achieve efficiency, while the distributive function concerns “determining the income to be received by individuals in return for what they contribute” (*TJ* 241).

Since under socialism the means of production and natural resources are publicly owned, the distributive function is greatly restricted, whereas a private-property system uses prices in varying degrees for both purposes. (*TJ* 242)

Understanding “the means of production” in the “commanding heights” sense, we see that Rawls clearly means that socialism does not permit a private rent to accrue from such ownership, ever, at all. The distributive function of capital ownership is “greatly” restricted, viz., exclusively to petty production.

⁶ Alan Thomas reads property-owning democracy this way, but he thinks “Rawls’s use of ‘or’ [in *Justice as Fairness: a Restatement* is] non-exclusive” (2012, 4 n1). Thus, Thomas denies that Rawls intended property-owning democracy and liberal democratic socialism to be genuinely alternative regime-types. There is not space here to discuss Thomas’s surprising reading.

right to control, via state ownership, all productive means.⁷ Although property-owning democracy envisages widely distributed private ownership of productive means, it accepts unequal rights of control of them, and also unequal accumulation of the return on productive capital (subject to the difference principle).

Another way of understanding the difference is this. Property-owning democracy does not guarantee private ownership of the means of production as a right, it merely permits it as a legislative option. Liberal democratic socialism (as before) forbids private ownership of productive means. The issue, then, is this: does property-owning democracy guarantee a basic right to acquire and hold productive means, or does it merely allow such ownership as a non-basic right? In his lectures on Marx, Rawls says that while “in a well-ordered property-owning democracy . . . property in productive assets is permitted, that right is not a basic right, but subject to the requirement that, in existing conditions, it is the most effective way to meet the principles of justice” (*LHPP* 321). Basic rights are subject to

⁷ I disagree with Robert Taylor’s claim that Rawlsian socialism is “anti-statist” to the extent of making a “rigid demand for universal worker self-management” (2014, 437 & n.19, 451; cf. Joshua Cohen (1989, 40) who, unlike Rawls, seems to make this very demand.). True, where Rawls conjectures that “a liberal socialist regime can also answer the two principles of justice” he says that “We have only to suppose that the means of production are publicly owned and that firms are managed by worker’s councils say, or by agents appointed by them” (*TJ* 248). In context, the remark about management does not state a demand of firms generally, but only of those on “the commanding heights.” Besides, on those heights, Rawls was unlikely to have envisaged as great a degree of firm autonomy as the language could suggest. A moment’s reflection on what an “anti-statist,” worker-managed financial sector would look like tells me that Rawls had no such thing in mind.

mutual adjustment to achieve a best overall scheme of basic liberties. The adjustment must respect the “central range of application” of each basic liberty, so what Rawls means is that in a property-owning democracy a right to own productive assets is not within the central range of application of a basic right to own property. On this reading, property-owning democracy allows but does not guarantee private rights of ownership in productive means, while liberal democratic socialism forbids private ownership of productive means and guarantees a right to participate democratically in the overall control and direction (though not in the routine management) of productive means that are, always, socially owned.

My question is this: is the exercise, and even the availability, of a legislative option to allow private ownership of the means of production consistent with maintaining the fair-value guarantee? I argue that it is not. If the argument succeeds, it establishes a fortiori that a basic right privately to own productive assets is inconsistent with the fair-value guarantee.

II. FAIR VALUE OF POLITICAL LIBERTY

There is a difference between merely formal political equality and fair political equality. The value of a citizen’s equal right to free speech, for example, will be significantly greater if she happens to own a newspaper, and coordinately lesser if she hasn’t got the leisure time needed to look at one. Moreover, the advantage in the value of liberty that accrues to wealth pervades the political process. This is the gist of the Marxist charge that parliamentary democracy is merely the public instrument by which a wealthier class maintains its dominant position in society. The charge is a serious one, in Rawls’s view, and to rebut it he insists on

a guarantee of what he called *the fair value of the political liberties*, principally, the equal right to participate in political discussion and to vote, and fair equality of opportunity, which includes a “fair chance” to occupy “public offices” (JF 43).

The fair value of the political liberties ensures that citizens similarly gifted and motivated have a roughly equal chance of influencing the government’s policy and of attaining political authority irrespective of their economic and social class. (JF 46; cf. TJ 197)

Fair value gives—or simply *is*—this assurance. It is defined in terms of chances to *influence*, not merely to participate. The comparison corrects for similar gifts and motivation. So defined, fair value might seem to be trivially satisfied in circumstances in which citizens of lower economic and social classes generally lack the gifts and motivation possessed by citizens in the upper classes. But Rawls clearly intends that the principles of justice will have already disrupted any possible correlation between gifts and motivation, on one hand, and class on the other. If the citizens who occupy the lower orders lack sufficiently developed gifts of articulateness and persuasiveness, or are unmotivated to participate in public life, that circumstance will already be an indictment. Accordingly, it is fairer to understand Rawls to mean that the fair-value guarantee operates on both levels. One, citizens of different classes have a roughly equal chance of possessing the motivation and skill to influence policy. Two, citizens who in fact possess in similar degree the relevant motivation and skill have roughly equal chances of exerting political influence and of holding public

office. No citizen will “withdraw into apathy and resentment” because she is skeptical that she has the means to exercise a “fair degree of influence” over public affairs (*TJ* 198).

Henceforth when I refer to fair value I mean that of both the formally equal political liberties and also to formally equal opportunities to achieve a public (presumably political) office.

The fair-value guarantee is hugely important to Rawls’s mature position. It serves not only to parry the Marxist critique of parliamentary democracy but also to forestall a standard objection to the difference principle.

It is sometimes objected to the difference principle as a principle of distributive justice that it contains no restrictions on the overall nature of permissible distributions. It is concerned, the objection runs, solely with the least advantaged. (*JF* 46 n. 10)

What Rawls is referring to is the difference principle’s exclusive focus on whether a given material inequality benefits the least-advantaged group in absolute terms. It is insensitive to the relative gap that it allows to open between the more advantaged and the least advantaged. So long as the least advantaged receive some small material advantage they would not otherwise get, it does not matter how great a material gain the more advantaged enjoy. “But,” Rawls answers, “this objection is incorrect:”

it overlooks the fact that the parts of the two principles of justice are designed to work in tandem and apply as a unit. The requirements of the prior principles have important distributive effects. (*JF* 46 n 10)

The two prior principles will themselves not allow relative inequality to grow to any objectionably great degree: a constraint on distributive inequality is already provided before the difference principle ever “kicks in.”

Consider the effects of fair equality of opportunity as applied to education, say, or the distributive effects of the fair value of the political liberties. We cannot possibly take the difference principle seriously so long as we think of it by itself, apart from its setting within prior principles. (*JF* 46 n 10)

The tone is emphatic, as though Rawls would scoff at the very idea that the difference principle might possess any stand-alone appeal. The “social surplus” that the difference principle operates upon is presumed to be what is generated by a society that already guarantees the fair value the political liberties. And yet Rawls seems also to be taking care to speak only of “distributive effects” and not of “distributive task.”

This raises several questions. What does fair value require? Rawls speaks of a “rough” equality of ability to influence political outcomes.⁸ How is political influence to be objectively measured? Unless subject to objective assessment, fair value does not satisfy public reason’s demand that matters of first-principle priority be free of those doubts and controversies that are grist for the mill of ordinary majoritarian legislation. What kinds of measures are allowed or required in order to secure fair value? Answers to these questions have to be collected from Rawls’s writings, and in some instances inferred from theoretical commitments that do not directly involve fair value.

Rawls acknowledges a connection between better life-prospects generally and better access to political power.

To accomplish [fair equality of opportunity] certain requirements must be imposed on the basic structure.... A free market system must be set within a framework of political and legal institutions that adjust the long-run trend of economic forces so as

⁸ Although “the collective activity of justice is the highest form of human flourishing” (*TJ* 463), the fair-value guarantee does not presuppose a civic duty of political participation. Just as Rawls rejects the idea that political activity is a necessary part of a reasonable conception of the good, he also rejects the thought that political liberty is consistent with compelled participation: “the extent to which we make engaging in political life part of our complete good is up to us as individuals to decide, and reasonably varies from person to person” (*JF* 144). True, “we cannot afford a general retreat into private life,” but luckily “some will find ... their good importantly in public life.... It is to the good of society that this be so.... The idea of a division of labor (rightly viewed) applies here as elsewhere” (*JF* 144-45). The fair value guarantee thus has a counterfactual component: those who opt out of politics would, nonetheless, have roughly equal influence were they to opt in. Given the fact of reasonable pluralism, it is most unlikely that every citizen will in fact equally influence political decisions. I thank Andrew I. Cohen for prodding me here.

to prevent excessive concentrations of property and wealth, especially those likely to lead to political domination. (*JF* 44)

Here, Rawls speaks of measures to prevent accumulations of wealth, rather than of allowing them while insulating political institutions and processes from their influence. And Rawls was impressed with, if not won over to, the Marxian idea that just distribution presupposes social ownership of productive means.

[W]e are likely to think that justice in distribution can be improved more or less independent[ly] from the relations of production. This tempts us to look for the best account of distributive justice to guide us in doing this. But distribution is not independent from the relations of production, which are, Marx thinks, fundamental. (*LHPP* 358)

These “relations of production” centrally include ownership.⁹ Rawls does not expect a guarantee of a decent social minimum to be enough to guarantee also the fair value of equal political liberty (and this is regardless of whether the social minimum guarantee is given priority to the two principles). And the difference principle, being posterior to the first principle guarantee of equal basic liberty, would not suffice either. In fact, he emphasizes that the fair value of the political liberties must be assured by a principle that is lexically prior to the difference principle or any acceptable substitute principle for distributing the social surplus (*JF* 42-43). The priority rules have a significance that Rawls explains this way:

⁹ See Brudney 2014, for a deft exploration of the Marxian charge that Rawls wrongly focusses on distribution rather than on production.

the priority of the first principle over the second ... rules out exchanges (“trade-offs,” as economists say) between the basic rights and liberties covered by the first principle and the social and economic advantages regulated by the difference principle. For example, the equal political liberties cannot be denied to certain groups on the grounds that their having these liberties may enable them to block policies needed for economic growth and efficiency. (*JF* 47; cf. *PL* 293-94, using the same example, but stating the priority in terms of “absolute weight”)

Pro-growth policies cannot justify denying equal political liberties, but—inferably—pro-fair value policies *can*. Fair value is a first-principle matter, but one that directly registers concerns about relative social and economic advantage. Precisely for this reason, Rawls finds legislation that limits campaign spending unproblematic, even though it is very much a matter of regulating both social and economic advantages and the first-principle basic right of free speech.

Rawls rejects any guarantee of the fair value of the other basic liberties. What is it about the political liberties, in contrast to the other liberties, that makes them special in this way? Rawls characterizes the political liberties as “the liberties of the ancients,” which have “in general less intrinsic value” than “the liberties of the moderns,” such as liberty of thought and conscience and the liberty to pursue one’s own conception of the good outside the political arena. It seems incongruous that the less significant political liberties are guaranteed their fair value while the other, more significant liberties are not. Rawls says:

The role of the political liberties is perhaps largely instrumental in preserving the other liberties [citing Berlin]. But even if this view is correct, it is no bar to counting certain political liberties among the basic liberties and protecting them by the priority of liberty. For to assign priority to these liberties they need only be important enough as essential institutional means to secure the other basic liberties.... And if assigning them this priority helps to account for the judgments of priority that we are disposed to affirm after due reflection, so far so good. (*PL* 299)

Although Rawls is evidently confident of this justification for selectively guaranteeing the fair value of only the political liberties, his “even if this is correct” is not meant to signal a concession.

[E]qual political liberty is not solely a means. These freedoms strengthen men’s sense of their own worth, enlarge their intellectual and moral sensibilities, and lay the basis for a sense of duty and obligation upon which the stability of just institutions depends. (*TJ* 206)

But these virtues do not flow from merely formal political equality. “Equal political liberty when assured its fair value is bound to have a profound effect on the moral quality of civic life ... the effect of self-government where equal political rights have their fair value is to enhance the self-esteem ... of the average citizen” (*PL* 205). Contrariwise, to the extent that the fair value is diminished, the less advantaged will tend to regard the conduct of public discussion with “apathy and resentment” (*TJ* 198); and—because the principle of reciprocity

is coordinately dishonored—“[a]ll desire and activity becomes empty and vain, and we sink into apathy and cynicism” (*TJ* 386). Insofar as “self-respect is secured by the public affirmation of the status of equal citizenship for all” (*TJ* 478), it follows that a public policy that rejects or consciously undermines fair value can rightly be resented by the less advantaged as an assault upon their self-respect.¹⁰

III. THE CONSTITUTIONAL STAGE OF THE FOUR-STAGE SEQUENCE

Subsequent to the choice of principles in the original position in the four-stage sequence comes a constitutional convention, in which Rawls puts matters of regime-choice on the agenda, and makes additional knowledge available.

The aim of constitutional design is to make sure, if possible, that the self-interest of social classes does not so distort the political settlement that it is made outside the permitted limits. (*TJ* 318)

If private ownership of productive means is constitutionally permissible, whether to allow it and how to adjust it to achieve the most effective total scheme of basic liberties becomes a matter of legislative determination. But it is not easy to envisage circumstances in which private ownership of productive means would not tend to undermine fair value; and this fact compounds with the considerations that already militate against recognizing a wide right to

¹⁰ Daniel Brudney points out that “lack of respect is not the only problematic social attitude. Another is lack of concern. . . . [H]istory has made us assume that to be treated as second-class is to be the object of disrespect. Yet to be the object of indifference can also count as second-class treatment” (2014, 459). Because the fact of domination is evident to common sense, a society’s failure to secure fair value expresses a lack of concern as well as a lack of respect.

private ownership as a fundamental. The means of production cannot usefully be kept in common ownership; therefore, what counts *against* the wide right of private ownership counts in *favor* of social ownership of the means of production.¹¹ This reinforces those reasons that already favor the other “wider” right, the right to participate in the control of the means of production, socially owned. If this is correct, then Rawls was mistaken in his claim that the choice between property-owning democracy and liberal democratic socialism was one not settleable until the legislative stage. An individual right to social ownership of the means of production, encompassing an equal right to participate in their overall direction, is a constitutional essential.

This result, though readily derivable within Rawls’s framework, is contrary to his explicit view. Rawls rejects the idea that the issue between social and private ownership of productive assets pertains to a constitutional essential; but nothing in his general characterization of the four-stage sequence disqualifies it. In *A Theory of Justice*, he proposes a “division of labor” (*TJ* 174) between the constitutional convention and the process of

¹¹ As Meade (1964, 67) points out, state ownership of productive assets has a decisive efficiency advantage over a regime in which equalized private holding of productive assets are the mechanism by which holdings are equalized. It should also be noted that maintaining as equality of private holdings would require restricting transfers, whether by sale, trade in-kind, pledge, loan or gift. Restrictions as extensive as this are inconsistent with the ordinary association of a property right with free alienability. Moreover, they arguably would require a vast bureaucracy that would itself tend diminish the fair value of political liberty (Vallier 2014).

ordinary (majoritarian) legislation that “roughly corresponds to the two parts of the basic structure” (*TJ* 174), by which he evidently means the two principles.

The first principle of equal liberty is the primary standard for the constitutional convention. Its main requirements are that the fundamental liberties of the person and liberty of conscience and freedom of thought be protected and that the political process as a whole be a just procedure. . . . The second principle comes into play at the stage of the legislature. It dictates that social and economic policies be aimed at maximizing the long-term expectations of the least advantaged under conditions of fair equality of opportunity, subject to the equal liberties being maintained. At this point the full range of general economic and social facts is brought to bear. The second part of the basic structure contains the distinctions and hierarchies of political, economic, and social forms which are necessary for efficient and mutually beneficial cooperation. Thus the priority of the first principle of justice to the second is reflected in the priority of the constitutional convention to the legislative stage. (*TJ* 174-75)

Rawls is clear that the fair-value guarantee is component of the first principle and that it falls to the constitutional convention to decide how to realize it. “What is essential is that the constitution should establish equal rights to engage in public affairs and that measures be taken to maintain the fair value of these liberties” (*TJ* 200; cf *TJ* 197; *PL* 357-62). Rawls is

not as clear as he might be about the rule of decision in the constitutional convention (*TJ* 314); but the only tenable position open to him is to require unanimity.¹²

A just constitution is defined as a constitution that would be agreed upon by rational delegates in a constitutional convention who are guided by the two principles of justice. When we justify a constitution, we present considerations to show that it would be adopted under these conditions. (*TJ* 314)

¹² Rawls introduces the expression “constitutional consensus” in *Political Liberalism*, but cautions that it is “not deep” and “not wide” and is “narrow in scope, not including the basic structure but only the political procedures of democratic government” and “the content of certain political basic rights and liberties” (*PL* 159, 161). He is not explicit as to whether that “content” will or will not include what will appear to the representative equal citizen to be demanded to assure fair value in advance of the “political rivalry” that is to ensue. In *Justice as Fairness: a Restatement*, he remarks that “we can expect *more* agreement on constitutional essentials than on issues of *distributive justice in the narrow sense*” (*JF* 48; emphases added). (By “more agreement,” I take him to mean “a readier consensus” rather than “a larger plurality in agreement.”) By “in the *narrow sense*” he means “in the second-principle sense.” The implicit reference to a “wide sense” acknowledges that certain matters of distributive justice—primarily the guarantees needed to assure the fair value of political liberties—are to be decided as first-principle matters. He further writes, “Differences about the most appropriate principles of distributive justice in the narrower sense, and the ideals that underlie them, can be adjudicated, though not always properly, within the existing political framework” (*JF* 49). This implies that principles of distributive justice not touching fair value are deferred to the third and fourth stages. Elsewhere, Rawls writes: “What is at issue, then, is the most appropriate principle of distributive justice (in the narrow sense); and whether the difference principle or the principle of restricted utility is more appropriate...” (*JF* 122). The context here is the choice in the original position between the difference principle the restricted-utility principle, to fill out the second half of the second principle. Other than in these three passages, I have been unable to locate anywhere in Rawls’s work a distinction between narrower and wider senses of distributive justice.

The first [but not the second] principle applies at the stage of the constitutional convention, and whether the constitutional essentials are assured is more or less visible on the face of the constitution and in its political arrangements and the way these work in practice. (*JF* 48)

The only workable alternative, majority rule, is explicitly adopted constitutionally to govern at the legislative stage—as assuring the most extensive right of participation—although other devices are open to him as well (Guttman 2003, 187-92).

The representative equal citizen evaluates fair value guarantees not behind the full veil of ignorance that characterizes the original position, but in light of the additional knowledge revealed to her at the constitutional stage. The two principles are known, of course, but delegates to the constitutional convention also know “general facts about their society, that is, its natural circumstances and resources, its level of economic advance and political culture, and so on” (*TJ* 172-73), and all this in addition to the “principles of social theory” understood in the original position, from which the two principles were derived, and the reasoning by which they were derived, including the general reflections that motivated the veil of ignorance. In the constitutional convention,

[the delegates] are no longer limited to the information implicit in the circumstances of justice. Given their theoretical knowledge and the appropriate general facts about their society, they are to choose the most effective just constitution, the constitution

that satisfies the principles of justice and is best calculated to lead to just and effective legislation. (*TJ* 173)

Notice that the “most effective” and “best calculated to lead to just and effective legislation” is what must be the consensus choice, even if the alternatives have appeal. Also worth noting is that the delegates have on hand not only the knowledge that led them to insist on the fair value guarantee, but also further knowledge about their political culture. They still do not know “their own social position, their place in the distribution of natural attributes, or their conception of the good” (*TJ* 172), but—given their additional knowledge—they are no longer ruled to the same degree by the “law of insufficient reason” that led them to reject utilitarianism in the original position. In the original position, the choosers had no way of knowing how likely it would be for society to sacrifice the interests of some in the name of the greater good. At the constitutional stage, however, knowledge of one’s political culture would presumably make possible estimates of the relative likelihood of alternative outcomes.

One would surmise that it is at this point (and not later) that, for Rawls, the problem of fair value must be resolved; if necessary, by crafting not only the legislative process but also other parts of the basic structure (though not all of the basic structure is involved).

The liberties protected by the principle of [political] participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate. For *eventually* these inequalities will enable those better situated to exercise a larger influence over the development

of legislation. *In due time* they are likely to acquire a preponderant weight in settling social questions, at least in regard to those matters upon which they normally agree, which is to say in regard to those things that support their favored circumstances. (*TJ* 198; emphasis added)

Rawls has insisted on the fair-value guarantee because of the tendency of unequal social and economic advantages to translate themselves into political advantages—I will call this *the fact of domination*.¹³

The fact of domination would seem to call for some adjustment to the principles of justice for the basic structure, but Rawls avoids confronting it that way. Rather, “[c]ompensating steps must, then, be taken to preserve the fair value for all the political liberties. A variety of devices can be used. For example, in a society allowing private ownership of the means of production. . . .” (*TJ* 198). This brisk movement avoids the question whether a guarantee of fair value is consistent with allowing private ownership of productive means (much less, with guaranteeing such a right). Instead, Rawls simply assumes that the tendency of private ownership of productive means to undermine fair value can be compensated for by certain devices, such as subsidies for political parties and political

¹³ Compare the young Marx: “The contradiction which exists between the [tremendous] effective political power of the Jew and his [formally denied] political rights, is the contradiction between politics and the power of money in general. Politics is in principle superior to the power of money, but in practice it has become its bondsman” (1978 [1843], 50).

discussion and coordinate limits on private political spending—following Martin O’Neill (2012, 82), I will call reliance on these devices an “insulation strategy.”¹⁴

Rawls does not mention liberal democratic socialism as a device to guarantee fair value. This is especially noteworthy, for Rawls then begins one of the most remarkable paragraphs in his extensive body of work.

Historically one of the main defects of constitutional government has been the failure to insure the fair value of political liberty. The necessary corrective steps have not been taken, indeed, they never seem to have been seriously entertained. Disparities in the distribution of property and wealth far exceed what is compatible with political equality have generally been tolerated by the legal system. Public resources have not been devoted to maintaining the institutions required for the fair value of political liberty. (*TJ* 199)

Presumably, this fact is available to the constitutional convention on its own, whether or not packaged with an explanation of why it is a fact. Rawls does not here—or anywhere else—

¹⁴ O’Neill argues that “fair equality of opportunity and the fair value of the political liberties could plausibly be achieved under a variety of different socioeconomic regimes” (2014, 93). This overlooks the fact that for Rawls fair value is a constitutional essential, and that parties to a constitutional convention are not to take unnecessary gambles. Allen Thomas (2014, 123), emphasizing the importance of cultivating a republican ethos, recognizes that fair value is a constitutional essential; but he concludes that property owning democracy is the required type of regime. Samuel Freeman argues that fair value as a first-principle concern decides against welfare state capitalism and in favor of property owning democracy (2007b 133-35, 224-26; 2007a 105-98). He, like Thomas, does not acknowledge that liberal democratic socialism must be preferred over property-owning democracy on fair-value grounds.

take this fact as calling into question his confidence that he has correctly identified the fundamental ideas latent in our public political culture. It is these ideas—and not any drawable solely from a comprehensive moral/political doctrine, even the true one—that he intends to “work up” into a theory of political justice. This is consistent with the method of reflective equilibrium, which in its application to the design of the original position, entitles us to discard philosophically dubious convictions, such as the conviction that political institutions must be shaped by pre-political conceptions of desert, or of property. Our public political culture may indeed seem not to have taken fair value seriously; but it does not follow that the best theory of justice for such a culture will not take it seriously either.¹⁵

But why has fair value never been taken seriously, despite its latency in our public political culture? He continues:

Essentially the fault lies in the fact that the democratic political process is at best a regulated rivalry; it does not even in theory have the desirable properties that price theory ascribes to truly competitive markets [viz., competition doesn’t make influence more affordable]. Moreover, the effects of injustices in the political system are much more grave and long lasting than market imperfections. Political power *rapidly* accumulates and becomes unequal; and making use of the coercive apparatus of the state and its law, those who gain the advantage can often assure themselves of a

¹⁵ Compare chattel slavery. The best theory of justice for the United States, circa 1860, forbade slavery despite the fact that slavery was so deeply entrenched that Congress had adopted rules forbidding debate on the subject.

favored position. Thus inequities in the economic and social system may *soon* undermine whatever political equality might have existed under fortunate historical conditions. (*TJ* 199; emphasis added)

This is plausible (albeit contestable). What might be done about it?

Universal suffrage is an insufficient counterpoise; for when parties and elections are financed not by public funds but by private contributions, the political forum is so constrained by the wishes of the dominant interests that the basic measures needed to establish just constitutional rule are seldom properly presented. (*TJ* 199)

Rawls here is not merely repeating that formal equality does not itself guarantee fair equality. He is also suggesting that any corrective will have to be sturdy enough to withstand the distorting influence of unequal wealth before the political process unfolds, for its influence may affect public deliberation on a topic even before it has begun. If that is the case, though, shouldn't we worry that the legislative design and implementation of these measures will itself be warped by the influence they are intended to control? Or that they might already be too late—especially if only “compensatory”? Might the inequalities of wealth themselves have to be addressed, before attempts are made to dampen their influence or compensate for them post facto?¹⁶ Concluding the paragraph, Rawls abruptly dismisses the matter.

¹⁶ Rawls is evidently confident the “strains of commitment” entailed by property-owning democracy or liberal-democratic socialism do not disqualify them.

These questions, however, belong to political sociology. I mention them here as a way of emphasizing that our discussion is part of the theory of justice and must not be mistaken for a theory of the political system. We are in the way of describing an ideal arrangement, comparison with which defines a standard for judging actual institutions, and indicates what must be maintained to justify departures from it. (*TJ* 199)

It is unclear what questions are being assigned to political sociologists for further study.¹⁷

Such results, whatever they turn out to be, are presumably inadmissible until we have passed from the constitutional stage and are into the legislative or the implementation stage. But Rawls does not take back the historical claim with which this remarkable paragraph begins.

What has been achieved?

By way of summing up the account of the principle of participation, we can say that a just constitution sets up a form of fair rivalry for political office and authority. By presenting conceptions of the public good and policies designed to promote social ends, rival parties seek the citizens' approval in accordance with just procedural rules against a background of freedom of thought and assembly in which the fair value of political liberty is assured. (*TJ* 199)

A fair rivalry for office and authority presupposes a basic structure in which fair value is already assured. But Rawls does not consistently formulate the problem that way. Instead, it

¹⁷ I do not say that Rawls was writing esoterically, setting up a powerful argument for socialism while leaving it to others to draw the conclusion he thought his own milieu unready for.

is more often stated in terms of “compensating steps” whose design presents a problem in “political sociology.”

IV. FAIR VALUE AND PUBLIC REASON

Rawls does not in fact leave political sociology aside. Rather, it reappears in the essay 1982 essay, “The Basic Liberties and Their Priority,” which is Lecture XII of *Political Liberalism*. In *Political Liberalism*, Rawls focuses on the problem of the stability of a well-ordered society. He withdraws justice-as-fairness insofar as it could be—and had been— taken as stating a more comprehensive moral view (viz., one addressing all values, ideals and human relationships)¹⁸ and recasts it as a “political conception” of justice. The change was motivated in large part by Rawls’s realization of “the fact of reasonable pluralism,” i.e., that in a well-ordered liberal society a multitude of diverse but equally reasonable conceptions of the good life (not all of them liberal, some of them “salvation religions” (*PL* xliii))¹⁹ will over time sprout and thrive. In such circumstances, a perpetual consensus on the principles of justice

¹⁸ Remarkably, Rawls suggests that some components of justice-as-fairness, the comprehensive doctrine set forth in *A Theory of Justice*, might “seem . . . and may actually be” *religious*, as well as moral and philosophical in the comprehensive sense (*PL* xliii). He does not specify which these are, but he may be alluding to his Kantian conception of moral autonomy. In light of his posthumously published senior thesis, a likelier surmise is that Rawls came to recognize his 1971 conception of a well-ordered society to be a continuation of his youthful—and aggressively Christian—conception of a community of faith (*BI* passim).

¹⁹ As Daniel Brudney (2014, 455) points out, despite many affinities between Rawls and the circa 1844 Marx, the distance between them on the fate of religion in an ideal society could not be greater. Rawls says nothing else specifically about these new, emergent, salvation religions; but presumably they promise an eternal afterlife in which temporal virtue finds its reward and vice its punishment (cf. *BI* passim).

cannot be assured if it rests upon a comprehensive conception of the good, for some citizens will reasonably disagree with that rationale. Moreover, given “the fact of oppression,” a consensus can not be recovered except by the coercive exercise of state force. Therefore, Rawls felt it necessary to explain how a society governed by the two principles (or close analogues of them) might not only be stable, but stable “for the right reasons” (*PL*, xxxix). By this he meant, stable neither by way of an uneasy *modus vivendi* among groups wedded to irreconcilable comprehensive doctrines, nor by way of coerced unanimity upon any one such doctrine. Rather, his project was to outline a freestanding political conception that each citizen could freely affirm from within his or her own comprehensive doctrines.

With these concerns in the foreground, the fair-value issue assumes added importance. Rawls envisages a just society as a deliberative democracy in which citizenship is “a relation of free and equal citizens who exercise ultimate political power as a collective body” (*PL* xiv; cf. J. Cohen 2003, 333-34). Its stability consists in there being a reliable passage from a “constitutional consensus” as to basic rights and liberties and “political procedures of democratic government” (*PL* 158-59) to a supportive “overlapping consensus” of the variety of comprehensive views that society will inevitably seed. The passage is made possible by *public reason*, “a reasonable public basis of justification on fundamental political questions” (*PL*, xxi). For a deliberative democracy to be legitimated by public reason it is essential that the principle of participation and the political liberties deriving from it be jealously guarded. But guarded in the “right way,” of course, which will be even more

difficult given that diverse comprehensive doctrines, as well as rivalrous political positions arising from diverse private economic and social interests, have to be held together across generations.

Since the ideal of public reason contains a form of public political deliberation ... public financing of elections ... fair equality of opportunity ... [and] a decent distribution of income [assuring] fair access to the political process ... are necessary for this deliberation to be possible and fruitful. In the absence of [fair access to the political process] those with wealth and income tend to dominate those with less and increasingly to control political power in their own favor... Without [these or] similar arrangements, reasonable political liberalism holds that these excessive inequalities tend to develop. This is an application of common sense political sociology. (*PL*, lvii-lix; reordered)

This passage tells us two things. One, Rawls regarded the fact of domination, the tendency of unequal wealth to lead to political and social subordination, to be a common sense truth, albeit one within the realm of political sociology; and, two, political legitimacy could not be achieved without adequate measures in place to prevent such inequalities from developing.

The fact of domination is not merely the tendency toward inequality of wealth, which Rawls already sees as an inevitable aspect of the workings of the basic structure of society. Nor does it merely the tendency of social and economic inequalities to be reflected in inequality of political influence. Rather, it also takes in the tendency of unequal political

influence (whether or not born of unequal social and economic advantages) to do two things. One, those in possession of greater political influence tend to entrench and extend that influence. Two, those in possession of greater political influence tend to exert that influence to gain, secure and extend other advantages, economic and social, and to promote via coercive state power comprehensive conceptions of the good that others might reasonably reject. For Rawls, the tendency is self-reinforcing. An actor in possession of social and economic advantages tends to possess and exercise a greater political influence, which in turn leads to greater social and economic advantages, which in turn ... etc.²⁰ Incidentally, but importantly, the tendency plays itself out across generations if left unchecked. Moreover, the less advantaged, as rational actors anticipating the opposition of the more advantaged, will increasingly tend to curtail their investment in political effort.

Compare the fact of domination with two facts the later Rawls did name, the fact of reasonable pluralism and the fact of oppression.²¹ The two latter facts, in combination, required a major adjustment of his ideal theory. The fact of reasonable pluralism and the fact of oppression do not by themselves require an adjustment of the principles chosen in the

²⁰ The Marxist critique of parliamentary democracy emphasizes the roles of ideology and social classes: similarly, Rawls sometimes claims that the most-advantaged tend generally a) to share a certain self-interested political viewpoint, and b) to affiliate politically in order to further a common agenda (see, e.g., *LP* 139). [Names suppressed] have convinced me that these two claims are too controversial to rest on an appeal to commonsense. Nonetheless, they are not essential either to Rawls's position or my interpretation of where it must lead.

²¹ The fact of domination cannot easily be discounted as hyperbole: what Rawls says about it is noticeably less hyperbolic than some of his claims about the fact of oppression and the fact of reasonable pluralism.

original position. Rather, they require an overhaul of the guidelines of reasoning by which public discussion in a society well-ordered by liberal principles of justice is to be conducted—in particular, public political justification is required rather than any ultimate appeal to truth as couched in a comprehensive moral or political view.

In contrast, the fact of domination directly affects the content of the principles of justice chosen in the original position. It justifies the fair-value guarantee that is already present in the 1971 version of the theory. One might ask, if the common sense, political-sociological fact of domination is known at the constitutional stage, and if it is also revealed that measures to assure fair value “never seem to have been seriously entertained” in constitutional democracies, wouldn’t socialism have to be considered as a “constitutional essential”? If it were, on what grounds could it be rejected (other than its inconsistency with a right to acquire private entrepreneurial control)?

Just as he insists that judicial review is constitutionally required to assure formal equality of political liberty, Rawls acknowledges the need to assure fair value structurally:

The guarantee of fair value for the political liberties is included in the first principle of justice because it is essential in order to establish just legislation and also to make sure that the fair political process specified by the constitution is open to everyone on a basis of rough equality. The idea is to incorporate into the basic structure of society an effective political procedure which *mirrors* in that structure the fair representation of persons achieved by the original position. (*PL* 330; emphasis added)

Rawls says no more about this idea of arranging the basic structure to mirror the original position. The original position is a very powerful conception. What points of contact might he have had in mind?²² If one took the mirroring idea seriously, one might suggest that fair value be guarded against the fact of domination by institutionalizing ownership within the basic structure so as to reproduce as closely as possible ownership as it is represented in the original position. But, of course, in the original position, all assets are in effect commonly owned, for all are regarded as products of the social enterprise. Even the valuable exercise of individual talents (though not the talents themselves) are regarded as a common asset. If society is a fair system of cooperation, how can productive property not ultimately be the property of all cooperating members? And, given the fact of domination, how can it justly be allowed to be distributed unequally merely to push total wealth further beyond what a decent society needs—even on the (contestable) ground that greater social output is achievable only by offering incentives?

Or rather, to serve as the mirror, did Rawls instead have in mind “insulation” devices? Public financing of parties and elections mirrors, in a certain sense, an important feature of the veil of ignorance. No public official, or political party or candidate “knows” with any particularity who is the source of financial support: it comes from every taxpayer and thus from none in particular. But the similarity ends abruptly there. In the original position, no

²² Joshua Cohen (2003b, 344-45) interprets Rawls’s mirroring image more abstractly. He thinks Rawls ought not to have intended the political structure to mirror “ideal fairness,” but, rather, to mirror a “system of ideal deliberation.”

party could know who in particular would benefit by one choice or another. In politics, decision makers are keenly aware of whose interests will be furthered and whose set back by one choice or another.

Insulation devices, as Rawls notes, are difficult to design in a way that is both fair and effective (*PL* 362-63). Given the fact of domination, those with social and economic advantages can be expected to use them to assure that the insulation is porous. Not only can the well-off be expected to weaken or oppose insulating legislation, nothing prevents their gaining such influence within the judiciary that judicial review undoes rather than reinforces legislative measures to assure fair value. In the extreme, the judiciary might declare that the legislature is forbidden to regulate the political process to secure fair value (*PL* 359-63).²³ Given the fact of domination, it is not easy to see how to *assure* rough equality of political influence without giving a credible prior assurance of at least rough equality of economic

²³That is precisely the teaching of a line of U.S. Supreme Court decisions running from *Buckley v. Valeo*, 421 U.S. 1 (1976) to *McCutcheon v. Federal Election Commission*, 572 U.S. ___ (2014). See generally Kuhner 2014.

resources. The difference principle does not and is not designed to do this and—owing to the nature of the political—cannot.²⁴

The difficulty for Rawls and Rawlsians is that the issue of capital ownership is too fundamental to be left to the legislature. Unless there is a compelling reason for the constitutional convention not to make the decision itself, it would be taking an unjustifiable risk if it deferred the question of ownership of productive means to the legislative agenda. The reasons the chooser will not agree to defer the decision to the legislative stage (where majority rules) are much the same as those that incline the chooser in the original position to eschew utilitarianism in favor of the two principles: “the parties would prefer to secure their liberties straightaway rather than have them depend upon what may be uncertain and speculative actuarial calculations” (*TJ* 138-39).

Is there compelling reason to be found in the burdens of judgment? Rawls relegates implementation of the difference principle to the legislative stage because he thinks matters of distributive justice are especially subject to the burdens of judgment. He objects to alternatives to primary goods as the currency of distributive justice on similar grounds.

²⁴ Another dimension I cannot fully explore has to do with the kinds of economic growth Rawls saw as inevitably arising from the fact of reasonable pluralism. One of Rawls’s lines of defense of the difference principle appealed to the effervescence of economic growth in a well-ordered society (*JF* 67-69); yet Rawls also held that a Millian “stationary state” economy would be eligible (*LP* 106-07 & n. 33) and even desirable (Rawls and van Parijs 2003; Little 2014, 519-21). Simply put, a property-owning democracy having an economy exuberant enough to trivialize the inequalities tolerated by the difference principle is irreconcilable with maintaining a stationary state economy. By contrast, a liberal democratic socialist state, by dint of owning the means of production, could rather straightforwardly maintain a cap on overall growth.

Such things as welfare defy interpersonal comparison and so cannot easily be debated within the guidelines of public reason. Fair value seems to suffer the same deficiency. Conducting debate about degrees of political influence would be difficult within the confines of public reason. Whether so-and-so has enough control over productive resources to endanger the fair value of the political liberties of others does not present itself as an issue fit for clear-eyed settlement. In contrast to this, whether or not all productive assets are socially owned and subject to democratic control seems easy to ascertain.²⁵ If the answer is Yes, then it is reasonable to think that the equal, fair value of the political liberties of all is secure. Of course, because the right to control is distinct from the right to revenue, liberal democratic socialism does not and need not guarantee equality of wealth: it can employ the difference principle to regulate these inequalities, confident that the structural guarantee of social ownership of the means of production secures fair value.

Adopting a right to social ownership of productive capital of course adds to a list of basic liberties that Rawls intended to guard carefully against expansion.

It is wise, I think, to limit the basic liberties to those that are truly essential in the expectation that the liberties which are not basic are satisfactorily allowed for by the general presumption [of liberty]... Whenever we enlarge the list of basic liberties we risk weakening the protection of the most essential ones and recreating within the

²⁵ It is true that line-drawing judgments about what does and does not stand on the “commanding heights” of the economy will be needed; but these are significantly more amenable to the strictures of public reason.

scheme of liberties the indeterminate and unguided balancing problems we hoped to avoid by a suitably circumscribed notion of priority. (*PL* 296)

In the present instance, however, the “indeterminate and unguided balancing problems” are ones generated by Rawls’s insistence on making fair value a first-principle guarantee. But it is, as he insisted, among the “most essential.” It is therefore one that the constitutional convention must make concrete.

In summary, Rawls is right that the choosers in the original position would insist not only on merely formal but also fair-valued political liberty. Rawls is right to conclude that welfare-state capitalism—given its insouciance about fair value—would be rejected at the constitutional stage. But, *pace* Rawls, given the fact of domination, the constitutional convention would have to opt for liberal democratic socialism over property-owning democracy. The choice could not safely be postponed to the legislative stage, for it is precisely at the legislative stage that individuals discover what they have to gain. To avoid this result, the fair value guarantee could be withdrawn or relaxed, but the cost to Rawls of doing so would be immense. It would not only undercut a key line of defense of the difference principle, it would restore the eligibility of welfare state capitalism—a type of regime that the mature Rawls was eager to disavow.

ACKNOWLEDGEMENTS

I thank Kevin Vallier, Bas van der Vossen, Andrew I. Cohen, and [your name here] for valuable suggestions.

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