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Philosophy Social Criticism 2008; 34; 203

DOI: 10.1177/0191453707087251

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Rawls, equality, and democracy

Abstract Part I distinguishes epistemic and choice democracy, attributing the first to the Rawls of *A Theory of Justice* but arguing that the second is more justifiable. Part II argues that in comparison with the difference principle, three principles – equal participation in choice democracy, no subordinating purpose, and a just wants guarantee – constitute a more rational choice in the original position; and that they better provide all the benefits claimed for the difference principle in its comparison with either average utilitarianism or restricted average utilitarianism (the mixed conception). Part III, despite noting that my conclusions in Part II can all be reached within the Rawlsian framework, suggests that finding the basis of equality in the presuppositions of communicative action rather than in the existence of the two basic moral powers is more conducive to the affirmative conclusions of Parts I and II. It argues that Rawls' conclusions represented in part his not fully carrying out the break with Kant that he identified himself as making.

Key words communicative action · democracy · difference principle · distribution · equality · just wants · Immanuel Kant · liberal neutrality · John Rawls · social minimum · subordination · toleration

John Rawls was passionately committed to democracy and to equality. Nevertheless, these terms are not self-defining. This article supports three claims. First, Rawls' crucial works, especially *A Theory of Justice*,¹ commit him to a peculiarly limited conception of democracy that should not survive reflective equilibrium. Second and relatedly, his argument for the difference principle is unpersuasive given that it could lead to irrational results. Within the original position, more persuasive arguments support an alternative that includes a better conception of democracy. Third but more speculatively, these two criticisms reflect ways in

PHILOSOPHY & SOCIAL CRITICISM • vol 34 no 3 • pp. 203–246

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and David Rasmussen

www.sagepublications.com DOI: 10.1177/0191453707087251

PSC

which his conception of equality is too Kantian. In contrast, a better interpretation grounded in the presuppositions of communicative action more easily leads to a better theory of democracy and a less thoroughly distributive second principle of justice.

Equality enters *A Theory of Justice* at three levels, each distinct – related respectively to justice’s basis, the devices of construction, and its content.² At a first, foundational level, Rawls treats conceiving of people as being free and equal as definitive of the moral point of view. The culture of modern democracies so widely assumes the propriety of this view that its justification is often not made explicit. Rawls, however, specifically locates the ‘basis of equality’ in two ‘natural attributes’, conceived of as undemanding ‘range properties’ of ‘moral persons’ – namely, of people as ‘capable of having . . . a conception of their good (as expressed by a rational plan of life)’ and being ‘capable of having . . . a sense of justice’ (*TJ*, 505–8; also 19; *RS*, 18–19). These two moral powers, two ‘facts’ or attributes, play a role in Rawls’ discussion similar, I claim, to that which the presuppositions of communicative action play in my Habermasian concept of equality.³ Differences between the two bases will be the focus of Part III.

Rawls’ social contract theory construes people as free and equal participants in a process of societal cooperation. As a moral rather than empirical theory of the political or legal order, Rawls asserts the propriety of a situation of equality as the correct starting point for thinking about justice.⁴ Thus, at the second level, equality is an aspect of his construction. His original position methodology ‘represent[s] equality between human beings as moral persons’ having the two natural attributes identified above (*TJ*, 19). The original position models this basic equality in order to draw out its implications. His two principles of justice purport to reflect the agreement that ‘free and rational persons’ would reach ‘in an initial position of equality’ (*TJ*, 11ff.). Finally, at a third level, equality is present in the strongly egalitarian content of Rawls’ two principles of justice. The first principle calls for ‘an equal right to the most extensive total system of equal basic liberties’;⁵ the second calls for both ‘fair equality of opportunity’ and the ‘difference principle’ (*TJ*, 302). By focusing on *distributive* aspects of basic institutions – what individuals get – these elements of justice represent a particular interpretation of the subject or point of social justice. Of course, if the basis of equality (the first level above) were different, this difference could affect the devices of construction in which the parties are represented as equals (the second level) and thereby affect the content of the resulting principles (the third level).

Four obvious points exist at which to challenge one or another of these egalitarian contents. First, maybe no natural or foundational equality exists from which to derive a meaningfully universal conception

of egalitarian justice. Any purported universal applicability could be unjustified, a point that Rawls eventually accepted for political purposes in *Political Liberalism*. Rejecting universal abstract principles hardly implies, though it would be consistent with, a general relativism. It does imply, however, that normative matters at best reflect local or contextualist visions or commitments. Normative rightness might inevitably be only 'ethical', that is, completely determined by reasons located in a particular social or ethical context, not 'moral' in the sense of proclaiming universal content.

Arguments exist for the (merely) ethical position. Frank Michelman observes that the linguistic turn in philosophy, which sees the world as constructed or constituted by language while languages are inevitably plural and infinitely variable, supports an initial impulse to reject universalism.⁶ Michelman notes, however, Habermas' claim to find a universalism, though 'not necessarily accessible from within every human form of life', in the language function itself.⁷ In *A Theory of Justice*, Rawls' argument for the two principles of justice, which he takes to constrain his constitutional and legislative stages, likewise aims at a universalism.⁸ In the face of grounds to doubt the possibility of universalism, one response – certainly the response taken here – is to see how well its aims can be redeemed. Certainly, if available, a moral universalism could play a constructive role in support of international human rights and a useful critical role in assessing existing governmental regimes.

Second, the particular grounding of basic moral equality could be wrong. Elsewhere I have criticized relying on facts about individuals as a basis for equality.⁹ These criticisms could cast doubt on Rawls' reliance on the two moral attributes as natural facts on which to ground equality. Third, his devices of construction – his original position methodology – may not properly reflect people's basic equality, invalidating any conclusions about the principles of justice that this methodology implies. Fourth, even given a persuasive modeling of basic equality, an internal critique of the reasoning within this model might show flaws in the egalitarian content the methodology purports to imply.

My critiques in Part I of Rawls' conception of democracy and in Part II of the difference principle quarrel with the reasoning in the original position – this fourth point of vulnerability. As for the third possible point of challenge, I largely accept and reply on his devices of construction. Still, Parts I and II implicitly quarrel with his construction to the extent that it relies on a thin theory of the good and a focus on primary goods. Finally, Part III extends the critique to the claimed basis of equality – the second possible point of challenge. I argue that Rawls either relies too much on natural facts about individuals or breaks too little with Kantianism. Accepting the aim of finding universal principles (and thus rejecting the first basis of challenge), I suggest that alternative

and better guidance can be obtained by modeling a conception of the equality presupposed by communicative action.

I Epistemic versus choice democracy

(1) Two conceptions of democracy

Rawls' strong commitment to democracy or, more specifically, constitutional democracy is unequivocally egalitarian. As an aspect of equal liberty, the democratic principle of participation means that power to influence results of elections should be distributed roughly equally and structural elements should assure the fair value of political liberties (*TJ*, 223–6). The questions here are downstream from that commitment. Any justice-based theory of government should distinguish two questions: *what* is the proper subject of government decision-making and *who* (which institution, group, or person) should make these decisions. Though the 'who' question has recently received considerable attention among constitutional democrats,¹⁰ the concern here is with the first question. What is Rawls' vision of the proper subject or remit of democratic decision-making? What should people engaged in democratic decision-making take themselves to be doing? Specifically, whatever the proper division of authority between elites (judges) and the public (or legislatures) to make judgments about the requirements of justice, the question here is whether democracy also properly encompasses deliberation and, then, non-unanimous (usually majority) choice about additional morally discretionary matters?

Consider two possibilities. In *epistemic democracy*, the only function of democratic decision-makers is to make judgments about and then carry out the requirements of justice. In *choice democracy*, this epistemic task exists – a just government should provide for and operate within the constraints of justice – but in addition democratic majorities have authority to make many other societal choices within these limits. Specifically, in this view, universal or moral principles are not the only determinants of the proper content of law or policy.

A rationale for at least the *epistemic* democratic tasks is clear. Even if objective requirements of justice exist, these requirements are seldom self-evident. In many circumstances, the numerically dominant judgment could provide the soundest or otherwise proper way to attribute content to justice when universal agreement is absent. In this epistemic justification, 'majority rule is adopted as the most feasible way to realize certain ends antecedently defined by the principles of justice' (*TJ*, 361–2). Of course, this epistemic democratic process will not be foolproof – at most it represents 'imperfect procedural justice' where 'perfect procedural

justice' cannot be achieved (*TJ*, 353, 360). Arguably, democratic judgment is not the best approach. Platonic philosopher kings, if accurately found and adequately empowered, might do better. In our day, some might claim that meritocratically chosen judges can do better and therefore should be given ultimate authority. Nevertheless, the public, acting within a democratic process, may predictably do better generally or, alternatively, may predictably do better at reaching judgments about *some* concrete demands of justice, maybe with courts handling other disputes. For example, those in the original position or at an actual constitutional convention might choose democracy as the best epistemic means for determining the application of the difference principle. Given the profound importance of reaching the right answer on these disputed matters, democracy might also be the fairest (the most egalitarian), whether or not the most accurate, means to evaluate the requirements of justice. This assignment leaves legislatures with lots of work. The key point, though, is that the only legislative task is to make these judgments about justice. Obviously, this epistemic interpretation of democracy amounts to a claim that the justification for the exercise of the coercive legal authority over individuals runs out after the legal order fulfills the mandatory requirements of justice.

Choice democracy encompasses the above epistemic tasks but also includes choosing public projects and rules that advance various goals – presumably advancing various conceptions of the good. Justice itself can be understood to authorize this popular empowerment to make discretionary although hopefully reasoned choices about which people will reasonably disagree. Under this interpretation, modifying democracy with the term *constitutional* represents in part the view that, although intrinsically democracy is often about choice, democratic choice is acceptable only if the procedural and the subsequent substantive treatment of the inevitable losers is fair. Wherever the *loci* of authority to interpret and enforce constitutional restrictions lie, a prime purpose of constitutional principles is first to constitute and then to restrict democracy so as to guarantee fair procedural and substantive treatment of political losers. One way to put the distinction is that while epistemic democracy, due to the presence of what might be called the 'burdens of judgment', contemplates there being losers in the effort to understand the requirements of justice, choice democracy in addition contemplates losers in the choice among potential conceptions of the good that the collective pursues.

I suspect that, at least prior to reflection, the common view is that democracy properly involves a collective process for making *choices*. People or their representatives decide whether or not to use collective resources to promote bilingualism; greater stewardship toward the physical environment; a more robust public life of ceremonies, holidays,

art, and culture; or a particular approach to crime and punishment. Justice, or the constitution, constrains the range of acceptable answers – though the content of these constraints may be highly disputed. Few are likely to think, however, that justice or the constitution can determine all the specifics even if we did not suffer from inadequacies of evidence and insight – the burdens of judgment. In part this belief probably reflects the view that any plausible universal principles of justice must be consistent with the existence of a pluralism of cultures. This step, however, may come too fast. Pluralism, either within or between countries, could merely reflect choices of individuals or practices of voluntary associations within a neutral just framework – that is, the application of universal principles to factually different contexts. Thus, the question remains: is favoring a particular way of life a legitimate matter for legal as well as individual choice? Or, equivalently, should the content of the coercive legal order be justified only by the right, leaving the good to be pursued individually, or, instead, should individuals also be empowered to pursue their varying conceptions of the good when creating the legal order? Should the ‘cooperative venture for mutual advantage’ (e.g. *TJ*, 4, 33, 84) be seen only as producing resources for individuals to use on the basis of a fair distribution in their individual and associational endeavors or as producing results properly controlled by and fundamentally at the disposal of the group?

An argument for the first alternatives in the questions above might rely on the fact that only individuals are to inhabit a kingdom of ends or that the ultimate moral concern is with the lives of individual persons; and it might rely on the fact that their subjection to a state legal order is not voluntary. Each point suggests an individual’s claim to resources to use in pursuit of her own conception of the good. In contrast, the second alternative sees people’s autonomous self-determinative pursuit of the good properly to exist both in their individual choices and in their democratic collective endeavors. Part III argues that the proper response of these issues reflects the preferred moral conception of the person, the conception of social cooperation, and the basis of the fundamental idea of equality. Here, however, the question is whether Rawls subscribes to democratic choice, the second alternative, as an aspect of justice?

(2) Rawls’ conception of democracy

On my reading, Rawls argues solely for epistemic democracy. Occasional causal remarks (noted here) suggest choice democracy, but the logic of his two principles commits him to the epistemic conception and this commitment is borne out whenever he focuses theoretically either on democracy or on political liberties. Parts II and III, however, argue that his subscribing to epistemic democracy inadequately carries through on

ways in which he explicitly claims to diverge from Kant and that his basic social contract methodology best supports a different and preferable theory of justice that includes choice democracy.

Admittedly, Rawls occasionally seems to suggest a choice theory. In his discussion of the 'worth of political liberty' (*TJ*, 224ff.), the rationale for providing for this worth seems largely related to the role of political decisions in affecting various people's 'well-being' and 'advanc[ing] their conception of the public good' (*TJ*, 225). These effects can also explain why people 'should have the means to be informed about political issues' (*ibid.*),¹¹ though an equal right to play a role in epistemic judgments would also require these means to be informed. Rawls emphasizes that historically a major defect of constitutional government 'has been the failure to insure the fair value of political liberty', which could be a major affront to equality precisely because of the importance of the choices that the political order makes (*TJ*, 226). By describing a proper political order as setting up 'fair rivalry for political office and authority', Rawls emphasizes that rival political parties compete by 'presenting conceptions of the public good' and that popular participation 'compels those in authority to be responsive to the felt *interests* of the electorate' (*TJ*, 227; emphasis added). Exactly as choice democracy prescribes, the representatives not only 'must . . . pass just and effective legislation, since this is a citizen's first interest in government . . . [*but they also*] *must further their constituents' other interests* insofar as these are consistent with justice' (*ibid.*; 227, emphasis added). Finally, choice democracy might be implied by the vital questions that Rawls explicitly leaves open, most famously, 'the choice between a private-property economy and socialism'; he likewise adds that 'various basic structures would appear to satisfy [the two principles of justice]' (*TJ*, 258; also at 280, 282).

Nevertheless, the logic of his theory excludes this role for choice. Rawls is clear about the *priority* of the right. Of course, priority is logically consistent with its requirements running out in respect to legal policy soon enough to allow for various discretionary choices or even with the right itself requiring provision for democratic choices. I postpone consideration of the second possibility until the next subsection. As to the first, priority rules guaranteeing equal basic liberties and fair equality of opportunity constrain the application of the difference principle. Subsequently, however, the difference principle appears to be all engulfing. Its language is maximizing: 'social and economic inequalities are to be arranged so that they are . . . to the *greatest* benefit of the least advantaged' (*TJ*, 83, 302; emphasis added). Virtually any law or other institutional arrangement will have *some* impact on the receipt of primary goods by the worst-off. A maximizing rule in respect to a matter – the wealth and income of the least advantaged – on which virtually all policies have some effect, even if small or obscure, means that in theory

the right completely determines all matters of legal policy. Of course, the principles of justice are to control only the design of 'basic institutions'. Still, if required to do so in order to satisfy the principles of justice, these basic institutions, especially the constitution, can and should control more specific practices – including the entire legal order – in which people exercise their liberties to make choices in their pursuit of their good. For this reason, I believe Samuel Freeman correctly reads Rawls to treat the basic structure as including 'more or less the entire legal system, including most public and private law'.¹²

Indeterminacy about the requirements of justice occurs in practice due to lack of information or causal knowledge and other burdens of judgment. These burdens, however, create only the necessity of directed judgment without opening up a realm for choice. Justice in principle provides a basis for a unique solution to virtually all policy issues. Moreover, this conclusion apparently should be welcome. Rawls argues that '[i]t is clearly desirable that a conception of justice be complete, that is, be able to order all the claims that can arise' (*TJ*, 134). Completeness in ordering conflicting claims is one of the five formal (practical) conditions on conceptions of right (*TJ*, 133–5). Combined with the priority of the right, completeness means that determining proper legal policy presents only the task of epistemic judgment, leaving no room for choice.

Restricting democracy (as normally conceived) to epistemic questions is possibly clearest in Rawls' discussion of a possible 'fifth branch of government, the exchange branch' (*TJ*, 282). He explains that assuming issues of justice have been settled does not mean that 'citizens should not decide to make further public expenditures' that 'provide for government activities independent from what justice requires' (*ibid.*). This addition would appear to represent acceptance of true 'choice democracy', as I have used the term, *except* for the stringent condition Rawls imposes only on this branch. These decisions, including the method of paying their costs, Rawls says, should 'satisfy Wicksell's unanimity criterion' (*ibid.*).¹³ Admitting (as did Wicksell) the real difficulties of realizing this scheme in practice, Rawls accepts that only a 'rough and approximate' implementation is possible. Still, in theory, justice requires unanimity.

Essentially, unanimity here means that once the demands of justice are met, majority rule as an epistemic procedure is put aside and each person can freely spend her resources as she sees fit. The fifth branch recognizes the obvious fact that people may find their goals best served by public expenditures. To the extent that they do, each individual is free to participate in such expenditures. Unlike inevitable disagreements about the requirements of justice, where majoritarian processes are thought most likely to result in correct epistemic judgments, here the aim is choice – but individual, not collective, choice. In a choice to use

one's own wealth, no one should be put on the losing side. This fifth branch is specified independently precisely because it does not really represent democracy in any traditional sense of the term. Rawls explains that, 'strictly speaking', this is 'not part of the four-stage sequence' (*TJ*, 284). Government decisions in this category are merely a mechanism for efficient individual expenditures – it is, Rawls says, 'only a trading arrangement' (*TJ*, 283). And this is the *only* context in Rawls' vision of democracy where citizens and representatives 'are quite properly guided by their interests' (*TJ*, 284).

Epistemic democracy is also evident in Rawls' rationale for rejecting the common complaint that majority rule does not weigh the intensity of people's desires. Rawls explains that intensity is not 'a relevant consideration in enacting legislation . . . To the contrary, whenever questions of justice are raised, we are not to go by the strength of feeling but must aim instead for the greater justice of the legal order. The fundamental criterion for judging any procedure is the justice of its likely results' (*TJ*, 230). 'The legislative discussion must be conceived not as a contest between interests, but as an attempt to find the best policy as defined by the principles of justice' (*TJ*, 357). This goal of justice even provides the contextual test for determining in particular circumstances 'the propriety of majority rule' in contrast to, for example, judicial review: 'Everything depends on the probable justice of the outcome' (*TJ*, 230–1). These statements make clear the remit of democratic majority rule: 'Each rational legislator is to vote his opinion as to which laws and policies best conform to principles of justice' (*TJ*, 361).

Rawls offers a four-stage sequence. Principles of justice are first constructed. A constitutional stage then aims at a political order that best implements these principles. A legislative stage assesses 'the justice of laws and policies' (*TJ*, 198). Finally, a judicial and administrative stage applies just laws (*TJ*, 196–200). Both his verbal presentation of this sequence and its logic bears out a commitment to an epistemic theory of democracy. For example, Rawls opens this discussion noting three different kinds of judgments a citizen must make: (1) 'judg[ing] the justice of legislation and social policies', and (2) given conflicting 'judgments and beliefs', 'decid[ing] which constitutional arrangements are just for reconciling conflicting opinions of justice', and finally, (3) since the procedural justice is imperfect, deciding when to reject the legal mandates as not binding (*TJ*, 195–6). The legal context presents no role for choice as opposed to judgments about justice, about how to achieve it, and about responses to its possible absence.

Rawls explains why, from the perspective of his four-stage sequence, justice favors democracy as the proper form of government. 'We are to decide between constitutional arrangements according to how likely they will yield just and effective legislation. A democrat is one who believes

that a democratic constitution best meets this criterion' (*TJ*, 296).¹⁴ He elaborates. The 'only' reason to give the 'electorate . . . the final say' is 'because it is more likely to be *correct*' (*ibid.*; emphasis added), correctness being an attribute of judgment, not choice, even reasoned choice. Democracy essentially represents an institutional response to the burdens of judgment. This explanation leaves the just constitution as 'a case of imperfect procedural justice' since 'even under favorable conditions' 'the people may still decide wrongly' (*ibid.*; also at 196).

Other discussions make the same point. After deciding on the principles of justice, and with the veil loosened so that the parties know about their own society but without information about their own conceptions of the good and their own capacities, the parties to the social contract move to the constitutional convention. There they '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*, 197). 'Ideally a just constitution would be a just procedure arranged to insure a just outcome' (*ibid.*). Since no 'feasible political procedure' will accomplish this aim, the goal is to select one 'most likely to lead to a just and effective legal order' and, in doing this, 'the two principles of justice . . . define an independent standard of the desired outcome' (*TJ*, 198). Tasks assigned political institutions – i.e. democracy – are purely epistemic.

How then should one understand Rawls' statements, quoted above, suggesting a choice conception of democracy? To some extent I remain unsure. Sometimes these statements seem to reflect a relatively unreflective acceptance of common understandings of democracy rather than integrated aspects of his theory, but interpretations that purport to find authorial inconsistencies usually reflect the critic's inadequate understanding of the author's vision. Thus, I discount the possibility that the statements reflect inconsistencies or a mere lack of focus on the issue. Instead, I offer two other tentative explanations.

First, some statements reflect the practical difficulties of applying general principles to actual contexts. The obvious reason for an abstract 'theory' of justice to leave open, that is, not to 'prejudge' (*TJ*, 274), whether a property-owning or a liberal socialist democracy is better is that which is better depends either on circumstances that are contextually and historically variable or on empirical matters beyond the reach of abstract theory. Thus, Rawls says that which alternative 'most fully answers to the requirements of justice cannot . . . be determined *in advance*' (*ibid.*; emphasis added) but depends on these contextual variables. Similarly, the theory 'does not *by itself* favor either form of regime . . . [but rather] the decision as to which system is best for a given people depends upon their circumstances, institutions, and historical traditions' (*TJ*, 280; emphasis added). What he does not say is that the alternatives

are left to political choice. This difficulty of determination merely repeats a problem that reappears elsewhere. The answer to the related structural question of setting a proper social minimum apparently depends on an evaluation, inevitably disputable, of factual circumstances. 'Whether the principles of justice are satisfied', he says, 'turns on whether the total income of the least advantaged (wages plus transfers) is such as to maximize their long-run expectations (consistent with the constraints of equal liberty and fair equality of opportunity' (*TJ*, 277).

Second, is a distinction often not highlighted in all his remarks about whether his reference is directed toward actual operating democracies or to the democratic ideal derived from his theory of justice. Still, he is emphatic about the distinction: 'the idea of the four-stage sequence is part of a moral theory, and does not belong to an account of the working of actual constitutions, except as political agents are influenced by the conception of justice in question' (*TJ*, 197, n. 2). Given that a theory of justice influences the real world of politics only to the extent that actual human agents subscribe to it and create a world in accord with it,¹⁵ pragmatic discussion of actual political contexts, including democratic ones in which his theory might be influential, must be distinguished from the theoretical ideal of democracy that he proposes should guide political actors. His strongest statements suggestive of choice democracy often relate to actually existing democracies – for example, when he says 'historically one of the main defects of constitutional government has been the failure to insure the fair value of political liberty' (*TJ*, 226). This article, however, is concerned with his theory. The theoretical issue is whether epistemic democracy is the right ideal for real world people to aim to realize.

As an example of this distinction, Rawls emphasized that majority rule should not be conceived as a 'contest between interests' and said that 'intensity of desires' is 'irrelevant' and 'should not be taken into account' (*TJ*, 357, 230–1). On the other hand, he also described the democratic process as including a receptiveness to felt interests (*TJ*, 227). These seemingly different accounts may represent the difference between the democracy called for by theory and democracies that actually exist. Rawls counsels against confusing questions of strategy with those of justice (*TJ*, 231). Real world experience sees the state furthering some rather than other interests. As long as that is so, the design of democratic institutions should account properly for this fact. Though the fair value of political rights remains importantly related to self-respect in epistemic democracy, in the actual world its significance is more like the role of wealth in enabling a person to pursue her interests. Thus, my suggestion is that sometimes Rawls' references that seem to envision choice democracy are really essentially distributive responses to actual conditions rather than a recommendation of an ideal that accords with

his theory of justice. Another way to put this could be to distinguish the requirements of legitimacy and justice, with the former being less stringent in its requirements and being consistent with choice democracy.

Rawls' commitment to a solely epistemic democracy is evidenced by various considerations. Epistemic democracy follows from the logic of the two principles of justice. It explains the otherwise rather odd justification for the 'fifth branch' of government. It provides the only theoretical rationale for democracy and for unweighted majoritarian processes. It explains the rejection of the role of people's desires within politics. Finally, just results are repeatedly stated as the aim of the institutional designs generated by the four-stage sequence and provide the standard by which to measure real world institutions.

(3) Democratic choice as an aspect of liberty?

Yet to be considered is what at first seems to be an internal argument for choice democracy but turns out to be the opposite. Specifically, the first principle of justice protects basic liberties, which Rawls says include political liberties. He also notes that the 'principle of participation' has its greatest extent under 'majority rule' (*TJ*, 228–30). Under the priority rules, these basic liberties cannot be restricted to serve other values such as the wealth or income of the least advantaged. To justify a limitation by devices such as a bill of rights or judicial review requires the conclusion that 'the less extensive freedom of participation is sufficiently outweighed by the greater security and extent of other basic liberties . . . The justification appeals to a greater equal liberty' (*TJ*, 229). Thus, the priority of liberty might be read to empower democratic majorities to make choices, including about social and economic arrangements, except when, on balance, the overall system of liberty is better advanced by constitutional protection of other basic liberties. The immediately troubling aspect of this otherwise clean argument is that it totally wipes out any structural role for the second principle of justice, in particular the difference principle.

The only obvious way to avoid trashing the difference principle – making it irrelevant as a mandate of justice – is to interpret the 'political liberties' differently. Instead of these political liberties involving choice, which by the priority rules would take precedence over the difference principle, the liberty could consist only of a right to participate in epistemic judgment. Then, although still having priority, political liberties could only implement, not override, the difference principle (and other principles of justice). Moreover, if political liberties provide only for participation in epistemic judgment, under the priority rules people cannot be deprived of this right of judgment for the sake of better providing for the second principle. Rawls echoes this conclusion in

leaving the difference principle, still a mandatory requirement of justice, to the legislative process. Restrictions on liberty are only permissible if they on 'balance' strengthen the overall system of liberty (*TJ*, 230). This strengthening is precisely the justification Rawls offers as a tentative, empirically contextual, explanation for devices of constitutionalism, a bill of rights, and judicial review. Thus, epistemic democracy is, first, the only interpretation consistent with any role for the difference principle as a matter of justice. Second, it precisely explains the division of tasks Rawls suggests for different parts of the constitutional structure.

Finally, support for the epistemic interpretation of political liberties is found in the way Rawls values them. For the Rawlsian liberal, the value of individual freedom lies in large part in allowing people to develop and exercise the two moral powers. In Rawls' account, equal political liberties, even if less important than the liberties of the moderns (*RS*, 143; cf. *TJ*, 229–30), are valued 'to insure that government respects the rights and welfare of the governed' (*TJ*, 230) and, in addition to this instrumental role, to allow for the development and expression of the first moral power, the capacity for a sense of justice (*TJ*, 230; *RS*, 112–13, 169) – for example, 'to weigh interests other than his own' (*TJ*, 234). Epistemic democracy provides precisely this allocation. It leaves the capacity for a sense of the good, which is not to be pursued in the political realm (*TJ*, 357), to be the rational focus of life within the structure created in accord with justice. Thus, in describing how the liberties provide 'for the adequate development and full exercise of the two moral powers of free and equal persons', Rawls attributes to political liberties the role of enabling citizens to judge 'the justice of the basic structure of society and its social policies' and to the liberties of the moderns the roles related to their individual conception of the good (*RS*, 45). In choice democracy, in contrast, a major reason to value equal political liberties is to be able to engage in collective self-determination – to rely on conceptions of the good in choosing among multiple 'just' types of society. Thus, if choice democracy were of theoretical moment, Rawls surely would have emphasized its relevance for a person's pursuit of her conception of the good but, as far as I can tell, this possibility is entirely absent in all Rawls' discussion. Political choice is neither defended nor its value highlighted.

II Reasoning within the original position: summary and critique

If Part I is right that Rawls offers an epistemic conception of democracy (and if Rawls is consistent), this conception should follow from reasoning within the original position. A critique of the epistemic conception could offer an alternative description of this reasoning. Or it could show

that the original position methodology is itself in some way misconceived. Part II evaluates the first possibility; Part III considers why the original position reasoning inclined towards these errors.

Within the original position, Rawls' combination of a 'veil of ignorance' and of 'primary social goods' that constitute a 'thin theory of the good' leads, he argues, to the two principles of justice as everyone's preferred choice. Here I leave aside the largely persuasive argument showing the merit of the expository devices of an original position and a veil of ignorance. Crucial to his argument for the two principles of justice is the more specific notion of primary goods. This feature – a thin theory of the good consisting in a list of primary goods – would not be necessary (or even helpful) in an argument for utilitarianism, for example. It is essential, however, in the argument for his two principles because his principles specify an approach to these goods.

Rawls aims for a theory in which the right is prior to and independent of any *specific* conception of the good – an approach congenial to, maybe essential for, the conventional liberal notion of neutrality. Rawls designs the original position to avoid argument based on people's actual conceptions of the good. As Rawls says, the purpose of his 'thin theory' of the good 'is to secure the premises about primary goods required to arrive at the principles of justice' (*TJ*, 396). In order 'to establish these principles [of right or justice], it is necessary to rely on some notion of goodness for we need assumptions about the parties' motives in the original position' (*ibid.*). Basically, within this information-limited environment, their motive seems simply to be to safely obtain more rather than less of these goods since these 'goods', as 'necessary means',¹⁶ are 'prerequisites' for any individual in her pursuit of her good – 'the most rational long term plan of life given reasonably favorable circumstances' (*TJ*, 92–3). As necessary means, rational individuals 'want [these primary goods] whatever else they want' (*TJ*, 396, 92). A full theory of the good relates to her rational long-term plan of life. The thin theory, however, consisting in the primary social goods, is a crucial building block in constructing the principles of justice. Rawls explains that knowing that they 'prefer more rather than less' provides information 'sufficient for [people in the original position] to know how to advance their interests in [this] initial situation' (*TJ*, 93, 396).

At first it seems, as it does within Rawls' reasoning, that with this list of primary goods in hand but with all other aspects of people's conception of the good veiled, the only thing for people to reason about is distribution. Or, more accurately, they should reason about principles that determine how the basic structure (which is the subject of justice) should influence distribution – actual distributions will reflect people's actual acts within a structure determined by (or designed in accord with) their abstractly chosen principles.¹⁷ Only two questions seem germane:

first, whether primary goods should be distinguished from each other and subjected to different treatment; and, second, how to treat them.

As for the second question, in Rawls' discussion, only maximizing choices of some sort seem rational. Average utilitarianism provides for maximizing average outcomes as measured by utility. For various reasons, arguably the most powerful being to avoid outcomes that one cannot accept (and thus could not expect to abide by willingly), Rawls argues instead both for a *most extensive*, the maximizing element, equal distribution (the conclusion in respect to liberty) and for a distribution that provides the *greatest benefit*, again a maximizing element, to the least advantaged (the difference principle applied to wealth and income). As for the first question, distinguishing various primary goods, Rawls argues against a single index that treats all as commensurate and allows trade-offs and even against applying the same rule once the primary goods are appropriately separated. He instead develops for his well-known priority rules, placing the 'most extensive total system of equal basic liberties' prior to the difference principle.

I make four claims. In the rest of Part II, I argue that the epistemic theory of democracy follows from Rawls' conclusions about the reasoning in the original position. Second, I nevertheless argue that the choice of the difference principle (and epistemic democracy) should be seen even within the original position to be irrational due to two facts: that it *could* lead to a situation in which everyone, including the least advantaged, is worse off than they would be under alternative arrangements; and that the main concerns that motivate its choice over, for example, average utilitarianism, can be equally well handled by better alternative principles specified here. Third, Part III observes that, though part of the problem that led to this irrationality was the narrow focus provided by the list of primary goods, the parties' reasoning within the original position could properly reject this focus. Fourth, despite the propriety of Rawls' general social contract approach that emphasizes our plurality, in particular his emphasis on the notion of society as a cooperative project, which strongly supports the social contract form of modeling, Rawls fell back on too individualistic a model of people when he engaged in various abstractions, such as the list of primary goods, that animate the model. Here, his Kantian background, though not logically entailing these problems, may have misled him in a way that would be avoided if he had grounded his argument on the presuppositions of communicative action.

(1) From the original position to epistemic democracy

Rawls typically lists the primary goods as 'rights and liberties, opportunities and powers, income and wealth' (*TJ*, 92), often adding 'self-respect' or 'sense of one's own worth' as possibly the most important

primary good (*TJ*, 440). Less measurable and more subjective, self-respect is not directly invoked in the reasoning that leads to the two principles, maybe because, unlike Prozac, it does not seem to be the type of 'good' fit in any direct fashion for distribution, equally or otherwise.¹⁸ It instead comes into play more globally and qualitatively in evaluating proposed principles; for example, in whether they 'undermine self-respect', since 'parties in the original position would wish to avoid at almost any cost the social conditions' that cause this result (*TJ*, 440). With this exception, a central feature of these primary goods is that, in conjunction with people's acts, the legal order determines who has a particular amount of each. These goods are subject to legal 'distribution' and individual possession. Given this quality, reasoning in the original position easily moves to choosing principles that determine how the basic institutions of society distribute these goods. The result, Rawls argues, is the two principles of justice.

Rawls rejects making the difference principle part of the constitution mostly for practical reasons related to the difficulty in knowing precisely how it is best furthered. Imagine, however, as a decision-making principle for democracy, possibly a constitutional provision directed at legislatures, not courts:¹⁹

The legislature must not pass any law if, without violating the priority rules relating to liberty and open offices, another law would provide better for the economic circumstances of the least advantaged; equivalently, it must pass that other law.

Epistemic issues in applying this principle would be huge – compare the problems with direct application of utilitarianism, also a theoretically determinative criterion. Still, the standard is clear. As an aspirational constitutional provision, this standard would unquestionably be part of society's basic structure. It would also seem to eliminate legislative choice, leaving only legislative epistemic judgment in respect to virtually all laws. Admittedly, there may be some few matters that have no distributional consequences – decisions about the state flower or state anthem might be examples. Even here, the 'no effects' conclusion is questionable. Choosing roses rather than tulips could affect the flower business and these effects could have distributional consequences. Psychological consequences with consequent distributive effects could result from the choice of particular anthems. Of course, absent this *constitutional* provision, most people would think a legislator had lost her grip on reality if she gave 'benefits to the poor' as her rationale for favoring roses.

Return to the point about basic structure. In response to the many policy theorists who, soon after the *TJ* was published, tried to apply the difference principle to settle every issue – education or tax policy or even

decisions of individuals – Rawlsian scholars continually and properly emphasized that the principles apply only to the basic structure. This caution, however, may merely reflect the need to look at the legal structure as a whole in the way the imagined constitutional provision requires. In contrast, a central reason for not applying the principle to decisions of individuals²⁰ is that doing so would contradict their *choice* freedom, itself guaranteed by the first principle. Even if the difference principle does not apply *directly* to each decision of minor institutions, much less to decisions by individuals, the constitution at least is a basic institution and the principles of justice properly apply to its content. At the constitutional convention stage within the theory's four-stage sequence, the parties choose constitutional principles best formulated to lead to just outcomes. Arguably, the best way to mandate this result is to give priority to the above proposed constitutional principle – basically the difference principle – over all other considerations within legislative decision-making. If so, the admonition that the principles of justice apply only to basic structure would still seem to place the whole legal order within its reach.²¹ Thus, as a principle of justice, the difference principle requires an epistemic theory of democracy except maybe for decisions, if any, that have *no* implications for distributions of wealth and income. The mere fact that the expected effects are unknown does not allow for choice but only reflects the huge extent of the epistemic burden.²²

(2) The irrationality of the difference principle

My claim is that the choice of the difference principle and the consequent epistemic theory of democracy is irrational. Although the structure of this critique might be directed at different parts of Rawls' argument – for example, to the priority of liberty²³ – looking at the reasoning for the difference principle best serves my theoretical aims.

If, after guaranteeing equal maximum liberty and fair equality of opportunity, everything else that a person wants correlates directly with her wealth and income, evaluating structures solely on the basis of how they distribute these all-purpose goods makes perfect sense. The same is true if satisfying the difference principle has no effect on other things that a person wants. Under either circumstance, the choice of the difference principle could be rational from the perspective of the least advantaged, although explanation is required (and, I think is persuasively given by Rawls) for why this choice is better than that of strong competitors, for example, first guaranteeing a social minimum and then maximizing average utility. Nevertheless, parties in the original position cannot assume an absence of variable effects and, in fact, generally that will not be true. Without directly correlated effects or an absence of effects, the rational argument for the difference principle collapses.

Think about all that people want, maybe even about what various people want most in life. High among these 'goods' will likely be various non-commodified 'relational' and 'process' goods that have no direct correlation with wealth and income. (I grew up in an era when a key lyric in a popular song was 'All you need is love'.) Evidence suggests that not only is meaningful work one of people's most significant sources of value but that an important aspect of this value involves work relations. A society's basic institutional structure inevitably affects the nature, the availability, and the distribution of this and other relational goods. Their availability will not necessarily be either maximized or most fairly distributed and their more precise content will not necessarily be best shaped by a structure that maximizes the distribution of wealth and income to the least advantaged. The same is true in respect to many other features of people's good – for example, their relation to the environment or the natural world and the form and extent of civic pride.

It is possible, maybe probable, that most people will find that the structure that maximizes the distribution of the wealth and income for the least advantaged will not have the most desirable effect on these relational or other ethically definitional goods. Because of these non-correlating goods, it is even logically possible that *all* people would prefer an alternative basic structure. That is, the basic structure mandated by the difference principle may be *pareto inferior* – i.e. there could be an alternative that everyone in the real world would favor. More likely, the structure that best promotes the availability of particular relational and process goods at some cost to the wealth and income of the least advantaged will be favored by many but not by all people or all of the least advantaged. Different structures favor different forms of life and any choice among them produces losers, likely including some of the least advantaged (as defined by Rawlsian criteria). That is, those among the least advantaged who highly value the relational goods best supported by the alternative will be losers if the difference principle is chosen while others among the least advantaged will be losers if it is not.

The difficulty can be stated more formally. Making a choice about primary goods in Rawls' original position, for example, to maximize primary good *A* for the least advantaged, can either favor or disfavor the availability of non-primary good *B* as compared to its availability in an alternative structure. While maximizing good *A* can be rational if without consequences for *B*, given such consequences, its rationality must depend on the actual valuation of the subsidiary good(s). By requiring the choice to be made under the veil of ignorance and by limiting the choice to a discrete list of primary goods, Rawls excludes consideration of how the choice affects *B*. The original position denies the chooser sufficient information with which to know whether her choice, which consciously takes account of only the limited list of primary

goods, will turn out to have been rational. Of course, the choice is still rational given the information restrictions *unless*, within the original position, the party could choose to postpone the decision to when information is available. If she could, the argument must focus on the merits of the postponement.

An example can clarify this point. Suppose that the structure that provides the greatest wealth and income for the least advantaged requires hierarchical industrial organizations. Suppose further that this structure 'produces' fewer friendships, more manipulation, a generally less egalitarian ethos, greater prevalence of materialist values, or shallower experiences of self-mastery and craft pride than would a less hierarchical system. If Rawls' list of primary goods does not include these values (e.g. they are neither liberties nor wealth) but they are highly valued by individuals, including the poor, then the choice to maximize the wealth of the poor is not necessarily rational even for the worst-off. Everyone, *including the least advantaged*, might prefer an 'economically' poorer but less hierarchical social order to the order required by Rawls' two principles. Moreover, even if, in the existing society, most people *presently* prefer increased all-purpose wealth more than increased friendships or greater equality, any robust right of self-determination would include a right to choose or to participate in choosing institutional structures that make preferences for equality or friendship or meaningful work more general and more intense while making preferences for more wealth less intense.²⁴

The poignancy of this example increases in relation to Rawls' own developing emphasis on property-holding democracy, his explicit repudiation of welfare state capitalism (*RS*, 137–8), his attraction to John Stuart Mills' idea of worker-managed firms (*RS*, 178), and his explicit aim of overcoming the 'narrowing and demeaning features of the division [of labor under capitalism]' (*RS*, 177; cf. *TJ*, 529).²⁵ I find his reasons for these positions generally persuasive but not without reliance on contestable conceptions of the good. Of course, he implies that a property-holding democracy can be an appropriate embodiment of the difference principle. This view, however, is not demonstrated. The problem, I think a serious problem, is that he gives no reason to believe that welfare capitalism would not, or would not under various plausible circumstances and institutional arrangements, maximize the wealth and income of the least advantaged. Without these reasons, Rawls apparently favors a particular conception of the good, a property-holding democracy, over or at least in disregard to the dictates of the difference principle. Again, the difference principle as a fundamental principle of justice appears irrational.

Or, more thoughtfully, the claim should be that the choice of the difference principle *may be* irrational. The more precise question is

whether, from the perspective of the original position, an appealing alternative can be found. And a crucial aspect of this question is whether proposed alternative principles, even if they *could* arrive at possible *pareto superior* results, would create unacceptable risks of doing much worse. If so, the parties could not rationally choose the alternative and Rawls' two principles might be the best we can safely do. To meet this challenge, I propose three principles in place of the difference principle – an alternative that I label a 'respect' rather than a 'distributional' or 'outcome' conception of justice.

(3) An alternative to the difference principle and epistemic democracy

Three principles in combination guarantee all of importance provided by the difference principle and respond to the problem discussed above. First is a 'political participation principle'. The legal order should recognize the fundamental nature of people's right to participate in a fair 'choice democracy' that seeks to advance or implement conceptions of the good society. Second is a 'no subordinating or denigrating purpose principle'. The state in advancing conceptions of the good must not engage in practices, and the political process must not choose policies, that purposefully subordinate or denigrate the inherent worth of any category of citizens or their reasonable conception of the good. Third is a 'just wants principle'. The state must seek to guarantee to each member the availability of those resources and opportunities that the existing society treats as necessary for full life and participation in that society.

(3a) Political participation and choice democracy principle The obvious way to overcome the potential irrationality of the difference principle is to defer choices about many aspects of the basic structure to a time when people can choose based on full information about the reasons and aims they actually have. In his four-stage sequence, Rawls defers much to the constitutional and legislative stages in which the veil of ignorance is increasingly lifted. He does so, however, only in order to more precisely identify constitutional principles and legislation that best implement the already adopted difference principle (and other principles of justice). The sequence does not defer choices about aims of government since these are given by the two principles of justice. In contrast, for parties in the original position to choose a right of political participation within a 'choice democracy' averts the irrationality described above. People then can use majority rule to choose institutions, legal policies generally, and public expenditures based on reasons related to their actual aims or conceptions of the good.

Choice democracy in a sense results in fewer people losing out. If the majority favors alternatives disfavored by the difference principle,

it results in more people getting outcomes they prefer. Choice democracy also changes the identity of who loses out. Nevertheless, it would benefit some, maybe many, of those whom Rawls identifies as the least advantaged. Although choice democracy inevitably results in some people's conception of the good losing out *politically*, the claim is that it is more rational to allow people's actual reasons and values to influence the basic structure, including the legal order, than to have those structures determined in a manner more likely to frustrate their aims.

(3b) No subordinating or denigrating purpose principle Utilitarianism and choice democracy create some similar dangers. Rawls convincingly argues against average utilitarianism by emphasizing its potential for producing results that parties know they would be unable to accept in real life. The same can be said for those who lose in respect to political issues that they consider vital. In the original position, parties should recognize that they cannot honestly or in good faith gamble on either utilitarianism or simple choice democracy as the sole measure of the merits or propriety of the legal order. A person should not accept being a slave – or even being left without sustenance. The unlimited nature of the potential loss to which purportedly either utilitarianism or choice democracy could lead does not show, however, that people could not accept properly restricted versions of either principle. Already, the first principle of justice's guarantee of equal basic liberties and their priority provides some security. I argue that two additional principles – one discussed here, the other in the next subsection – that I claim people would also choose within the original position provide safeguards sufficient to make choice democracy preferable to the difference principle.

The reason to make political choice available is that it can lead to outcomes that all people could and, by the fact of prevailing (and assuming proper majoritarian processes), clearly a majority do prefer to an outcome dictated abstractly, say by the difference principle. Self-respect also arguably requires that a person favor availability of political choice, including the consequent vulnerability to being a 'political loser'. Majoritarian political decisions leading to collective standards or projects can be the only effective way of her achieving various goods. Rejecting this political process out of fear that one's reasons for one's preferred conceptions will not prevail respects neither one's reasoning capacity nor one's reasons themselves. In contrast, the realistic assumption that one will sometimes, maybe often, be a political loser does not require doubting one's status (as an equal reason-giving participant) on which self-respect builds. It merely recognizes the fact of human plurality.

To fully recognize their two moral powers also requires that, in individually or collectively making decisions about the practices and aims

of the cooperative project, people be able to invoke reasons and interests consistent with the right but related to their full conception of the good. People should be able to propose at least any reasons that others reasonably could, even if they predictably will not, accept.²⁶ The head of General Motors or Exxon *could* choose to become an environmentalist, the atheist *could* convert to Catholicism. Reasons for choosing in the original position to allow consideration and potential adoption of these possible conceptions of the good within actual political decision-making provide the rationale for choice democracy.

No similar argument justifies allowing an interest in subordinating or denigrating the other to be the basis of a possible choice within a collective project that values each as free and equal parties. There is no reason in the original position to authorize collective choices purposefully to make people losers, that is, to make their *loss or subordination* the reason for a policy or choice. Certainly, in a discourse aimed at agreement, such a reason cannot be reasonably addressed to the potential loser. Unlike simply being a loser in political debate (because, some other conception than one's own is favored), accepting the propriety of being purposefully disparaged or subordinated by the collective of which she is a part is inconsistent with self-respect. An advocate can treat others as free and equal even when she advocates adoption of peculiar conceptions of the good that they could accept and that she attempts to show them that they should accept even if she knows they will in fact reject but not when she advocates conceptions that affirmatively value disparaging or subordinating them. In these later cases, her premise is that they are not or should not be free or equal.

An objection to the difference principle was that conceptually it could be *pareto inferior* to other alternatives. This possibility does not hold for proposals premised on purposefully subordinating some portion of the society. (This slightly overstates the situation given that some people desire their own subordination. I leave aside reasons not to pursue that possibility here.) Admittedly, some people's conception of the good may consist in subordinating or denigrating others.²⁷ From the perspective of a moral system that treats people as equals, however, *no* reasons exist for allowing collective choices based on that reason – it is not a reason that can be addressed to the other with any expectation that she could rationally accept it.

The reasons for treating these purposes as impermissible bases for actual public decision-making are analogous to the reasons why Rawls constructed the original position in a manner that rejects a role for envy. Claims aimed at being destructive to others or denying their equality and freedom are not an appropriate element in a model constructed on the premises of people being free and equal. If Rawls had not simply ruled envy out by external fiat in the construction of the original position,

his arguments provide reasons for the parties themselves to reject a structural role for envy. Similarly, parties in the original position should rule out as a permissible reason for a collective decision in the real world an aim to be destructive of others – even though they should allow as reasons any positive concerns for others, reasonable comprehensive conceptions of the good, or self-concerns with relational or process goods.²⁸

The veil of ignorance is sometimes criticized as too extensive. Relatively uncontroversial reasons explain denying knowledge with which to argue for principles that favor oneself. But why rule out knowledge with which to argue for principles that fairly favor the values widely held within a society? (Note that allowing this knowledge is in effect what choice democracy does.) One reason, often unremarked on in discussion of the veil, is relevant here. The veil denies a role for preferences or values which themselves manifest injustice. Observation of the past documents the ever-present existence of values and preferences that reflect and reinforce unjust structures of domination and it would be naïve to think similar values or preferences do not exist now. Kantian constructivism in Rawls' hands addresses this problem of injustice creeping into the choice of principles by which to judge a society's basic institutions. It eliminates all reliance on preferences that embody injustice by devising a scheme to choose principles in which no specific preferences – good or bad – play a role. Making the right definitive of the basic structure aims to achieve this result.

If, however, the parties in the original position favor 'choice democracy', these misbegotten conceptions and preferences re-enter. But if parties could describe categories of values or preferences inconsistent with the reasons to favor choice democracy itself, they should choose to rule out any political decision premised on them. Purposes to subordinate and denigrate members of the cooperative are inconsistent with the rationale for choice democracy as a means to achieve aims that anyone could have and as a means that respects the equal and fullest existence of both moral powers in all citizens. In a sense, ruling out any affirmative role for these purposes endeavors to purify politics. The hope is for a positive spiral. The anti-subordination principle identifies politics with the activity of people choosing and creating the nature of their community *while* respecting each person's equal status as a citizen and her autonomy. Over time, a series of choices about the legal structure made within a process shorn of preferences inconsistent with the very rationale of democratic choice will progressively result in institutions that increasingly encourage conceptions of the good consistent with the rationale for political participation.²⁹

The expository power of Rawls' original position methodology lies in modeling respect for people as free and equal. I argued that this

fundamental notion justifies a right to participate in collective political choice. Given this basis for choice democracy, equally justifiable should be any *restriction* on the democratic process that embodies this same basis – fundamental respect for people as free and equal. An obvious candidate is a prohibition on government action whose meaning or purpose is to disrespect or to deny their equality or freedom. The original position methodology indicates how the same fundamental value leads both to the right to participate in democratic choice and to this crucial limitation on that democratic right.

Note can be made of a way in which choice democracy, combined with the ‘no subordinating or denigrating purpose principle’, differs in orientation from the difference principle. As argued, no approach can be neutral in ‘effects’. The difference principle (along with Rawls’ other principles of justice) seeks, however, to design the basic structure in a manner neutral between ‘purposes’ to have the structure favor particular conceptions of the good. Choice democracy explicitly rejects that form of neutrality. The assertion of a no-subordinating-purpose principle says further that although justice should allow non-neutral choices it should rule out some purposes as unjust. Rather than ‘neutrality’, either in effect (impossible) or in purpose (as implicit in Rawls), the liberal standard should be ‘toleration’ – not simply of all people, who presumably should be accorded respect as equals, but of all morally acceptable conceptions of the good, which must be tolerated if people are respected as free.

(3c) *Just wants principle* Parties in the original position can reason that in the real world doing without various resources and opportunities would be intolerable even if they cannot know abstractly what these needed resources and opportunities are. Although average utilitarianism promises a higher average well-being than does the difference principle,³⁰ it overtly allows outcomes that a person may turn out to be unable to abide in the real world. Rawls persuasively argues that a person in the original position cannot rationally choose principles the consequences of which she knows she may be unable to accept. Of course, no principle entirely eliminates this danger. Someone may be unwilling to accept any legal order that fails to treat various mountains as holy, that allows people to eat animals, or that results in her having insufficient resources to be a great mountain climber or a regular drinker of rare wines. A principle that achieved any of these demands, however, is likely to create a world that another person could not accept. Conflict can be too deep for any legal order to bridge. And even if pressing demands could be fulfilled, doing so could be unfair. Still, a person in the original position should seek to reduce this danger of unacceptable outcomes – the question is by what means.

At least under the reasonably favorable circumstances that Rawls requires for the full theory of justice, the difference principle assures a person the availability of sufficient resources to lead a tolerably meaningful life in her community (*TJ*, 154, 156, 169, 176).³¹ Nevertheless, the difference principle is a blunt, indiscriminate tool with which to do so. It is not and does not purport to be precisely calibrated to identify and eliminate outcomes a person finds unacceptable. 'Unacceptability' differs for different people. Any principle is likely to result in outcomes that some people with particular needs or obsessions find highly frustrating if not unacceptable. Whether those people can abide by a result is an empirical, psychological matter, not a conceptual question answerable within the original position. In practice, the difference principle will be an unnecessarily high guarantee for many, and is likely to be an inadequately low guarantee for some. The lower total wealth produced in a structure that conforms to the difference principle may even lead to more people finding the result intolerable (due to their unusually expensive tastes or values) than they would under average utilitarianism. No abstract reasoning within the original position can show whether the difference principle, a utilitarian standard, or a just wants guarantee most often avoids unacceptable outcomes.

Bluntness is evidenced by the total failure even to try to assess whether people in an actual society find the minimum provided by the difference principle necessary to avoid unacceptable outcomes. More precise would be a principle that directed policy-makers to find the minimum that people in *the existing society* generally treat as necessary for full life and participation in that society and then to adopt policies that guarantee the availability of these 'just wants'. Anyone denied this minimum could reasonably argue that this failure denies her respect as a free and equal person. Of course, a third approach gives even greater precision. A society could attempt to guarantee each person the minimum *she* finds necessary.

All three alternatives are likely to surpass average utilitarianism in avoiding unacceptable outcomes. Argument is required, however, for which of these three – the difference principle, the socially determined minimum, or the individually determined minimum – provides the most appropriate standard for a party in the original position to choose. As between a 'just wants' guarantee and the difference principle, a party to the original position can reasonably conclude that the first more directly responds to the concern of unacceptable outcomes while having three interconnected positive merits. It avoids the sacrifice of the possibility of much higher average prospects, avoids the elimination of choice democracy, and avoids the irrationality implicit in the dictates of the difference principle. Both higher average wealth and political choices can be necessary to achieve results whose absence would make the social

structure an outcome that some people could not abide. For this reason, a just wants guarantee is likely to prevent unacceptable outcomes for more people than would the difference principle. This prediction does not logically compel choice of the just wants principle over the difference principle. On the whole, however, I expect most people would find it persuasive. In reflective equilibrium, I expect that many people find justice violated by denying people food, shelter, medical care, and education (or whatever people in their society find basic) while they have little intuition that welfare gains of the worst-off should *always* take precedence over virtually all other collective projects or concerns.³²

Greatest precision in identifying individually unacceptable outcomes results from focusing on each person's subjectively experienced conclusions. Identifying is not the same as avoiding, however. Irreconcilable conflict can occur between different people's subjectively identified requirements. Whether society should coddle those with resource-intensive subjective conceptions of needs or, instead, encourage them either to be especially productive in seeking resources or to modify their needs is a serious question. A principle that responds to individually identified needs gives to the person with the greatest (most expensive) needs a claim to have these claims met identical to the claim of the most ascetic. Any unfairness of this result is exacerbated in a world where no sharp line distinguishes 'needs' from mere degrees of self-realization.

Programmatic reasons also counsel rejection of this third approach. The principle is virtually unusable for evaluating structures to the extent these evaluations aim to be insensitive to individual identities. Moreover, an individual may not have sufficient insight even to apply the standard to herself, much less to others. In any event, fulfilling the standard for those with expensive or idiosyncratic needs can be so consuming that it deprives others of important opportunities for more fulfilled lives and unduly narrows the democratic collective's political opportunity to engage in collective self-definition, including possible choices to provide for some expensive subjectively defined needs. Society could choose to support Olympic athletes or great pianists. But given that the subjective individualist focus could outstrip available resources and still leave some without their needs met, the subjective criterion might actually increase intolerable results. For these reasons, the socially defined just wants guarantee could provide the better and more justified protection against unacceptable results.

Three further theoretical considerations favor choosing a socially defined over a subjective need criterion. First, within the original position, parties could reason that choice of relatively objective criteria of what individuals can demand of the group is the only way to avoid giving some people potentially inordinate power over the group. A person's real intolerance of any outcome other than her being imperial empress

would not be a relevant consideration for granting her or even for creating the position. Although the conclusion is not clear-cut, avoiding a grant to the individual of this type of power over the whole can outweigh avoiding a slight risk of a situation that one finds intolerable. Second, maybe being an equal in a *joint cooperative venture* suggests that her claims of right in respect to the venture should be similar to those of others in some more objectively (that is, collectively) defined 'space', whether the space involves need, wealth, capability, or political power. Reflection on this last 'space', formal political power, illustrates the point well. A person's claim cannot be to have the political power she (subjectively) considers necessary to achieve her (subjectively) envisioned conception of a minimally acceptable life – for example, to be empress. Admittedly, liberal toleration requires that those with idiosyncratic, possibly very expensive, conceptions of the good be free to pursue them (and, though maybe not a right to try to be an emperor, at least an equal right to try to be chosen president). Still, what people in a cooperative venture owe each other is much closer to assuring that each has available to herself not only what the group recognizes as necessary to participate in group decision-making (a political-based argument for a just wants guarantee)³³ but also what they as a group consider basic to a meaningful life (a respect-based argument). Thus, third, the just wants guarantee arguably offers the better interpretation of respecting the other as an equal. Failure of the community to provide for these goods or opportunities involves the community's sacrificing some people's meaningful life, *as understood by members of that community*, to the interests of others, often to better-off members. The failure shows contempt for those denied, undermining a major social basis of self-respect. In contrast, guaranteeing her what she herself considers to be her needs is reasonably seen as treating her as potentially more than an equal. It neither embodies a public recognition of people's equality nor provides a social basis to support the sense of self-worth of those provided much less.

One further feature of a just wants guarantee merits attention. The just wants principle is ethically or culturally sensitive. Its content relates to a society's self-conception and, in that respect, may itself be partially subject to political struggles. Whether just wants take the form of a capabilities approach³⁴ or some other standard would also presumably be a matter of societal self-definition. This sensitivity is fully consistent with roughly world-wide consensus on many but not all elements of just wants or human rights.³⁵

The claim, then, is that providing for people's needs as understood by members of the collective venture largely meets the group's responsibility for avoiding most but not all outcomes that occasionally someone finds unacceptable. Although both the difference principle and a subjectively

defined needs principle respond to a key problem in utilitarianism, the collectively defined just wants guarantee appears as a more rational, relatively fine-tuned response to this fear of unacceptable outcomes. As such, it may be both a prerequisite for making choice democracy legitimate and a partial embodiment of democratic ethical choices. Thus, the claim here is that, instead of the difference principle, people would choose these three principles of political participation, no subordinating purpose, and a just wants guarantee.

(4) *The difference principle, restricted utility, and the three principles compared* These three alternatives all assume as background the priority of equal basic liberties and fair equality of opportunity. Rawls then treats a 'principle of restricted utility' as the most serious utilitarian challenge to the reasoning leading to the difference principle (RS, 120). Restricted utility diverges from Rawls' two principles only in that, instead of the difference principle, it first guarantees a social minimum and, after providing for this minimum, then seeks to maximize average utility (ibid.; see TJ, 316 ff., describing this proposal as a 'mixed conception'). The three principles do the same (putting aside slight differences between 'just wants' and 'a social minimum') except for substituting 'democratic choice' for 'utility maximization' and adding the no subordinating purpose principle. Both the three principles and restricted utility avoid most 'worst outcomes'. This avoidance also featured prominently in Rawls' argument for his theory of justice over average utilitarianism (RS, 102–3). Rawls rightly suggests, however, that restricted utility's provision of an adequate minimum (largely) eliminates this problem of unacceptable outcomes (RS, 120). Given the similarity between restricted utility and the three principles, the obvious questions are: what are Rawls' subsequent arguments against restricted utility and how do these arguments fare as a critique of the three principles?

In the *Restatement*, Rawls offered three affirmative arguments for favoring the difference principle over restricted utility: its superiority in relation to publicity, which leads to an important educational role; its embodiment of reciprocity; and its contribution to stability (RS, 120–6). Utilitarianism does not guarantee the publicity that gives justice as fairness its educative role. By allowing for the mechanical subordination of the interests of some in order to provide for higher utility received by others, it strains any idea of reciprocity. In contrast, '[the difference] principle conveys to the less advantaged [the more advantaged's] acceptance of an appropriate idea of reciprocity in the clearest possible way' (RS, 126).

Choice democracy does better in these comparisons. Combined with a social minimum, choice democracy does not so obviously fail to convey 'an appropriate idea of reciprocity' as to convey it in a different and

arguably deeper way and with different content, embodying slightly different educative messages. The no subordinating purpose requirement and just wants (social minimum) guarantee publicly assert that everyone is respected as a full participant in the cooperate enterprise. Democratic choice implies a vision that the content and achievements of 'our' cooperation are for us to decide collectively and cooperatively – even if divisively, given predictable disagreements. Despite political losers, reciprocity exists in our equal right of participation in a process of reason-giving and choice and in our asserting that the product is 'ours' – its content and use for us to decide. It also exists in toleration of political losers' presumptive right to use their own resources to pursue their own conception of the good along with the losers' liberty rights, including their continuing political right to participate in the collective process of making choices. The difference principle arguably offers a weaker (at least different) conception of reciprocity by treating *only* distributions as a matter of reciprocity. By changing the focus from distribution, for which the difference principle maximally serves those who are least advantaged as defined by that metric, political participation extends reciprocity by treating everyone equally as rightfully and potentially actually interested in collective decisions. Because the metric changes, some but not all of those least advantaged as identified by the difference principle will likely now obtain more of the world they want even if their share of wealth and income may be less. Both choice democracy and the difference principle are moral conceptions, but different moral conceptions, of reciprocity and cooperation. Which is better? In considering that question, the utility maximization principle's failure to embody reciprocity is not in play.

Even as to stability, the empirical issue is not clear-cut. The difference principle provides better for stability only if stability can and should be achieved by avoiding public thematizing of real conflicts over conceptions of the good that choice-oriented politics puts to the fore. Certainly, it does not eliminate the conflicting interests themselves. And despite the attempt to avoid the politics, actual conflict can occur – it has in some lands – precisely because people demand rights of political choice. The deeper issue may be to determine the ideal form of stability and the ideal way to respond to conflict.

Thus, the affirmative arguments for favoring the difference principle over restricted utility do not easily apply to favoring it over the three principles. Plausible reasons for valuing democratic choice suggest that the three principles may better achieve these benefits. So too for Rawls' specific objections to restricted utility. Rawls argues that the indeterminacy of the second half of 'restricted utility', its utility maximization, creates substantial difficulties and will increase controversy among claimants (*RS*, 126–7; *TJ*, 320–4). This indeterminacy has no obvious

analogue in choice democracy. Giving reasons and then voting to generate revisable decisions provides clarity at least in the sense that vote-counting is not indeterminate (except in Florida).³⁶ Rawls also emphasizes that utility maximization can ask more of the disadvantaged than the difference principle asks of the advantaged (*TJ*, 127). Again, the point changes. Political choice puts political losers under strain but not necessarily greater strain than those whose vision of the world loses under the difference principle without even being considered.

In respect to the first half of restricted utility and in implicit contrast to the purported clarity of the difference principle, Rawls objects to the difficulty of determining the social minimum (*RS*, 129; *TJ*, 316–18). He argues that ‘the difference principle is a relatively precise conception, since it ranks all combinations of objectives according to how well they promote the prospects of the least favored’ (*TJ*, 318). ‘It is fairly straightforward to ascertain what things advance the interests of the least favored’ and this discernment can be used to settle ‘policy questions’ (*TJ*, 320). (Curiously, Rawls treats a social minimum as a constitutional essential within a judicially enforced constitution [*RS*, 47–8] and one rationale he gives for not so treating the difference principle is that ‘whether [it] is met . . . is extremely difficult to settle with any exactness’ [*RS*, 162; 49]). Finally, Rawls also objects that, by providing less to the least advantaged and by doing so under less clear standards, restricted utility can add to the strains of commitment and, thereby, lead to alienation from the public world (*RS*, 127–8).

Rawls’ points could refer either to theoretical or practical lack of clarity. In theory, the difference principle is clear (virtually mechanical) while the social minimum requires a definition and a rationale for the chosen definition. The definition I offered earlier for just wants is the resources and opportunities that a given society views as necessary for full membership or participation. This criterion, too, is clear in theory although surely both very vague and very contested in practice – but any more so than the difference principle is in practice? As noted, Rawls’ reasons for accepting a social minimum but not the difference principle as a constitutional essential certainly cut against viewing the minimum as seriously more vague in practice. As for the fear of alienating participation in the public world, a conception of justice that provides means for public participation and then affirms the centrality of legal ordering as a *locus* of important citizen choice and an embodiment of conceptions of the good arguably encourages participation more than a conception that treats that realm as merely a location for epistemic inquiry.

Rawls presents good reasons, but reasons that he recognizes (*RS*, 95, 133) are neither overwhelming nor clearly decisive, for favoring the difference principle over restricted utilitarianism. Nevertheless, none of these reasons even applies to favoring the difference principle over the

alternative proposed here. Like the difference principle, a just wants guarantee combined with an equal right to participate in political choice, offers a notion of reciprocity – only a different one, a reciprocity based on a vision of cooperation that involves collectively creating a world through the terms and with the products of cooperation rather than by a mere distribution to individuals of these products. Both reciprocities exhibit a vision of people who exercise their two moral powers. In justice as fairness, however, exercises of the capacity for a conception of the good occur only individually (or within voluntary associations). The alternative offered here treats both moral powers as exercised both individually and collectively, thereby more deeply emphasizing our plurality and giving the two powers fuller scope.

III Constructing justice from the bases of equality

Both the Rawlsian construction and the alternative three principles have arguable advantages. Adoption of any structure creates losers in comparison with an alternative under which they would do better – so liberals know that no neutrality in ‘effects’ is possible. Instead, the commonly asserted liberal ideal of neutrality relates to justification. By giving priority to the right, Rawls aims to prevent people from being losers in the *justification* of the basic structure. It is neutral in leaving proper and inevitable divergences in people’s conceptions of the good to be played out purposefully only *within* the just basic structure. This approach closes the legal arena as a place where people reason about the good and pursue their interests.

The alternative three principles proposed here avoid the potential irrationality caused by the above closure. By being sensitive to people’s actual and developing conceptions of the good, the alternative provides for a basic structure that could be preferred by everyone. Much more likely, it will result in a structure responsive to many people’s conception of the good and create an arena in which people reason about and pursue conceptions of the good, but will also create losers in the process of deciding on legal content. What reasons favor one approach over the other? My suggestion is that central are different conceptions of the basis of equality and of the moral person and, relatedly, different conceptions of the nature of society as a cooperative project.

In making a comparison, criticism here of Rawlsian methodology must be modest. Nothing above found fault with the basic original position strategy. (I also emphasize that I do not consider here the merits or demerits of the first principle of justice, the fair equality of opportunity, or their priority.) Part II argued simply that within Rawls’ original position, without any more information than allowed under the veil,

people could reject the difference principle and rationally choose three principles related to choice democracy, anti-subordination, and just wants. Of course, the proposed reasoning diverged from Rawls' reasoning in not making any particular use of his primary goods of wealth and income. Instead, it relied on general knowledge to explain that a focus on primary goods misled the parties to choose the difference principle. Still, even if I am right that the proposed three principles provide the better choice within the Rawlsian construction, the discussion below considers whether differing conceptions of the basis of equality, the person, and the nature of social cooperation incline toward one choice or the other. Specifically, 'incline toward', not 'entail', a caveat already implicit in my being able to rely entirely on his constructivist methodology to arrive at my proposed three principles.

I begin by briefly outlining an approach to moral theory that differs from Rawls' in these three respects and then note four matters in which the two approaches suggest different conclusions. In the end, I argue that the alternative theory embodies more persuasive conceptions of equality, the person and the nature of social cooperation. Arguably, it better represents the break with Kant that Rawls saw himself as making.

Communicative action – communication aimed at agreement – is a practice that humans as they are cannot do without.³⁷ Communicative actions inherently make four validity-claims: that the communication is comprehensible, true, truthful, and right or appropriate. The last three of these relate, respectively, to one of three 'worlds' – the objective (true), subjective (truthful), and social (right or appropriate). When any interlocutor resists a statement, her challenge usually thematizes only one of these validity-claims but at any point she can raise questions about a different or additional validity-claim. Unlike unavoidable individualized facts such as mortality or even the human capacity to be aware of and reflective about their own mortality, communicative action is a *social* practice and, for people as they are, both is *unavoidable* and is a practice that they *do not wish to do without*. As such, communicative action involves commitments both to the practice and to realizing its necessary presuppositions. On the basis of these commitments, my conclusion, defended at length elsewhere³⁸ is that communicative action can serve as a grounding of morality. Here I put aside serious issues about whether and how this could be so. Rather, I merely compare this approach's robust possible implications with the aspects of Rawls' reasoning that I have challenged.

In its role, or so I claim, as a basis for moral equality of persons (and for other moral content), communicative action has features, simply listed here, important for the subsequent discussion. First, the structure of communicative action represents people as formally *equal* in that each is equally authorized to question or assert validity-claims or to say

'no' as well as 'yes' to any proposed claim. This equality is a fundamental presupposition of an aim of reaching agreement on the basis of reasons. (The practice also involves formal equal respect for autonomy, which each must accord the other in order to carry out the cooperative practice of reaching *agreement*.) Second, participation in communicative action is *relational*. The practice locates equality not in any natural fact about individuals in isolation but precisely within their plurality or social life. The central feature of the moral person lies in her embeddedness in relations (usually social practices), not in her individualized possession of two moral powers. Third, though communicative action can be about the right, it can in fact be about anything. That is, the subject matter of the practice has an *unlimited domain*. An individualistic focus based on person's two moral powers more easily suggests dividing their role into separate domains. The capacity for a sense of justice could be operative in support for just institutions and the capacity for a conception of the good operative in a person's private choices within, that is, consistent with, a just framework. The notion of communicative action plausibly sees both moral powers exercised in all contexts, including the choice of structures. Fourth, people recognize that though agreement is sought, they know that it is not guaranteed. Likewise, they recognize that decisions are *not neutral* in respect to conceptions of the good and cannot be expected to be accepted unanimously. Still, each party and the group must respond and act even in the absence of agreement. Fifth, communicative action is a cooperative practice that people as they are do not wish to forsake. Thus, at least to some degree, there is a *motivation* to engage in the practice and hence to realize whatever presuppositions that it entails. Each feature – equal, relational, unlimited domain, not-neutral, and motivation – is further considered below.

The contrast between the two moral powers and communicative action as bases for theory give a framework for examining: (1) the focus on distribution, (2) the criteria for determining the content of basic structure or more generally the legal order, (3) the related notion of liberal neutrality and unanimity versus toleration of political losers, and (4) issues of derivation and motivation.

(1) Distribution

Social justice, Rawls tells us, is 'the first virtue of social institutions' (*TJ*, 3). But to say that its subject is the basic structure (even if this structure is identified) is too open. What about these institutions is at issue? Social justice could be about how these institutions operate, about the practices or processes. Procedural theorists might believe this. Social justice could be about avoiding particular obnoxious practices, purposes, or results. I once suggested as much, claiming that the constitutional

concern should be to avoid specifiable injustices although agreement on or even knowledge of the meaning of justice is unavailable.³⁹ Or social justice could be about particular aims or goods – a proper distribution is one possibility – which these institutions should promote. Utilitarian and some perfectionist theorists often appear to say this.

From the perspective of communicative action, no issue is out-of-bounds. From its perspective, it is unsurprising that the three principles proposed here bow to each answer noted above – ‘choice democracy’ to process, ‘anti-subordinating purposes’ to avoiding injustice, and ‘just wants’ to mandated outcomes. In contrast, Rawls repeatedly, but possibly most clearly in a telling opening move, indicates that social justice is about ‘the *distributive* aspects of the basic structure of society’ (*TJ*, 9; also 4, 10 and *passim*; emphasis added), although sometimes he more broadly refers to ‘a set of principles . . . for choosing among the various social arrangements which determine [the] division of advantages and for underwriting an agreement on the proper distributive shares’ (*TJ*, 4). In specifying a particular outcome, this interpretation is curiously like utilitarian and perfectionist aims that he critiqued. Reasons are needed for a focus on distribution as opposed to the other alternatives.

As beings ‘having a conception of their good and capable of a sense of justice’ (*TJ*, 19) – the two moral powers – the emphasis on distribution could follow intuitively. As an individual with a conception of the good, the matter under inquiry would seem to involve, first, her concern, purely as an individual (or head of a family), with a need for the resources potentially required for the pursuit of her own (or their) conception of the good. Second, as someone who also has a capacity for a sense of justice, she should ask to what extent each has a proper claim on the product of their cooperative projects for the pursuit of his or her own good. The original position attempts to answer this second question. Rawls envisions the structure of the original position as a modeling of ‘reasonable’ moral premises and the choice within it as modeling the parties’ ‘rational’ pursuit of their own good. The first moral power gives a person a rationale to take up original position reasoning and the second power gives that reasoning an object. This modeling also achieves the significant aim of constructing a deontological alternative to maximizing teleological theories of justice. ‘Distribution’, in a relevant sense a non-maximizing criterion,⁴⁰ is an obvious though certainly not the only alternative to mere maximization of the good.

Contrast the moral vision of the person as simply an individual having two moral powers with a moral vision based on the person’s engagement with and commitment to others within a cooperative project, either communicative action or societal production. This alternative creates a quite different focus. The person should ask not what she should receive but how she should relate to the others with whom she

is in the cooperative relation. The first moral view of the person and of the corresponding conception of social cooperation sensibly leads essentially to an inquiry about 'distribution', maybe of primary goods. The second account starts by addressing both relationships within the cooperative activity and the use (sometimes the cooperative use) of any output. Issues of distribution of the product of cooperation enter only downstream as a possible subtopic of the question of collective authority.

(2) Criteria for determining structure – the right or both right and good

The distributive account of justice requires something to be distributed. Theorists have offered various possibilities including utility (welfare) or wealth.⁴¹ For a full theory of justice, wealth is surely too narrow a category – what about liberties? And though distributing utility is hardly the same as maximizing utility (utilitarianism), many of Rawls' objections to utilitarianism also raise problems for making distribution of welfare the standard. As an alternative, the parties could rationally consider the all-purpose means of his thin theory of the good without already relying on any *particular* conception of the good. This list gives the parties in the original position an object and a motive for their reasoning (*TJ*, 396).

Given, however, other possible *terms* of cooperation, why should parties in the original position focus on the distribution of this list of primary goods? Or, at least, why should not the decision whether or not to focus on this list be left to the parties to make? Many aspects of the original position methodology – the equality, the aim of agreement, the veil – reflect reasonable modeling of basic moral notions. In contrast, introducing the primary goods as a matter of theory construction seems arbitrary. The thin theory of the good appears to receive primarily a pragmatic justification related to allowing the reasoning to proceed – but the list was unnecessary for this purpose. Given only general knowledge allowed under the veil, the parties could themselves construct this list, if warranted, and could determine what issues about the list to consider rather than simply move to the matter of distribution. This broader range of reasoning, however, opens up questions not merely of distribution but also the terms and goals of cooperation, which Part II argued leads to the three principles rather than the difference principle.

Rawls certainly gives some support for this broader reading of the proper focus. He does locate the issue of justice in the context of people engaged in a cooperative venture or social cooperation. The question is then how to conceive of this venture. For an individual with two moral powers and *who represents her own interests* (an image of the person adopted solely for purposes of the artificial device of the original position),⁴² the obvious issue concerns the individual's claim on the

product of the cooperative project 'for mutual advantage'. How should the product be shared? The issue is a matter of the 'right'. The cooperative project itself is treated as *external* to her as an equal moral being with her own interest in her own good. In contrast, the relational quality of equality within communicative action – or within participation in the societal project of social creation – makes the cooperative project *internal* to her existence as an equal moral being. The issue becomes the appropriate goals or aims of the project, which could be anything, though with the important caveat that the terms of cooperation ought to be fair to each person. Fairness, however, is a constraint on, not the goal of, the cooperation. Choice democracy, not an epistemic attempt at achieving the correct distribution, would define the goals. The criteria for a just and proper structure within communicative discourse rely on both principles of right and contested conceptions of the good.

(3) Liberal neutrality and political losers

Liberals often argue that the state should be neutral between conceptions of the good. In doing so, they do not, or at least need not, make a mistake of which they are often accused. Any institutional arrangement favors some conceptions of the good life over others so it cannot be neutral in effect. Moreover, liberalism as a 'fighting faith' is not neutral in its commitment to ideals of right or justice with their consequent effect on realizing different conceptions of the good. Rather, the plausible liberal claim is that any favoritism between people or their conception of the good should not be justified on the basis of the arrangement favoring particular (for example, majoritarian) conceptions of the good but rather should be justified solely by the concept of the right. This principle of neutrality may follow easily for a theory that conceives of each individual as a part of a kingdom of ends.⁴³ Her equality is based on her moral attributes – the individual's possession of the two moral powers. This person's moral autonomy arguably requires that other people's conceptions of the good not be a basis for constraining the structure in which she makes her own choices. The design of institutions should follow merely from a conception of the right that itself is justified independently of any particular notion of the good – for example, chosen within the original position (which, Rawls says, depends on the good only in relation to the widely accepted notion that primary goods are useful for people's more specific full conception of the good). If 'the right' combined with judgment fully determines basic institutions, epistemic democracy is all that we should have – it adds the judgment aspect. Conceptions of the good play a role only within choices of the individual about how to live and what aims to pursue within a just basic structure not influenced by her or others' conceptions of the good.

Another way to see this is that if the fundamental category is the person with two moral powers, no conclusion is satisfactory unless she finds it acceptable. She should be able to treat all legislation as self-rule. Universal acceptability of proposed principles of justice and any consequent exercise of state coercion are often taken as definitive of liberal or Kantian conceptions of justice. This point, in turn, is often seen to demand that the principles of justice and the conforming legal order be neutral between conceptions of the good that actually divide reasonable people. This neutrality, in turn, requires that democracy coercively carry out only the mandates of justice. Actual, potentially momentous, political or constitutional disagreement should reflect only inevitable burdens of judgment, that is, should reflect only epistemic obscurities.

In contrast, for a vision of the moral person as fundamentally within a cooperative project, a conclusion is satisfactory if it results from properly carrying out this project in a manner that respects each as an equal, respect that is implicit, for example, in *attempts* to reach agreement based on reasons. Rather than neutrality between independently conceived persons with their own interests, communicative action envisions people as reason-giving beings. Cooperation aims to rely on the full set of reasons they find persuasive. No exclusion of conceptions of the good is proper. In communicative action, as in choice democracy, argumentation consistently *seeks* agreement and invokes reasons on which others *theoretically* could agree. Of course, the person cannot fail to realize that sometimes agreement will not be reached even though action (or, equivalently, inaction) must follow. Losers will exist not merely in respect to the burdens of judgment as in epistemic democracy but also in respect to collective decisions that purposefully favor certain but not their ideals of the good. But democracies in establishing laws, like people engaged in communicative action, still will and still should act, still make choices. When doing so, some positions will dominate. Losers will exist but can properly demand only that they be treated fairly.

This second vision, which finds morality in the presuppositions implicit in people engaged in communicative action, an inherently relational practice, also suggests a second understanding of the cooperative venture that society and the coercive legal order represent. Both society and the wealth that people produce within it result because people choose particular principles of cooperation or particular collective projects. It would be odd to exclude from the reasons for collective choice of structure those reasons that individuals rely on for their own choices. The very reasons for a right of liberty – a right for an individual to make choices about her life based on her comprehensive conception of the good – suggests a right to participate, using the same grounds, in making choices about the structure that so greatly influences her life. Of course, within communicative action, the constant possibility is that

the autonomous person says 'no', that agreement is not reached – but the parties must continue to act. This view of morals phenomenally presupposes the possibility of losers in the collective pursuit of the good.

(4) Derivation and motivation

A theory of justice needs an explanation for its obligatoriness and for a motivation to conform. Why does any fact, why does equality in possessing these two natural 'range' properties (*TJ*, 508) – that is, the fact of people possessing the two moral powers – ever provide an 'ought'? A person's 'capacity' for a sense of justice, without more steps, does not give her a reason to realize it, much less provide for the particular content of reasonableness as modeled by the original position. And, even granted both content and an explanation for the 'ought', what motivates a person to act on the 'ought', especially when tempted by various features of her sense of the good? These questions led Rawls in *TJ* to show that, *under appropriate conditions*, the right (whose logic includes its claim to priority) will be a part of a person's good, which could solve the motivational problem. This congruence also responds to an additional matter that Rawls considered crucial – the problem of stability. Congruence allows for a realistic utopia – society as it could be and humans as they are. As a doubter, I am unpersuaded that equality in the two moral powers provides an adequate basis to arrive at the 'ought'. Rawls himself, in recognition that he had relied in his argument for stability on the empirical inclusion of right into the good that would follow for a Kantian person but not for all people given reasonable pluralism, backed away from claiming that *TJ* had demonstrated the possibility of stability, offering different arguments purportedly for the same ultimate result in *PL*. I do not explore these issues further but merely observe that both justificatory and motivational arguments are difficult given the Rawlsian basis.

These issues look very different if the basis of the right lies within commitments actually implicit in communicative action or, possibly, in the engagement in any fully cooperative social projects. Communicative action is a social, not natural, fact. As an inescapable and desired practice, commitment exists to the practice and, hence, to the presuppositions implicit in the practice. Social practice is constituted by 'oughts',⁴⁴ thereby putting aside the problem of deriving an 'ought' from a natural 'is'.

This perspective also changes the issue of stability. Little reason exists to expect, certainly to want, stability for an unjust scheme. Given the inevitability of injustice, our proper lot may include some degree of instability. The world may have had greater problems with the considerable, even if eventually temporary, stability of unjust orders than with the instability of just regimes, regimes we have nowhere yet experienced.

Given inertia and huge pressures to conform, the calculation could be that stability of a just regime is unlikely to be so precarious – stability may be a false problem for ideal theory. The dissenters, the losers, expected within communicative action and similarly within choice democracy face powerful pragmatic reasons to go along with many outcomes that they reject, on which they vote ‘no’. Requirements of toleration and the guarantee of basic liberties often provide sufficient room for them to abide by their alternative views. The majority’s proper humility about being right suggests that when, as a matter of conscience, dissenters refuse to go along, their actions often will represent less stability deficits to be mourned than dramatizations of alternatives and demands for reform or better justifications to be valued.⁴⁵ Too much stability can be a problem. This view is implicit in the practice of communicative action where ‘no’ – lack of agreement and further discussion – often occurs and should be accepted as implicit in the practice of engaging in cooperative projects.

Rawls’ original position device models a notion of equality among free rational persons aiming at reasonable terms of agreement on the nature of their cooperation in a fundamental collective project. This normative modeling left Hobbesian social contract reasoning behind in that the Rawlsian contract relates to terms justified by the force of reasons, not necessities of power. Part II argued that this modeling supports reasoning that leads in directions recommended there rather than in ways Rawls developed; that the proposed three principles provide a better basis on which to agree than does the difference principle.

Arguably, Rawls laid the groundwork for this alternative in the ways he broke from Kant (*TJ*, 256). Rawls assumed that ‘[t]he person’s choice as a noumenal self . . . to be a collective one’ (*TJ*, 257). My suggestion is that he failed to follow through when he treated individualized natural attributes, possession of the two moral powers, as the basis of people’s equality. Rather, fundamental equality of noumenal beings engaged in collective choices lies in people’s basic relational practices, of which communicative action provides a morally generative instance. By beginning with communicative action, this second approach does not reject the significance of the two moral powers but sees their moral relevance as lying precisely within cooperative ventures (of communication action or societal cooperation).

Stylized, the Rawlsian derivation can be described: individualized moral facts, which include a capacity for a sense of justice (i.e. fairness), leads to individualized pursuit of good but in a manner restricted by what is fair. Likewise, the alternative can be stylized: relational moral facts (practices), in which both moral powers have relevance, leads to collective choices and collective pursuits that embody both moral powers.

The original position models basic equality. Basing this equality on individual attributes involves the first vision of the moral person and correspondingly envisions ‘cooperation for mutual advantage’ as providing resources to that *person* – the distributional focus. Basing equality on relational qualities involves the second, socially embedded vision of the person and correspondingly envisions cooperation for mutual advantage as providing resources to *us* – and an image of justice that is more open or responsive to conceptions of the good and to provision for respectful relations. This approach pushes deeper Rawls’ change from Kant in more fully seeing the choice as ‘a collective one’. The collective quality of ‘social contract’ receives recognition. The plausible results include choice democracy as a locus in which people exercise both moral powers. It replaces a person’s relatively exclusive interest in gaining only an equal or ‘maximin’ share of ‘all purpose means’ with an interest in the structure, content, and output of relations of cooperation.

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Notes

I thank T. S. Scanlon, Frank Michelman and Aditi Bagchi for careful comments on a draft and participants at the Prague Conference on Philosophy and Social Science (May 2007) and at the Northeastern Law School faculty workshop (April 2007) for their comments. I also thank the Radcliffe Institute of Advanced Study for providing an appealing home for writing this article.

- 1 References to John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), are identified as *TJ*. Page citations are to the original edition. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), is identified as *PL*. John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge: Harvard University Press, 2001), is identified as *RS*.
- 2 My listing differs in two respects from Rawls’ own report (*TJ*, 504–5). First, Rawls adds that equality applies at the level of rule application. Roughly meaning regularity, equality requires ‘treating like cases alike’. I neglect this formal ‘rule of law’ principle because it does not relate to any controversial aspect of the *substantive* meaning of equality. Second, Rawls’ list of three levels does not distinguish my second level, the modeling of basic equality by the structure of the original position, an issue that merits separate consideration. My primary earlier work on equality, on which this article especially in Part II draws, C. Edwin Baker, ‘Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection’, *Texas Law Review* 58 (1980): 1029–96; C. Edwin Baker, ‘Outcome Equality or Equality

- of Respect: The Substantive Content of Equal Protection', *University of Pennsylvania Law Review* 131 (1983): 933–98, contrasts in respect to the first point above with Peter Westen, 'Empty Idea of Equality', *Harvard Law Review* 95 (1982): 537–96.
- 3 See C. Edwin Baker, 'Grounded Universal Commitments' (MS, November 2006; obtainable from the author at University of Pennsylvania School of Law [ebaker@law.upenn.edu]).
 - 4 Cf. Samuel Freeman, *Justice and the Social Contract* (Oxford: Oxford University Press, 2007), pp. 18 ff. (distinguishing interest-based [e.g. Hobbes or Gauthier] and rights-based social contract theories).
 - 5 Largely in response to a critique by H. L. A. Hart, Rawls subsequently modifies this principle to refer to 'fully adequate scheme of equal basic liberties' (RS, 42).
 - 6 Frank I. Michelman, 'Morality, Identity, and "Constitutional Patriotism"', *Denver University Law Review* 76 (1999): 1009–28 (1011–12). This point about universalism and its not being available in every form of life could justify liberals following (any persuasive) recommendations of Kantian constructivism without accepting new justifications advanced in *PL*.
 - 7 *ibid.* at 112–14.
 - 8 At least as I read *TJ*. *PL* is worked up from the commitments of modern liberal democratic societies and whether it should be seen as claiming, even if only from its own perspective, a universalism is an issue that I do not find it necessary to address.
 - 9 See Baker, 'Grounded Universal Commitments'. See also Part III, below.
 - 10 Among democrats who accept that justice at least limits the decisions that the democratic majorities can properly make, some would have these limits found and interpreted by a judiciary, others argue that the public itself (or its elected representatives) should have sole authority to do so, while possibilities such as under-enforcement of constitutional norms give a role to each. Parties at either actual constitutional conventions or the envisioned constitutional stage of Rawls' four-stage sequence could have reason to assign interpretative authority as to some of the requirements of justice to the judiciary while leaving other requirements of justice to determination by democrat majorities. Jeremy Waldron, 'The Core of the Case Against Judicial Review', *Yale Law Journal* 111 (2006): 1346–1406; Lawrence G. Sager, *Justice in Plainclothes* (New Haven, CT: Yale University Press, 2004); Frank I. Michelman, 'The Liberal, the Procedural, and the Contractual in Normative Constitutional Conceptions' (MS, 2007, ch. 2).
 - 11 I read Rawls to relate this concern to 'choice' because he notes that unless the least advantaged have these political rights, the better situated may further entrench their position in the settlement of social questions (*TJ*, 225).
 - 12 Freeman, *Justice and the Social Contract*, p. 268.
 - 13 Knut Wicksell, *A New Principle of Just Taxation* (1896), reprinted in *Classics in the Theory of Public Finance*, ed. Richard A. Musgrave and Alan T. Peacock (London: Macmillan, 1958), pp. 72–118.
 - 14 It might be suggested that 'effective' legislation relates to discretionary choices about alternative conceptions of the public good, but that seems to be a mistake. Rather, within the general argument 'effective' relates to how

well the legislation achieves its just goals. 'Effective' is subordinate to the delineation of proper goals even though 'effectiveness' will obviously often require contestable judgments and pragmatic difficulties. The difference principle, for example, requires effectiveness in promoting the expectations of the least advantaged. Like efficiency, 'effectiveness' remains subordinate to the posited goals.

- 15 *TJ*, 197, n. 2. Rawls emphasized the real world side of this distinction in his reply to Habermas. John Rawls, 'Reply to Habermas', *Journal of Philosophy* 92 (1995): 132–80. See also John Rawls, *Lectures on the History of Political Philosophy*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 2007), p. 4.
- 16 Even if some individuals have conceptions of the good for which certain primary goods are not needed, Rawls notes that, from behind the veil of ignorance, 'it is rational for the parties to suppose that they do want a larger share, since in any case they are not compelled to accept more' than they want (*TJ*, 143).
- 17 Seeing this point undermines a major criticism of Rawls in Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
- 18 At the legislative stage, however, citizens might make adjustments for excusable envy, which undermines self-respect, as something along with wealth and income to be taken into account in applying the difference principle (*TJ*, 546).
- 19 Rawls implicitly suggests such a possibility in terms of including the difference principle in a non-judicially enforceable 'preamble' or aspirational portion of the constitution (*RS*, 162).
- 20 G. A. Cohen, like Nozick, largely rejects the distinction in order to recommend a conclusion that is almost the distributional mirror image of Nozick's. G. A. Cohen, *If You're an Egalitarian, How Come You're So Rich?* (Cambridge, MA: Harvard University Press, 2000).
- 21 Freeman, *Justice and the Social Contract*, p. 268.
- 22 Frank Michelman in conversation has suggested that, though with unclear frequency, sometimes the most reasonable legislative judgment is that no judgment can be made about theoretically acknowledged effects. Although this conclusion apparently leads to the need for legislative choice, this justification for making choices would not be any theoretical appeal of choice but rather an epistemic failure that, if possible, should be corrected.
- 23 H. L. A. Hart, 'Rawls on Liberty and Its Priority', *University of Chicago Law Review* 40 (1973): 534–55. Although my argument is structurally similar at many points to that made by Hart, it derives from a 1972 conversation with Andreas Eshete who explained the possible rationality of a distribution more egalitarian than that created by the difference principle. Andreas Eshete, 'Contractarianism and the Scope of Justice', *Ethics* 85 (1974): 38–49.
- 24 Barry Gruenberg, 'The Happy Worker: an Analysis of Educational and Occupational Differences in Determination of Job Satisfaction', *American Journal of Sociology* 86 (1980): 247–71. Gruenberg argues that intrinsic rewards are more satisfying for workers than are extrinsic rewards. Although no evidence shows that workers must learn to appreciate the intrinsic satisfaction of work, they apparently often need to learn to like extrinsic rewards, learning that reduces dissonance if intrinsic rewards are not available.

- 25 See Freeman, *Justice and the Social Contract*, pp. 102–9. The matter deserves more attention but I find this development best described either as Rawls interpreting the demands of the difference principle (e.g. his engagement in the epistemic effort of determining the principle's application) or as a modification of the content or role of his two principles. It may be that he thought he was doing the first while actually doing the second.
- 26 This claim is obviously relevant for recent debates about public reason. It would allow a person to make proposals based on Muslim or Jewish or Episcopalian orthodoxy. Such a proposal is consistent with the freedom and self-respect of the person addressed, who could, even if she predictably would not, accept such views. Not so for proposals for subordination of people – though even here, a person might properly have a right to propose it even if the group would have no right to act upon it, a point related to the proper conception of free speech.
- 27 I will not forget the Yale law professor, whom I heard, when a student, note the value he placed on other people's lesser wealth as an indication of his own superiority to them as his reason to reject Rawls.
- 28 C. Edwin Baker, 'Counting Preferences in Collective Choice Situations', *UCLA Law Review* 25 (1978): 381–416.
- 29 Compare Rawls' argument that in a well-ordered society stability will occur based on mechanisms that eventually lead to the right becoming part of people's good.
- 30 This assertion puts aside the important difference in standards for measurement, what Sen calls the 'space' of equality, under the two approaches: utility in one, an index of primary goods in the other. See Amartya Sen, *Inequality Reexamined* (Cambridge, MA: Harvard University Press, 1992).
- 31 Rawls also argues that people may have little reason to want more than the minimum assured by the difference principle, although I do not find it obvious why this would be so, especially from the perspective of a person in the original position who might turn out to be the mountain climber or the fine wine drinker – but this point hardly seems essential to Rawls' argument.
- 32 Samuel Scheffler, 'What is Egalitarianism?', *Philosophy & Public Affairs* 31 (2003): 5–39.
- 33 Frank I. Michelman, 'Welfare Rights in a Constitutional Democracy', *Washington University Law Quarterly* (1979): 659.
- 34 Sen, *Inequality Reexamined*; Martha C. Nussbaum, *Women and Human Development* (Cambridge: Cambridge University Press, 2000).
- 35 Nussbaum, *ibid.* Rawls' argument with cosmopolitans could be reconsidered if justice requires a culturally sensitive (local) just wants guarantee rather than the difference principle, whose application on a worldwide basis Freeman shows is inconsistent with Rawls' enterprise. Freeman emphasized, however, that Rawls did advocate worldwide provision of basic needs. John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999); Freeman, *Justice and the Social Contract*.
- 36 *Bush v. Gore*, 531 U.S. 98 (2000).
- 37 This paragraph and the subsequent invocations of communicative action obviously draw very heavily on the work of Jürgen Habermas. I do not address divergences from his work. (I believe there is ambiguity about this.)

One point, though, merits emphasis. Habermas' frequent suggestion of a purely procedural approach or the view that no rights exist prior to the exercise of the discourse principle in an institutionalized democratic context claims to defend no substantive content other than that which passes the discourse, but he also refers to presuppositions and enabling conditions. My enterprise takes its starting point from this second theme, which is at least in some tension with the first.

- 38 Baker, 'Grounded Universal Commitments'; Baker, 'Foundations of the Possibility of Legitimate Law' (MS, September 2006; obtainable from the author at University of Pennsylvania School of Law [ebaker@law.upenn.edu]); C. Edwin Baker, 'Michelman on Constitutional Democracy', *Tulsa L. Rev.* 39 (2004): 511–46.
- 39 C. Edwin Baker, 'Injustice and the Normative Nature of Meaning', *Maryland Law Review* 60 (2001): 578–606.
- 40 If teleology understands the good independently of the right and interprets the right simply as its maximization, an effort to *maximize* the right distribution does not provide for teleology since the 'right distribution' is not independent of the right.
- 41 e.g. Sen, *Inequality Reexamined*; Ronald Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2000).
- 42 Only this restricted, hypothetical, constructed context allows the statement: 'now obviously no one can obtain everything he wants; the mere existence of other people prevents this' (*TJ*, 119). In the real world, Rawls emphasizes that 'among our final ends are the attachments we have for persons, the interests we take in the realization of their interests, and the sense of justice' (*TJ*, 494; see also 522–3; 570–1; 573), ends for which the existence of others is crucial.
- 43 Samuel Freeman nicely describes how Rawls' intense democratic sentiments lead him to substitute 'Realm of Ends' for Kant's phrase. Freeman, *Justice and the Social Contract*, p. 5.
- 44 Peter Winch, *The Idea of a Social Science and its Relation to Philosophy* (New York: Humanities Press, 1958).
- 45 See Steven H. Shiffrin, *Dissent, Injustice, and the Meanings of America* (Princeton, NJ: Princeton University Press, 1999).