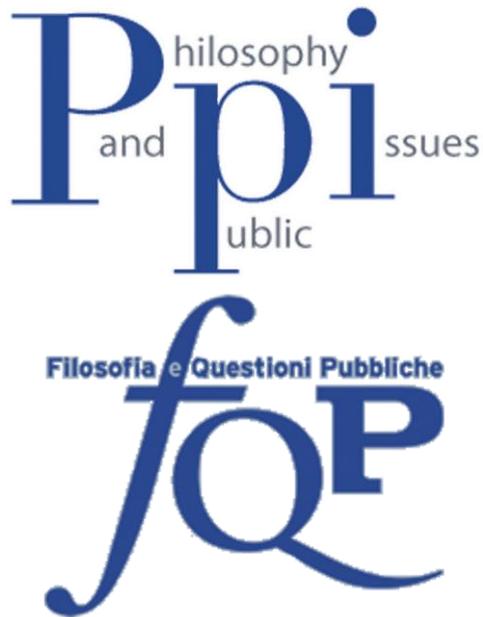


SYMPOSIUM
LIBERALISM AND SOCIAL JUSTICE



REPLIES TO CRITICS

BY
SAMUEL FREEMAN

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Replies to Critics

Samuel Freeman

1

Reply to Edmundson

Bill Edmundson primarily focuses on my arguments in chapter 4 of *Liberalism and Distributive Justice* on property-owning democracy and its connection with the difference principle. Basically, he sees Rawls's argument against welfare state capitalism as resting almost exclusively on the fair value of the political liberties, and contends that only socialism of some form can satisfy Rawls's stated aim to guarantee democratic citizens' equality of opportunity for political influence. Property-owning democracy he contends cannot meet the requirements of the fair value of the political liberties. This is the primary thesis of Edmundson's important recent book, *John Rawls: Reluctant Socialist*. I contend in my book that the difference principle plays a crucial role in Rawls's argument for social equality and against any form of capitalism, and that the difference principle together with fair political value and fair equal opportunity supports a property-owning democracy as well as liberal socialism. Instead of restricted utility, which I contend

underlies Rawls's conception of the capitalist welfare state, Edmundson somewhat surprisingly contends that a better way to understand welfare state capitalism is in terms of Rawls's principles of justice themselves, absent the guarantee of the fair value of political liberties, a position he calls "justice-without-fair-value." Justice-without-fair-value is exactly like justice-as-fairness, he says, but without the first-principle guarantee of the fair value of the political liberties. On this interpretation, the second principle of justice is perfectly compatible with the vast inequalities typical of welfare state capitalist economies, so long as they benefit the least advantaged members of society.¹ This is a familiar reading of Rawls's justice as fairness, especially by many on the critical left; it has long been assumed that his aim in *A Theory of Justice (TJ)* was to justify the capitalist welfare state that evolved in liberal democracies between the Great Depression up until the 1980's. Rawls sought to combat this (mis)interpretation, in the Preface to the 1999 revised edition of *A Theory of Justice (TJ)* – which was originally the Preface to the 1987 French edition – and he argued at greater length in *Justice as Fairness: A Restatement* (2001) that the principles of justice do not justify welfare state capitalism.² Justice

¹ Edmundson says in his book, "what could be termed Neoliberalism...is just like the two principles, but without a guarantee of the fair value of equal political liberties" (Edmundson 2017, 76, n.3). I argue below that neoliberalism or "justice without-fair-value" cannot be squared either with the 2nd principle's requirement to mitigate inequalities implicit in fair equality of opportunity, or with the "deep reciprocity" of the difference principle.

² Here referred to as 'JF' or the 'Restatement.' As the editor, Erin Kelly, says (JF, xii), the *Restatement* consists of Rawls' lecture notes for his class in the history of political philosophy in the 1980's, and were substantially completed by 1989 with some revisions in the early 1990's as he completed *Political Liberalism* (here PL). The remaining lecture notes for this class were on Hobbes, Locke, Rousseau,

as fairness instead justifies either a property owning democracy or market socialism – as Rawls initially claimed to little fanfare or notice in the first edition of *Theory*.³

Edmundson and I disagree primarily about his contention that Rawls’s argument against the welfare state and for property-owning democracy or liberal socialism rests solely on the conditions necessary to guarantee political fair value. I contend on the other hand that the difference principle together with fair value and FEO are all three crucial components of Rawls’s argument against welfare state capitalism (WSC). A second major disagreement lies within Edmundson’s rejection of both Rawls’s and my separate arguments for property owning democracy. Edmundson suggests here the striking thesis – developed at length in his book *John Rawls: Reluctant Socialist* – that no private property system, not even POD, is capable of guaranteeing the fair value of the political liberties with equal political influence; hence some form of socialism is required by Rawls’s principles of justice. He argues there, not for liberal socialism of the kind Rawls endorses, but for a kind of democratic socialism, at least at the level of “the commanding heights of the economy,” (Keynes’s term) that resembles in many respects British socialism of the post-WWII years, where the state owned and controlled major industries.

Here, I will focus first (in § I) on the difference principle and how my understanding of it differs from Edmundson’s. Then I will discuss why I think the difference principle and fair equality of opportunity are crucial components of Rawls’s argument for both

Hume, Mill, and Marx, and were published as *Lectures in the History of Political Philosophy* (Rawls 2008).

³ See, TJ orig. 258, 271, 272-274, 279; cf. TJ rev., 228, 240-242, 247. See also “Fairness to Goodness,” (1975) in Rawls 1999, 277, where Rawls says that both “associational socialism or property-owning democracy” may be realized by the principles of justice.

property- owning democracy and liberal socialism. The fair value of political liberties itself is not enough. First, in §§ II-III, I discuss and contest some of Edmundson's main reasons for contending that property owning democracy does not meet the requirements of Rawls's principles of justice. Then in § IV, I discuss reasons why Rawls's second principle requires the fair distribution of economic powers and prerogatives to all citizens, including in their place of work. I address in § V Edmundson's and others' argument that my position is basically a defense of syndicalism – or exclusively worker-owned and managed firms. In arguing that workers should have fair opportunities to exercise powers and prerogatives in their work, it was not my intention to defend syndicalism – or exclusively worker ownership and control of firms – but rather a wide variety of arrangements in which workers can exercise a guaranteed minimum of powers and prerogatives in their employment. Finally, in § VI I respond to Edmundson's and others' contention that my position violates freedom of association and occupation. I argue that, while the first principle protects freedom to choose one's occupation and workplace, it does not protect either the freedom to engage in impermissible occupations or the freedom to contract into or join forms of economic association that conflict with the second principle of justice.

Before beginning, I should say that Edmundson's book is an important contribution, in large part because it stands as a much-needed correction to the longstanding criticism from the Marxist and critical left, that Rawls's justice as fairness is but one more liberal attempt to justify the inequalities inherent in capitalism. I respond in chapter 3 of my book to G.A. Cohen's version of this criticism, which I contend rests on misunderstanding the difference principle. Edmundson argues differently, that the criticism rests instead on misunderstanding the crucial role of the fair value of political liberties in mitigating economic inequalities and dissolving the concentration of private wealth that attends

private ownership of means of production. So, we agree on the outcome – that far from being incompatible with (liberal) socialism, justice as fairness is a reasonable – perhaps the most reasonable – justification of it. I go one step further, and agree, with Rawls, that property-owning democracy is (also) justified by Rawls’s conception of justice. Here I’ll also note that Edmundson’s primary thesis in his book exactly controverts Alan Thomas’ argument in his book – which is that *only* property-owning democracy, not liberal or democratic socialism, can satisfy Rawls’s principles of justice. I respond to Thomas’ argument in my reply to his comments.

I

Democratic Equality and the Difference Principle

I.1. My case for property owning democracy rests in large part on Rawls’s difference principle, as I believe Rawls’s does as well. I agree with Edmundson that the conditions for guaranteeing the fair value of political liberties (and fair equality of opportunity as well) are an important part of Rawls’s argument against welfare state capitalism. But I disagree with his contention (developed at length in his book) that the fair value requirement is sufficient to eliminate property owning democracy from consideration as well. One reason I focus most of my attention on the role of the difference principle in Rawls’s argument for POD and liberal socialism is that, unlike the difference principle, Rawls had little to say about the economic arrangements required to guarantee the fair value of political liberties. Clearly, he thought fair equality of opportunity for political influence (like the 2nd principle’s fair equality of opportunity principle itself) required mitigating economic inequalities and diminishing as far as possible the influence of wealth on the electoral and political process; also, that

fair value could not be realized in a capitalist economy, even combined with the welfare state, because of capitalism's unregulated inequalities and inevitable concentration of wealth. But unlike Edmundson, Rawls believed that these aims could be achieved in a property-owning democracy (POD) wherein economic wealth, and social and economic powers and prerogatives are not concentrated in a capitalist class but are widespread across all citizens in a democratic society; moreover, where economic inequalities are kept in check by all three principles of justice – fair political value, fair equality of opportunity (FEO), and the difference principle.

Here Edmundson is sceptical, and has a different understanding of the difference principle (and seemingly FEO too) than I do. He says (Edmundson 2020, 24) that it “could be misleading” when I suggest that the difference principle expresses “democratic reciprocity” and “reciprocity at the deepest level.” For “Rawls rejects the difference principle in its general form,” – by which Edmundson means, as he continues – “the general conception of justice, that is to say the difference principle regarded as the sole requirement of justice” – primarily because the general conception does not guarantee equal rights of political participation and their fair value. The implication is that there is nothing democratic about the alleged reciprocity of the difference principle. The fair value of equal political liberties is for Edmundson the fundamental expression of democratic equality in Rawls, not the difference principle or even fair equal opportunity principle. This comes out also when Edmundson contends that capitalism is best conceived as grounded, not in utilitarianism, but in Rawls's general conception of justice, and also when he says that rather than restricted utility as I contend, welfare state capitalism is best conceived as being grounded in Rawls's principles of justice absent the guarantee of the fair value of political liberties – “justice-without-fair-value” he calls it (Edmundson 2020, 27). The

suggestion again is that the difference principle itself – in either its general or special form – is not a democratic principle itself, even if it does guarantee reciprocity of distributions, since it puts no restrictions on the inequalities allowed so long as they benefit the least advantaged. Edmundson seems to suggest that inequalities are sufficiently constrained only by the guarantee of the fair value of equal political liberties, which evidently includes and goes well beyond those restrictions on inequalities imposed by fair equality of opportunity on Edmundson’s reading.

I think it is a mistake to conflate Rawls’s difference principle with the general conception of justice, for reasons I discuss below. But basically, I have a different understanding of the difference principle proper – as part of the second principle – and its role in the special conception than does Edmundson. To begin with, “Reciprocity at the deepest level” is not my term but one Rawls himself uses in distinguishing the kind of reciprocity realized by the difference principle from other alternatives (JF 49).⁴ My term “democratic reciprocity” comes to the same thing; it refers to the “deeper ideal of reciprocity implicit in the difference principle.” (JF 126). Rawls says that some such form of the idea of reciprocity expressed by the difference principle “is essential to democratic equality” (JF 133). In saying this, Rawls implies, I believe, that political equality with fair value and other equal basic liberties even when combined with FEO are *not sufficient* to guarantee *democratic equality*.

⁴ Rawls says in reference to the idea of free and equal citizens who are fully cooperating members of society over a complete life, “I believe this idea involves *reciprocity at the deepest level* and thus democratic equality properly understood requires something like the difference principle.” (JF 49) Rawls also says the difference principle contains “a deeper idea of reciprocity implicit in the difference principle” than in other alternatives. (JF 126, also JF 124)

It is no accident then that § 13 of *A Theory of Justice* is entitled ‘Democratic Equality and the Difference Principle.’ Rawls says, “democratic equality properly understood requires something like the difference principle” (JF 49). The difference principle I believe guarantees a kind of social equality – Implicit in “reciprocity at the deepest level” – that the first principle with fair value and FEO cannot achieve by themselves. The term ‘democratic equality’ as Rawls uses it refers to “the democratic interpretation” of the second principle of justice (TJ 75/65) – the difference principle combined with fair equality of opportunity. I think the democratic interpretation also must apply to the first principle, to guarantee what one might call “the fair democratic value of political liberties.” For without the difference principle, equal basic liberties and FEO are difficult to interpret by themselves, and yield only *liberal equality* once combined with the Pareto principle, a weak reciprocity principle. Even assuming liberal equality makes some attempt to achieve what might be termed the “fair liberal value of political liberties,” in the same way it achieves a liberal version of fair equality of opportunity, neither guarantees the restrictions on inequalities required by democratic equality and the democratic interpretation of the principles of justice.

The difference principle is then crucial to democratic equality and the democratic interpretation of *both* principles of justice. Later I’ll argue that Edmundson perhaps overestimates the conditions necessary for the fair value of the political liberties when he argues that fair value alone requires socialism and not POD. Whether or not that is the case, Rawls clearly must have thought that there is a kind of *social equality* guaranteed by the difference principle that is essential to democratic equality and that is not realized by equal political liberties and their fair value alone independent of the

difference principle, even within a socialist regime that is not governed by the difference principle.⁵

So, I take issue with Edmundson's capitalistic interpretation of the difference principle. What is most striking is his claim that the best understanding of welfare state capitalism is Edmundson calls "justice as fairness-without-fair-value." It is hard to square welfare state capitalism either with the equality requirement of fair equality of opportunity on its democratic interpretation, or with the "deep reciprocity" of the difference principle. The reason is that capitalism, even with the welfare state, involves few if any efforts to constrain inequalities of income, wealth, and economic powers and responsibilities. The difference principle plainly says that inequalities are justifiable only if they are "to the *greatest advantage* of the least advantaged." Under no convincing interpretation of capitalism's invisible hand, even with the welfare state with social insurance programs meeting basic needs, are there either

⁵ Here we might imagine a socialist regime that satisfies liberal equality, where the means of production are publicly owned, inequalities of income are kept within the bounds of what is necessary to guarantee fair liberal opportunity for political influence and to compete for open positions, but otherwise the principle of efficiency or alternatively the principle of restricted utility governs economic inequalities of distribution of income and wealth – a mixed conception according to Rawls. Nothing about public ownership and control so conceived under such a democratic socialist system that secures the fair value of political liberties but not the difference principle guarantees a fair social minimum or the fair distribution of income and wealth – not any more than, as Rawls says, socialism guarantees that a large portion of national income will be devoted to public goods. (TJ 238-239 rev.) It may be that a socialist system patterned on liberal equality guarantees the fair liberal value of political liberties but results in a low social minimum, where the economic surplus is invested and reinvested for future generations (as in Communist China). This is not democratic equality according to Rawls's position, which is only achievable by the difference principle combined with the first principle and FEO.

tendencies or serious efforts to make least advantaged better off than they would be in any other economic system. As Rawls suggests (and Thomas Piketty confirms),⁶ in the absence of intentional design to counter its inequalities, the tendency of capitalist markets and the invisible hand is continually increasing inequalities between the most advantaged and the least advantage, as well as the less advantaged in between.

I've claimed then that, just as the difference principle imposes substantive equality requirements on fair equal opportunity on the "democratic interpretation" of the second principle that are not require by liberal equality interpretation of FEO, so too there is a democratic interpretation of the first principle when it is combined with the difference principle that requires the fair democratic value of the political liberties. Fair political value cannot guarantee democratic equality on its own. The difference principle is essential to the democratic interpretation of both principles of justice.⁷

I.2. *The General Conception and the Difference Principle*: Now to turn to Rawls's general conception of justice, which Edmundson terms, "the difference principle in its general form." This might seem surprising since the only statement of the general conception stated in the revised edition of TJ simply says:

All social values – liberty and opportunity, income and wealth, and the social bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values *is to everyone's advantage* (TJ 62/54, emphasis).

⁶ Piketty 2014, see also Piketty 2020.

⁷ This is not to say that the fair value of political liberties could not also be combined with other egalitarian principles for the basic structure, such as a luck egalitarian principle.

Stated this way, the general conception bears little resemblance to the difference principle since it makes no specific mention of the least advantaged. It is instead simply a generalization of the initial statement of the second principle of justice – that “inequalities are to be arranged so that they are. . . (a) reasonably expected to be to everyone’s advantage,” which is itself compatible with a Pareto principle that puts *no* restrictions on inequalities or the position of the least advantaged, so long as they are better off than equality. So, it might come as some surprise when Rawls says in the 1971 original edition shortly after discussing the difference principle, “Hence the general conception is simply the difference principle applied to all primary goods including liberty and opportunity” (TJ 83 orig.; deleted from the revised edition) This authorizes Edmundson’s contention that the general conception is “the difference principle in its general form.” This comparison of the general conception with the difference principle is strengthened by Rawls’s restatement of the general conception in TJ §46 of the original edition, which follows his restatement of the difference principle. The revised general conception says:

All primary social goods. . . are to be distributed equally unless an unequal distribution of any or all of these goods *is to the advantage of the least advantaged* (TJ, 303, emphasis added).

But the problem with comparing the difference principle with the general conception is that, even Rawls’s revised statement of the general conception still differs significantly from the difference principle itself, which says that inequalities are not simply to advantage the least advantaged, but are to be “to *the greatest benefit* of the least advantaged.” (TJ 302 orig./266 rev.) Stated as is in its final form in the original edition of TJ, the general conception is still but a more qualified statement of the Pareto principle since it

does not put any restrictions on the degree of inequalities that are permitted – only minimal improvements to the position of the least advantaged will still suffice. By contrast with the revised general conception, a genuine “difference principle in its general form” would instead say that inequalities in the “distribution of any or all of these goods is to be *to the greatest advantage of the least advantaged.*” But Rawls nowhere states the general conception in this way, to reflect what he later calls, “democratic equality” and “reciprocity at the deepest level.”

Furthermore, in the revised edition Rawls completely *omits* the revised statement of the general conception and also the claim that the general conception is simply the difference principle applied to all primary social goods. The only statement of the general conception in the revised edition of TJ is the initial Pareto statement on TJ 54 rev. There is no longer any mention of the difference principle in connection with the general conception. Rawls deleted these comparisons of the general conception with the difference principle as early as the 1975 German translation of TJ.⁸ He did not mention the general conception in *Political Liberalism* (1993), perhaps because it is a comprehensive conception of justice on a par with the principle of utility. Still something vaguely akin to the general conception resurfaces in *The*

⁸ See Rawls, *Eine Theorie der Gerechtigkeit*, trans. Hermann Vetter (Frankfurt a. M.: Suhrkamp, 1975, 1979 ppk. ed.) § 46, 337, where the revised general conception is absent from the final statement of the principles of justice, and also 104, where the concluding paragraph to § 13 no longer mentions the difference principle, as it appears in the 1999 revised edition of TJ. Rawls says in the Preface for the 1999 revised edition (TJ 1999, xii, originally written for the French edition in 1987) that the 1975 German edition has almost all the revisions contained in the 1999 revised edition of TJ, except for some revisions Rawls wrote for the French edition *Théorie de la Justice*, translated by Catherine Audard, which she mentions in her Preface to the French edition.

Law of Peoples, which requires that a decent society's laws be governed by a common good idea of justice that assigns human rights to all its members and promotes certain common interests (Rawls 1999b, 66, 71).

Why are these details important? I mentioned earlier that there is a long history of criticisms of Rawls' difference principle from the Marxist left, that the difference principle justifies capitalism and "trickle down" economics, and is little more than a revised Pareto principle that puts no restrictions on inequalities (e.g., as G.A. Cohen contends).⁹ Neo-liberal critics of Rawls also happily contend capitalist distributions with an insubstantial safety net best satisfy the terms of the difference principle. (e.g. John Tomasi, Jason Brennan). Edmundson himself says that without the fair value of the political liberties, the second principle justifies the inequalities of welfare state capitalism.¹⁰ Rawls's statement that the general conception is just the difference principle applied to all primary goods just reinforces this misreading of the difference principle itself. But then Rawls also says, "The difference principle

⁹ Cohen 2008, 29-39n, 158. I discuss the dissimilarities between the difference principle and the Pareto principle, and address Cohen's Pareto misreading of the difference principle in my book, chapter 3, 110, 116-118, 129, chapter 4, 137-138. See also my essay, Freeman 2013.

¹⁰ Also, in Edmundson's book, and echoing his claim that capitalism is best understood in terms of the generalized difference principle, Edmundson's capitalist non-democratic understanding of the difference principle is reinforced when he says: "[The difference principle] is repeatedly invoked, under different names, to justify tax cuts for the wealthy. The 'trickle down' and 'rising tide lifts all boats' similes that were the standard talking points of the Reagan and Thatcher governments are the close cousins – if not monozygotic siblings – of the difference principle in the sense of the general conception" (Edmundson 2017, 86, emphases added).

is a strongly egalitarian conception.” (TJ 65-66)¹¹ The general conception in all its forms is not egalitarian since it puts no limits on inequalities: any alternative inequality measure is permissible so long as it benefits the least advantaged to some degree. The difference principle by contrast requires choosing the alternative at any point (on the OP curve, JF 62) that most benefits the least advantaged; thereby it justifies measures that mitigate inequality by reducing the wealth of the most advantaged in ways that maximally benefit the least advantaged. Rawls had then good reason to delete in the revised edition his earlier statement that that the general conception is but a generalized version of the difference principle. (TJ 83, orig.)

I.3. *Self-Respect and the Difference Principle*: Democratic reciprocity is one reason Rawls contends that the difference principle guarantees democratic equality. A second ground for the difference principle Rawls emphasizes, especially in *Theory* (TJ §29, 179-182/155-158) in his comparison of the principles of justice with utilitarianism, is that the difference principle is among the social bases of self-respect in a democratic society where citizens regard themselves as free and equal citizens. Rawls discusses reasons for the difference principle related to self-respect in the *Restatement* (JF 127-130) in connection with the principle of

¹¹ The best way to understand the “strongly egalitarian” nature of the difference principle is by referring to the “contribution curve” (TJ §13, 76/66 rev. fig. 6 with a much better depiction in JF 62). Starting from equality (the O point) any point of inequality on the rising OP curve not only reciprocally benefits both the most advantaged group (MAG) and the least advantaged group (LAG), but also maximally benefits the least advantaged at each point in such a way that hews closer to the equal distribution line than all other alternative distributions at that point below the curve that would also reciprocally benefit the least and most advantaged. Moreover, any increasing inequalities on the downhill slope of the OP curve to the right of the D point are increasingly unjust; they are to be rectified by measures (e.g. progressive taxes) that reduce inequality and the wealth of the most advantaged in ways that benefit the least advantaged.

restricted utility's "idea of a social minimum." Following Jeremy Waldron's suggestion that restricted utility might rely on "the distinct idea of the minimum as that of meeting the basic human needs essential for a decent human life" (JF 128n). Rawls discusses certain problems with restricted utility relying on such an idea of a "decent minimum" that covers "essential needs." The main problem is that, because restricted utility's decent minimum does not meet the deeper reciprocity requirement of the difference principle, the least advantaged will "grow distant from political society and retreat into their social world. [They] feel left out, withdrawn and cynical [and] cannot affirm the principles of justice in [their] thought and conduct over a complete life" (JF 128). Then Rawls says that "in Part IV, I suggest that the concept of a minimum as covering the needs essential for a decent human life is a concept for a capitalist welfare state" (JF 129). This is one of several reasons I contend that Rawls saw restricted utility's account of a decent minimum as grounding the capitalist welfare state.¹² (Edmundson rejects this saying a better grounding of the welfare state is "justice as fairness-without-fair-value.") It is also a reason that I contend that the arguments Rawls makes against restricted utility and for the difference principle parallel those made against the capitalist welfare state and for property owning democracy in Part IV (which Edmundson also questions).¹³

¹² Rawls also says in T1 that "the term 'welfare' [in 'welfare economics'] suggests that the implicit moral conception is utilitarian." (T1 229) This suggests he had the same understanding of the term 'welfare state.'

¹³ Edmundson says I "transpose Rawls's 'second fundamental comparison' between justice-as-fairness and restricted utility, as competitor conceptions of justice, to the comparison of property-owning democracy (as a realizer of justice-as-fairness) with welfare-state capitalism (as a realizer of restricted utility)." (Edmundson 2020, 34). But in Rawls's argument against the capitalist welfare state Rawls makes roughly the same argument on grounds of self-respect

Like the main reasons for the difference principle, the social bases of self-respect is also one of the primary reasons for political equality and the fair value of the political liberties.¹⁴ The implication is that political equality and its fair value are among the conditions of social equality, along with the priority of equal basic liberties, fair equality of opportunity, and the difference principle. Rawls however did not think that social equality and the social bases of self-respect require socialist control of the means of production. For he says that the socialist right to participate in the control of the means of production and natural resources, both of which are to be socially, not privately, owned, “is not an essential basis of self-respect,” since such socialist rights are not necessary for the adequate development and full and informed exercise of the moral powers, including the sense of justice (JF 114). Perhaps Edmundson would contest these claims. But his main reason for democratic socialism is that, the fair value of the political liberties with equal chances for political influence cannot be realized in any private propertied economy, even property-owning democracy which seeks to dissolve the concentration of wealth by the wide distribution of economic wealth among all society’s members.

that is implicit in his argument against restricted utility’s idea of a decent minimum. He refers to a “discouraged and depressed underclass many of whose members are chronically dependent on welfare” in welfare state capitalism. “This underclass feels left out and does not participate in the public political culture.” (JF 140)

¹⁴ Rawls says in TJ § 82, “Grounds for the Priority of Liberty” (544-546/477-479 rev.): “Self-respect is secured by the public affirmation of the status of equal citizenship for all.” TJ 478. See also TJ 205 where Rawls says the effect of self-government where equal political rights have their fair value is to enhance the self-esteem and sense of political competence of the average citizen.

II

Private Property and the Fact of Domination

I turn now to Edmundson's contention, that socialism with public ownership and democratic control of the means of production is required by Rawls conception of justice. For all that Rawls says in defense of property-owning democracy in *Theory* and the *Restatement*, Edmundson contends that justice as fairness combined with general facts of political sociology and special psychologies imply that POD cannot satisfy the requirements of justice as fairness. This is not because the second principle of justice might require socialism. Rather it is due to the social and economic institutions required to achieve the fair value of political liberties. Only a socialist system can guarantee what Rawls calls "equal chance of . . ." or "fair opportunity for political influence" among all citizens.

The argument that fair political value requires socialism is developed by Edmundson at length in his 2017 book, *John Rawls: Reluctant Socialist*. The argument is complex and rests on several crucial assumptions that Rawls himself does not explicitly make, but which Edmundson contends are implicit in Rawls's argument. The most notable of these is what Edmundson calls "the fact of domination" – that private capital and economic inequality tend to dominate politics.¹⁵ Edmundson's key contention is that the fair value of the political liberties required by the first principle of justice cannot then be realized in any private-property economy. This is true even in a property-owning democracy that otherwise satisfies Rawls's difference principle, fair equality of opportunity, and does its best to neutralize the effects of money on political

¹⁵ He says, "Rawls acknowledges it as a general fact that disparate economic power inevitably conveys disparate political power. This is the fact of domination" (Edmundson 2017, 84).

democracy with public financing of campaigns and other measures. (Here Edmundson must assume that even though FEO has its own equality requirements these are either unobtainable without fair political value or not stringent enough; in any case FEO cannot be fully guaranteed without fair political value and requires socialism as well.) Edmundson insists in his book that the “fact of domination” is presupposed by Rawls’s argument that the fair value of political liberties must be guaranteed by the first principle of justice. He explains that Rawls did not think that public financing of political campaigns and other equalizing measures designed to neutralize the effects of money in politics would be sufficient to guarantee fair value and that further equality measures would be required. Edmundson also notes that Rawls said that for Marx any private property regime, even POD, “generates political and economic forces that make it depart all too widely from its ideal institutional description,” and Rawls concedes that “this is a major difficulty and must be faced.” (JF 178)¹⁶ On Edmundson’s account, had Rawls indeed faced this problem, he should have realized that only in a socialist economy with public ownership of “the commanding heights of the economy” can fair value of political liberties be realized.

¹⁶ Here Rawls continues, “We must ask whether a liberal socialist regime does significantly better in realizing the two principles.” As I contend in the text, if “the fact of domination” is as powerful a force in a property-owning democracy as Edmundson believes, we also must consider why its effects would be contained within a liberal socialist society, as well as a democratic socialist regime of the kind Edmundson advocates. Moreover, even if Edmundson is correct and the fair value of political liberties can only be realized in a socialist system, this still does not decide in favor of socialism, since the relevant question is, which economic system can best realize the ends and requirements of justice as fairness *as a whole*.

Rawls discusses the “curse of money” in American politics (PL 448) and suggests that it extends to welfare state capitalism even under ideal conditions. He also mentions in passing, in his discussion of “special psychologies” of envy and spite (TJ §§ 80-81) a negative “special psychology” he calls “attitudes of domination and submission” (TJ 541/474) and says these attitudes must also be considered in assessing the stability of justice as fairness.¹⁷ Edmundson refers to these attitudes as “the will to dominate” and says they and “the fact of domination” must be considered as among “the circumstances of justice” known in the original position in fashioning both the principles of justice and the institutions that they require at the constitutional stage.¹⁸ He contends the fact of domination runs throughout Rawls’s concerns for guaranteeing the fair value of the political liberties and citizens all having the fair chance to influence the democratic process.¹⁹ In his book Edmundson also expresses uncertainty about whether “Rawls accepted Kant’s view that “radical evil,” – that is, a desire

¹⁷ What Edmundson calls “the will to dominate” is further mentioned in Rawls’s lectures on Hobbes, in connection with the human tendency Hobbes called “pride and vainglory,” and it is implicit in Rawls’s discussion of Rousseau’s account of improper *amour propre* which prevails under conditions of political and economic inequality.

¹⁸ See Edmundson 2017, 87.

¹⁹ Edmundson 2017, 60-64. Sometimes Edmundson says, quoting Rawls, that fair value requires “a roughly equal chance of influencing the government’s policy” (53 quoting Rawls JF 46), and at other times Edmundson says “Fair value of political liberty requires rough equality of political influence” (57). These are quite different, as Ronald Dworkin contends, in that equal political influence is not realistically possible even assuming equality of wealth, given differences in citizens’ intelligence, persuasive power, celebrity, interest and engagement with politics, and many other factors. Rawls himself says that in order for the political liberties to have “approximately equal worth” citizens should have “roughly an equal chance” (JF 46), or “fair opportunity” (PL 327, JF 149) or “fair equal opportunity” for political influence (JF 177).

to dominate others – is simply a metaphysical fact about human beings.”²⁰ He seems to attribute to Rawls Hobbes’s view that “the anxiety about being dominated naturally generates a desire to become *indomitable*.”²¹

I do not think Rawls regarded the desire to dominate others as a metaphysical or natural fact about the human condition, nor did he think the fact of domination widespread enough in a well-ordered property-owning democracy to undermine its stability. Given Rawls’s rejection of the doctrine of original sin as “morally wrong... even repugnant,”²² his positive comments on both Rousseau’s rejection of Hobbes’s pessimism about human nature (Rawls 2008, 205, 208-209) as well as Rousseau’s argument that human nature is good and that unnatural *amour propre* is based not in human nature but in social inequality, (*ibid.*, 198-200), and other similar suggestions²³ there is little grounds for holding that Rawls regarded the desire to dominate as a psychological tendency of persons that is triggered by the institution of private property alone. Rather, like Rousseau, it is great inequalities of social class and private property that underlies political inequality and corruption on Rawls’s view. These excessive inequalities, Rawls assumed, could be kept in check, if necessary, by “steeply

²⁰ Edmundson 2017, 83, citing as evidence Rawls’s *A Brief Inquiry into the Meaning of Sin and Faith* (Harvard: Harvard University Press 2009), Rawls’s youthful senior thesis on sin and evil.

²¹ Edmundson 2017, 83. Edmundson here refers to “cf. LHPP 49-50” which is Rawls’s *Lectures on the History of Political Philosophy*. Rawls in the passage referred to is discussing Hobbes’s state of nature and the reasons behind Hobbes’s thesis, that a state of nature is or tends toward a state of war.

²² Rawls, “On my Religion,” in *A Brief Inquiry into the Meaning of Sin and Faith*, 263.

²³ See for example Rawls’s negative comments about the darkness of Augustine’s and Dostoyevsky’s views about human nature, “St. Augustine and Dostoyevsky are the two dark minds in Western thought, and the former has shaped it profoundly” (Rawls 2008, 302).

progressive taxes” on income and wealth, TJ 246, cf. JF 161 – to protect the fair value of political liberties and FEO in a property-owning democratic society that seeks to widely distribute economic wealth among all society’s members. It is *excessive inequality* of private property that undermines political equality and democracy. Private property alone does not lead to a will to dominate and excessive inequality of wealth, and does not cause inequality of fair chance for political influence.

It is unclear how central the special psychology “will to dominate” is to Edmundson’s thesis that “the fact of domination” is the inevitable consequence of a private property system. Assuming there is such a special psychology that in all private property economies – even in a POD designed to considerably mitigate inequality – It is highly questionable that its pervasive effects would be limited to private property systems and not also apply to socialist economies as well. Surely the will to dominate, whether politically, socially, or economically – if powerful enough to survive the rough equalization of private capital within a POD – would evidence itself in other ways than simply through private ownership of capital. Any market system including liberal socialism would be prone to its effects due to competition among firms and industries, regardless whether the means of production were publicly or privately owned. Moreover, any non-market socialist system – where the government owns and controls “the commanding heights of the economy,” – could well be even more prone than liberal socialism to “government control and bureaucratic power” (JF 150) and political leaders’ will to dominate because of the effects of concentration of economic and well as political power in the hands of governing elites who gain the trust of democratic majorities.

Like Rawls, I am not so pessimistic about human nature to assume that the human propensity to want to dominate politics for

personal gain or other reasons would be pervasive in a property-owning democracy that mitigates wealth inequalities and monitors wealth's influence in order to maintain the fair value of the political liberties. But perhaps this negative psychology, the will to dominate, is not necessary to Edmundson's assumption of the "fact of [political] domination" by private capital in private property economies. Instead of a being motivated by a will to dominate, owners of private capital may just want to increase their profits by any legal means available; then the unequal influence of private capital on politics could be simply an unintended side effect of otherwise reasonable persons' attempts to influence political representatives and public opinion in ways favorable to themselves. Edmundson's argument that POD inevitably falls prey to the "fact of domination" is perhaps better understood in this form – political domination is still an unintentional side effect of private ownership in any society. Still, I do not see why this fact would be any more likely in a well-ordered property-owning democracy than it would be in a competitive liberal socialist economy of the kind Rawls also endorses, or in the kind of democratic socialism Edmundson endorses with state ownership and political control of "the commanding heights of the economy."

Finally, however much Rawls may have regarded attitudes of domination and submission as prevalent under conditions of political and economic inequality, he did not believe that within a property-owning democracy that conforms to his principles of justice, that the *will* to politically dominate would have significant presence. I think the same is true about the fact of political sociology Edmundson puts forth, the fact of domination. Since inequalities are constrained within reasonable bounds in a POD that conforms to Rawls's principles, the sense of justice of free and equal democratic citizens should neutralize the effects of such negative psychologies and tendencies among reasonable citizens.

Assuming that the sense of justice of democratic citizens is as robust as Rawls contends in *Theory* chapters 8-9 and elsewhere, there should then not be a sufficient number of unreasonable citizens prone to dominate politics for personal gain to undermine the fair value of political liberties and the stability of a well-ordered society. Moreover, Rawls clearly thinks that the widespread and fair distribution of ownership of economic wealth, the dissolution of concentrations of capital and the elimination of a capitalist class that owns and controls means of production, joined together with public financing of political campaigns and public forums, mitigating excessive economic inequalities, and other measures, would all together be sufficient to guarantee the fair value of political liberties and equal opportunity for political participation and influence in a property owning democracy. So, the “fact of domination” should not be any more influential in a property-owning democracy than under liberal or democratic socialism and in neither case sufficient to undermine the stability of a well-ordered democratic society. Edmundson recognizes that Rawls makes arguments along these lines, and has more to say in his book in support of his position than I can respond to here.

III

The Fair Value of Political Liberties

Next, I’ll briefly consider equal political liberties and their fair value, in order to suggest that Edmundson may well exaggerate the requirements of the fair value of political liberties. We do not have a clear idea of what rough equality of chances for political influence could mean and why it is so important, independent of a framework of some kind. Rawls nowhere says that fair political value requires adopting the economic system that maximizes citizens’ equality of chances to exercise political influence – indeed

he implicitly denies it in saying that the basic liberties do not maximize anything (PL 332). Equal political liberty and its fair value is but one of the equal basic liberties and must be synchronized with the requirements of others into a coherent scheme. Though Rawls in *Theory* said that is this to be “the most extensive total system” of basic liberties compatible with similar liberties for all (TJ 266) he later discards that maximizing criterion for lack of coherence (PL 331) in favor of one that requires a system of basic liberties that is “fully adequate” to the “development and full and informed exercise” of the moral powers. (PL 332) Rawls says that fair value requires “approximately equal or at least sufficiently equal” worth of the political liberties for all citizens, “in the sense that everyone has a fair opportunity to hold political office and to influence the outcome of political decisions.” He notes that this corresponds with fair equality of opportunity for access to educational and employment positions. (PL 327) Fair equal opportunity is not perfect equality of opportunity, which would be better approximated, he says in *Theory*, if society were to eliminate the family (TJ 447-448) and (one might add) most other forms of personal association. But this would violate basic liberties of freedom of conscience and association, severely constraining individuals’ pursuit of important human values. The idea of perfect equality of fair opportunities for political influence incurs many of the same problems. We might better approximate perfect equality of (chances for) political influence by restricting certain individuals’ educational and cultural opportunities, especially those who are more talented or otherwise naturally gifted – since greater than average education considerably affects citizens’ opportunities for political office and influence. Even if the first principle with fair value of political liberties has priority over fair equality of opportunity, this cannot be understood to deny individuals the freedom to take advantage of educational and cultural opportunities that are crucial for the

adequate development and full and informed exercise of their moral powers, and therewith the effective exercise of basic liberties themselves, in, for example, informed democratic deliberation and many other activities. As we saw with the interactive effects of the difference principle in making possible the democratic interpretation of fair equal opportunity and of the first principle of justice itself, the principles of justice have to be interpreted as a cohesive whole, so the priority of one principle over another cannot be allowed to eclipse entirely a subordinate principle's requirements and influence.

Thus, even if we conclude that the fair value of political liberties – in the sense of equal chances for political influence – could best be fully realized in a democratic socialist society without private property in means of production, we still have to consider the effects this would have on the effective exercise of other basic liberties, as well as its effects on the fair equality of diverse opportunities for education, employment, and culture, and the consequences for the position of the least advantaged members of society. If a democratic socialist economy that achieves fair political value results in circumstances where the economy does not thrive and the least advantaged cannot effectively exercise their other basic personal liberties; or if democratic socialism undermines the creation of diverse employment, cultural and educational opportunities that individuals have fair equal opportunities to take advantage of and compete for, then these are sufficient reasons for a society to abandon democratic or liberal socialism and adopt property-owning democracy. The priority of the first principle over the second surely cannot mean that the establishment of the optimal conditions for realizing the fair value of equal political liberties has absolute priority over the effective exercise of all other equal basic rights and liberties, or the fair distribution of diverse opportunities and also of income and wealth, powers and prerogatives, and the social bases of self-

respect. Again, social and political justice does not require maximizing the worth of political liberty or any other specific liberty, or liberty itself. Instead, Rawls says, “Taking the principles together, the basic structure is to be arranged to maximize the worth to the least advantaged of the complete scheme of equal liberty shared by all. This is the end of social justice.” (TJ 205)

Here it is also relevant that Rawls says the equal political liberties are in large part instrumental to realizing the other basic liberties and political values (TJ 205). He does not insist that democratic participation is intrinsically valuable for all and takes precedence over all other basic liberties or their effective exercise. Indeed, he suggests the opposite, that “the various liberties are not on a par...” and that under certain historical conditions, maintaining equal political liberties is not as essential as maintaining freedom of the person and freedom of conscience for all. “The case for certain political liberties and the rights of fair equality of opportunity is less compelling”.²⁴ Fair opportunity for equal political influence is then but one primary social good among many others, and it does not dominate the fair and adequate distribution of the rest.

This raises the question: Why is equal political liberty and “roughly equal access” to the political process (PL 328) so important within the scheme of basic liberties and justice as fairness as a whole? What is its primary role? Among the primary reasons Rawls sets forth to justify equal political liberties and their fair value are: to enable individuals to publicly voice, represent, and defend their own interests and conceptions of the good; to enable them to fully exercise and adequately develop their moral capacities for a sense of justice; to educate and enlarge citizens “intellectual and moral sensibilities,” so they take will others’ interests and the

²⁴ TJ 247/217 rev.

public good into account; and to maintain citizens' sense of self-respect as free and equal citizens (TJ 205-206, 477-478). More generally, political equality with "sufficiently" fair equal opportunity for political influence is a fundamental condition of *social equality* – "equality as it applies to the respect owed to persons irrespective of their social position" – as are all the equal basic liberties, as well as fair equal opportunity.²⁵ To realize these multiple aims Rawls says "property and wealth must be kept widely distributed," public monies must be supplied to encourage free public discussion and fund political parties and campaigns, private economic interests must be discouraged if not barred from influencing campaigns, along with other measures (TJ 198). Taking these and other reasons for political equality Rawls discusses into account, it is difficult to see why fair value can *only* be adequately realized under conditions of public ownership and control of "the commanding heights of the economy," given the alternative of a property-owning democracy that widely and fairly distributes ownership and control of these and other productive assets and resources. And even if fair political value of equal political liberties can be better realized in a socialist society than in property-owning democracy, I've argued, that still does not settle the issue. Citizen's opportunities to effectively exercise their remaining basic liberties, the diversity of fair opportunities open to them, and the economic position of the least advantage all still have to be considered before it can be decided that socialism on balance consistently outweighs property-owning democracy regardless of social, economic, cultural, and historical conditions.

²⁵ TJ 447-448. Niko Kolodny emphasizes the central role of social equality in justifying the political equality of citizens in a democracy. See Kolodny 2014.

IV

Property-Owning Democracy and the Fair Distribution of Economic Powers and Prerogatives

Edmundson devotes a large part of his comments discussing my differences and departure from Rawls's account of property-owning democracy, most notably my suggestion ("friendly amendment" to Rawls, I call it) that fair equality of opportunity should include the fair opportunity to exercise economic agency, not simply by ownership of economic wealth (already guaranteed by the difference principle), but also through the exercise of economic powers, prerogatives, and responsibilities in occupational positions and economic institutions.²⁶ In a liberal socialist society, citizens would also be entitled to certain powers and prerogatives of economic agency on my account, even if not entitled to substantial ownership of a fair share of economic wealth, which is largely publicly owned (aside from personal property, small businesses and tools and equipment, and savings from income).

Social and economic powers and prerogatives are the least discussed of the primary social goods in Rawls's works. Rawls sometimes calls these 'powers and prerogatives of authority,' (TJ 93/) and more fully 'powers and prerogatives of offices and positions of responsibility in the political and economic institutions of the basic structure.' (PL 181, Rawls 1999, 454)²⁷ He

²⁶ I address the issue of guaranteed social and economic powers and prerogatives in my replies to Thomas and Salvatore as well.

²⁷ Rawls says alternatively "*particularly* those in the main political and economic institutions" (Rawls 1999, 362), which would suggest powers in other institutions in addition to political and economic. In the *Restatement* Rawls adds

says, significantly for my position, “*Powers and prerogatives of offices and positions of responsibility are needed to give scope to various self-governing and social capacities of the self*”.²⁸ This statement implies there are strong reasons to guarantee all citizens at least an adequate share of powers and prerogatives in economic institutions, including their workplace. This is, I would argue, already implicit and guaranteed by the difference principle, as I discuss below. I go one step beyond this to argue that fair equality of opportunity itself should guarantee substantial opportunities to exercise powers and prerogatives of economic control in one’s workplace, for reasons discussed below. Here it’s noteworthy that Edmundson is skeptical of workers having such powers of economic agency, even in a socialist economy.

To avoid confusion, which is frequent here, by ‘powers’ Rawls does not mean *power* in the sense of control, dominance, or the ability to causally influence political, social, or economic outcomes.²⁹ He denies that.³⁰ Instead by ‘powers’ Rawls means *legal and institutional powers*, as clarified in H.L.A. Hart’s works and

the term ‘authority’ and refers to “Powers and prerogatives of office and positions of authority and responsibility” (JF 58).

²⁸ “Kantian Constructivism in Moral Theory,” Rawls 1999, 313 (emphasis added).

²⁹ Alan Thomas in his book, *Republic of Equals* (Thomas 2017, 261) approvingly cites a reply by John Tomasi to my argument that workers should have powers and prerogatives in their workplace. Tomasi says that an increased wage is also a form of power that workers may be more satisfied with than with rights to vote and participate in decisions in their workplace. Perhaps, but increased wages are not economic powers but are a different primary good, income and wealth.

³⁰ Rawls says: “That political and economic power is a primary good I never meant to say; if at certain points the text will bear this interpretation, it needs to be corrected”, “Fairness to Goodness,” in Rawls 1999, 273.

elsewhere in legal philosophy and jurisprudence.³¹ Offices and positions of authority and responsibility carry certain powers and prerogatives with them that are needed to carry out the duties and responsibilities of the position (e.g. mayor, town manager, teachers, coaches, or members of corporate boards, business managers, foremen and other employees). Likewise, legal ownership of property is normally construed as coming with certain powers and prerogatives of use and control, which one might exercise, lease or delegate to others. There are many powers and prerogatives of use and control that go with economic production and ownership of resources. In American capitalism, these powers normally are exclusively controlled and then delegated by managers, indirectly by boards of directors of firms, and eventually majority owners of shares. That's a problem I seek to address in my book.

Rawls says, "The primary social goods that vary in their distribution are the powers and prerogatives of authority and income and wealth." So, Rawls clearly thinks that inequalities of social and economic powers and prerogatives are justified, so long as the social and economic positions exercising them are open and there is fair equality of opportunity to compete for these positions. But it would seem that the *distribution* of social and economic powers and prerogatives *themselves* among the many offices and positions that exercise them is ultimately to be governed by the difference principle. For each social and economic position in which individuals are employed and have fair opportunity to compete for, there is the question of which powers and

³¹ "Hart says of powers conferred on private persons that they provide individuals with facilities for achieving their aims; they bestow upon them powers to create by certain procedures a structure of rights and duties that the courts will enforce. The power to make a will is an example. Powers so defined seem naturally to belong with liberties and opportunities as primary goods." Rawls 1999, 273 n.

prerogatives that specific position should have the authority or responsibility to exercise? Though he does not specifically address this question, this seems to be Rawls's position with respect to the fair distribution of social and economic powers, prerogatives and responsibilities, just as it is with the distribution of income and wealth. How this should be interpreted and realized, including questions of which powers and prerogatives should go with particular positions, is not addressed by Rawls. Clearly, it is not a question that can be left up purely to considerations of economic or social efficiency, but is to be determined by the difference principle. I do not think that the difference principle allows that there be employment positions with absolutely *no powers or prerogatives*, leaving workers with no discretionary control over themselves in their workplace. This is not to say that the difference principle itself implies any *specific* guarantee of social and economic powers and prerogatives to individual citizens. But it does imply however that at least *some guarantee* of such powers and prerogatives for all workers and employees is implicit in "the index" of primary social goods that are governed by the difference principle. For again, as Rawls says, "powers and prerogatives of offices and positions of responsibility are needed to give scope to various self-governing and social capacities of the self" (Rawls 1999, 313)³² (I'll say more about the difference principle's distributive role with respect to powers and prerogatives shortly).

But first, regarding Edmundson's objection that I err in contending that, not simply the difference principle, but fair equality of opportunity itself guarantees all working citizens some degree of powers and prerogatives in their place of work: I first

³² The index of primary goods distributed according to the difference principle includes income and wealth, social and economic powers and prerogatives, and the social bases of self-respect (which qualifies the first principle and FEO as well).

suggested in my 2007 book, *Justice and the Social Contract* (Freeman 2007a, 106-107) that among the fair opportunities guaranteed by FEO should be not simply opportunities to compete for educational and employment positions, but also the fair opportunity to directly exercise economic powers and prerogatives themselves. The idea was to parallel the fair opportunity to exercise equal political influence that is guaranteed by the fair value of the political liberties in the first principle, with a fair opportunity to exercise economic agency and influence in ways that may not be adequately guaranteed by the difference principle.

My reasons for initially making this claim, which were developed in greater detail in *Liberalism and Distributive Justice* (Freeman 2018a, 159-163), were to counter arguments (emphasized by John Tomasi, Jason Brennan and others) that, because capitalism seeks to maximize overall wealth in society, welfare state capitalism is in a better position to offer the least advantaged workers greater overall combined income and wealth than a property-owning democracy. Presumably, in a property-owning democracy satisfying justice as fairness, the vast majority of least advantaged workers might be inclined to alienate whatever claims they have to ownership and control of economic wealth with the risks this involves, as well as to any powers and prerogatives they may be entitled to in their workplace, in order to obtain the greater increases to income they otherwise would have in welfare state capitalism. But if so, then it should follow (advocates of capitalism contend) that the least advantaged if given the choice might be said to be better off in WSC with higher income supplements than they would be in POD with less income and greater economic powers. It was to escape this conclusion that I suggested as a solution that workers and employees' rights to exercise economic powers and prerogatives of control within their workplace should be regarded as guaranteed not simply by the difference principle, but by fair equality of opportunity itself. For

given FEO's priority over the difference principle, and since fair equal opportunities are inalienable on Rawls's account – since one cannot alienate what are regarded as conditions of social equality – workers would not then have the legal capacity to alienate their rights to exercise economic powers and prerogatives in a property-owning democracy – not any more than they could alienate their rights to exercise their equal political powers to participate in the democratic political process.

There are stronger more positive reasons to guarantee citizens' fair opportunities to exercise economic powers than these, which I discuss in my book – such as the social conditions of self-respect, free and equal persons' desire for meaningful work, and non-exploitation of workers as a condition of mutual respect. Rather than discuss these at length here, perhaps a better way to depict these kinds of considerations and the problem I was trying to address is this: as Elizabeth Anderson forcefully argues in her recent book, *Private Government*, workers and employees are legally guaranteed absolutely *no economic powers and prerogatives whatsoever* under the default laissez-faire employment contract that governs civil law in the U.S. If workers can attract or bargain for any powers, prerogatives and responsibilities, then freedom of economic contract gives them the opportunity to do so. But the least advantaged unskilled workers – a large portion of the workforce – are by law offered “take it or leave it” terms of employment that put them under the complete control of their employers, not just at work but also outside it, except for their legal right to quit their job at any time and exit the relationship (involuntary servitude no longer being legally permitted in the U.S. under the 13th Amendment). If employees exercise any powers and prerogatives at work, they are specified by employment contracts or within labor union agreements with firms or industries. The contemporary default employment contract in the U.S. is with few exceptions still grounded in the 19th century laissez-faire model

made possible by common law and state legislation, with no legal protections in the workplace except those employment discrimination and workplace safety regulations added in the second half of the 20th century (by the 1964 Civil Rights Act and OSHA regulations).

As Anderson argues, the vast majority of unskilled workers are at the mercy of their employers, many in a position of virtual involuntary servitude during the normal workday, with their activities outside work subject to surveillance and control as well (including their political activities, speech, sexual preferences, Facebook postings, smoking, drug use, etc.). (Anderson 2017, 39) Their only remedy for employer abuse of their personal integrity is their right of exit from their job, with the option of joining a different but equally despotic workplace. The circumstances of the many migrant workers who are in the agricultural, meatpacking, janitorial, landscaping, construction, and home cleaning services, etc. is even worse, since they are subject to abuse and blackmail by employers who threaten to report them to Immigration services if they do not comply with employers' every demand. Employers are as a matter of course legally granted arbitrary, unaccountable control over their employees' lives, and often abuse this power to dominate many workers lives, not simply at work but in their off-hours as well.

This is a shameful consequence of the 19th century laissez-faire capitalist employment contract that still governs American law and employment relations. It is not slavery, because employers cannot assault and physically abuse employees, and it is not serfdom either since modern workers can quit and walk away most any time they choose. But during the workday itself, and often outside it, the control that employers exercise over their workers, and the absence of powers workers themselves may exercise, resemble economic serfdom. Anderson calls it “a form of authoritarian private

government, in which, under employment-at-will, workers cede *all* their rights to their employers, except those specifically reserved for them by law” (Anderson 2017, 60). It is this kind of legalized dominance and subjugation that employers exercise over least advantaged workers’ lives in particular that I was primarily concerned with addressing in arguing that employees should be guaranteed fair equal opportunities to exercise economic powers and prerogatives of control over their person and activities in their workplace and also outside of work – including certain basic powers that are inalienable and non-fungible, and thus cannot be bartered away in the face of employers’ monopoly on bargaining power in employment contracts with the least advantaged workers.

An alternative solution to this “fungibility problem” that is perhaps more in keeping with Rawls’s own position than my suggestion is to appeal to the difference principle itself and its requirements with respect to the regulation of employment contracts. A society can recognize and enforce the inalienability of certain fundamental powers and prerogatives of economic agency that are guaranteed to all workers by their fair share of the index of primary goods. The index of primary goods under the difference principle includes the appropriate combination of income, wealth, and social and economic powers and prerogatives, tempered by the social bases of self-respect. Rawls had nothing definite to say about how to construct the index of primary goods to be distributed by the difference principle and that is used to determine the social minimum. One way to understand the role of self-respect here is to hold that the index of primary social goods is to be determined by giving due consideration to the institutional bases of self-respect that results from the combination of the more tangible primary goods constituting the index. Here the relevant question in determining the social minimum should then be: what combination of income, wealth, and social and economic powers and prerogatives is necessary to sustain the moral powers and sense

of self-respect of free and equal moral persons in a well-ordered democratic society? Whatever the appropriate combination may be of these primary goods in constituting the index, I think it is fair to assume that the difference principle neither presumes nor allows the laissez-faire employment contract that is taken for granted in most American jurisdictions to determine individuals' share of the index of primary goods under the difference principle. We already have some few legal measures that protect certain powers and prerogatives of workers in regulated welfare state economies. Most jurisdictions even within U.S. capitalism – where the laissez faire employment contract has long been the default assumption – require health and safety measures that employers are required to maintain as well as no more than a required 8-hour workday or 40-hour work week, with added requirements of overtime pay if workers are expected to work longer hours. Though often abused, these are not legally fungible prerogatives that employers can demand that workers surrender or bargain away in exchange for being hired or increased wages.

A solution to this fungibility problem that can be resolved by the difference principle itself is then to regulate employment contracts so that certain fundamental powers and prerogatives of economic agency are legally guaranteed all workers – the level that is necessary to sustain the self-respect and therewith full exercise of the moral powers of representative free and equal citizens in a well-ordered democratic society. However, this self-respect criterion is to be specified, we can safely presume that it would restrict laissez-faire freedoms of the employment contract, so that any attempted alienation of fundamental powers and prerogatives in the workplace would be legally void and unenforceable. Just as workers cannot be required by employers to alienate their health and safety protections under current U.S. law, they should not be allowed be put under duress by threats of losing their employment if they do not alienate the fundamental powers and prerogatives of

control they should have in their work as a condition of employment. The only potential shortcoming of this position perhaps is that the fundamental powers and prerogatives to be guaranteed to employees by the institutional bases of self-respect criterion may largely involve worker protections and not rise to the level of positive powers, prerogatives, and responsibilities that constitute a more robust conception of economic agency within the workplace. That provides some reason to turn to the fair equality of opportunity principle to guarantee certain additional powers and prerogatives for all workers in either property-owning democracy or liberal socialist societies.

In any case, whatever these additional powers and prerogatives may be, they would not be so stringent as to require that all firms in a property-owning democracy be worker-owned-and-managed-firms. That is certainly one form of employment in a property-owning democracy that guarantees workers certain powers and prerogatives in their workplace; and perhaps, as Rawls says, if economically viable perhaps it ought to be politically supported and subsidized by governments until it has established itself. But large shareholder-owned firms with co-determination rights for workers (and public representatives as well) is another alternative, as are a variety of smaller privately- owned businesses, individual proprietorships, partnerships, and so on.

V

My Position on Economic Agency: Not Syndicalism

Edmundson however reads me differently (as does Thomas). He interprets my remarks regarding worker's rights to economic powers and worker-owned and managed firms as an endorsement

of a syndicalist interpretation of POD.³³ It is not clear what passages he is referring to support this claim. It was not however my intention to argue that either Rawls's principles of justice or my own "friendly amendment" to them require democracy in the workplace with worker-owned-and-managed firms under property-owning democracy, nor do I think my text bears out Edmundson's syndicalist interpretation of my position.³⁴ My remarks are based in Rawls's review of the institutions of a property-owning democracy and his endorsement of J.S. Mill's "idea of worker-managed firms [as] fully compatible with property-owned democracy" (JF 176, 178). Rawls's interpretation of liberal socialism also largely but not exclusively involves worker controlled and managed firms as well.³⁵ But Rawls also endorses

³³ Edmundson says: "One might call Freeman's a 'syndicalist interpretation of property-owning democracy.' Because it has rather scant textual support in Rawls, it too has to be seen as a 'friendly amendment.'"

³⁴ Perhaps the offending passage is the following (Freeman, 2018, 143, emphases added).

POD seeks the widespread distribution of productive wealth, as well as economic powers and positions of responsibility among those actively engaged in production. Here Rawls says POD encourages either worker-owned-and-managed firms or cooperatives (JF 176, 178 [cf. Rawls 2008, 316]), or "share economy" arrangements, with workers' partial ownership of firms with rights to share in profits (JF 72.) Finally, though he says there is no basic right that workers own and control the means of production, *Rawls mentions the importance of democracy in the workplace* and in shaping the general course of the economy (JF 114, 178). Given these and other claims, *property-owning democracy for Rawls seems to include some degree of worker prerogatives and responsibilities, if not worker control, as well as workers' participation in firm's governance, for example by voting for management and having representatives on boards that make major decisions (much as Mitbestimmung, or co-determination rights.)*

³⁵ (TJ 280, TJ 266, 273, JF 138. Rawls mentions liberal socialist workers' councils on TJ 266 and 280. Rawls says: "[A] liberal socialist regime can also answer to the two principles of justice. We have only to suppose that the means of production are publicly owned, and that firms are managed by workers' councils,

“share economy” arrangements within property-owning democracy where “worker’s compensation is based on an index of the firms’ market performance” (JF 72).³⁶

While worker-owned and managed firms might then be a significant option in a POD that satisfies Rawls’s principles – as he

say, or by agents appointed by them. Collective decisions made democratically under the constitution determine the general features of the economy, such as the rate of savings and proportion of society’s production devoted to public goods.” TJ 280. See also JF 138, where Rawls refers to socialist regimes where “economic power is dispersed among firms, as when, for example, a firm’s direction and management is elected by, if not directly in the hands of, its own workforce.” Finally see Rawls 1999, 277, where Rawls says the principles of justice “may be realized either by associational socialism or property-owning democracy.” Edmundson in his book tends to de-emphasize democracy in the workplace and even liberal socialism in Rawls, advocating instead a kind of democratic socialism with democratic control of major industries, which he suggests is also compatible with Rawls’s position. I am skeptical of Edmundson’s democratic socialist interpretation of Rawls given Rawls’s emphasis on both worker-managed firms and the efficiency of markets in allocating productive resources under liberal socialism (TJ 241).

³⁶ He is referring here to Martin Weitzman’s *The Share Economy*, which argues for workers being partly compensated with a share of a firms’ profits or revenues, or ownership of shares in the firms for which they work. On employee stock ownership see Piketty 2020, 972-975, 509 and 509n. He contends that, combined with the German model of co-management with workers and shareholders each having half the seats on boards of directors of firms, employee stock ownership plans would result in predominantly worker-controlled firms, which he endorses. What Piketty calls “participatory socialism” resembles, as he says, Meade’s property-owning democracy (*ibid.*, 970n). But, like Edmundson, Piketty also favors limiting shareholder power in health, culture, transportation, environmental and other major sectors of economy; though instead of public ownership, Piketty suggests adopting something like the model of trustees of private foundations such as universities exercising fiduciary roles in such industries – which would keep with, if not Meade’s idea of “property owning democracy,” at least the idea of a “private property democracy,” a term Rawls used rather than property-owning democracy on at least one occasion. See, “Social Unity and Primary Goods,” Rawls 1999, 363.

himself says (JF 176,178) – it is not the only way that employees can exercise economic agency in their place of work and employment in a property-owning democracy. Worker-owned and managed firms are difficult if not unfeasible in some capital-intensive industries (e.g. oil tankers) which have few workers but require substantial risks and/or vast sums of money to finance – which workers are not in a position to undertake. Moreover, there is an efficiency problem in that workers will be reluctant to employ new workers even if it would be profitable to do so, since it would diminish the average share of compensation. Meade suggests as a remedy to this problem that new workers be paid only their marginal product for a time period. Whether these and other problems could be resolved to make worker-owned and managed firms the predominant model for the firm, as Mill maintained, is not crucial to the argument for giving workers ways to exercise economic powers and responsibilities in their workplace, for there are other ways to do this.

What I mainly had in mind in applying fair equality of opportunity to guarantee economic powers and responsibilities is more general: namely, that there be legal guarantees of “ongoing opportunities for citizens to exercise economic powers and some degree of freedom and control in their work, thereby assuming a degree of initiative and responsibility.” (Freeman, 2018, 160). As noted earlier, there are multiple ways for employees to exercise voice and powers of control in employment activities, some of which I discuss in my book (Freeman, 160-161). Worker co-determination rights to vote for management and have representatives on boards of private firms should be one such requirement in large firms, which would remedy the current corporate practice in the U.S. of board members’ focusing only on maximizing shareholder value at the expense of the health and

well-being of employees as well as the environment.³⁷ Another legally mandated power should be work councils within larger firms, where workers discuss and their elected representatives participate in making decisions regarding work rules on such matters as division and rotation of tasks, safety measures, breaks and free time, and other regulations within the workplace. Such work councils also are guaranteed by German and other Northern European legal systems, and would be a protection against the constant abuse and domination of many unskilled and especially migrant workers that is the norm in American agriculture, sales, and industry. As I say in this regard, “The opportunity for less skilled workers to exercise developed capacities not just in their leisure time but in their workplace as well, by overcoming the subservience of the wage relationship through the assumption of economic powers and responsibilities, can play a crucial role in providing [them with] social bases of self-respect,” (Freeman 161) – which is, Rawls says, “perhaps the most important primary social good.”

Aside from worker-managed or co-managed firms, in any POD or liberal socialist society that complies with Rawls’s principles of justice, individuals would have the freedom to work as individual worker-proprietors (roofers, landscapers, plumbers, electricians, farmers, dentists, doctors, lawyers, accountants, etc.), or as entrepreneurs who create and run a business.³⁸ Also workers should have the freedom to form business partnerships with others. Nothing prevents small businesses of this kind under either

³⁷ Since 1974 such *Mitbestimmung* rights have been mandated in Germany for firms over 500 employees. In Denmark they apply to firms with over 20 employees.

³⁸ John Tomasi in *Free Market Fairness* lauds the capitalist freedom to create small businesses such as Amy’s “Pup-in-a-Tub” dog grooming business. There is nothing to discourage such private businesses in property-owning democracy, or even liberal socialism.

property-owning democracy or liberal socialism as Rawls or I imagine it. The question is rather whether, once private firms reach a certain size (over 25, 50, 250, or more employees, for example), or gain disproportionate economic power compared with others, should rights of co-management be afforded to their employees? Or alternatively should they be publicly owned in a liberal socialist economy, with fair compensation going to their owners? The endorsement of privately owned and managed small businesses and farms in a socialist economy appears to be Edmundson's view as well. It is "the commanding heights of the economy" that are to be publicly owned and publicly managed on his view, instead of managed or co-managed by workers themselves. If mandatory co-determination in privately owned firms of over, say, 500 workers is required by law, as in Germany, with opportunities for workers to be paid with shares in firms or in mutual funds, I do not see how that limits workers' freedom of occupation and association any more than does Edmundson's public ownership and democratic control of large firms that are "the commanding heights of the economy."

Finally, in this connection, I note in my book Rawls's reference to "meaningful work" on several occasions, and discuss the importance of it to the self-respect of less advantaged workers.³⁹ Labor does not have to require trained skills in order to be meaningful. Instead it needs to be respected and appreciated by others for what it is, essential to society and the well-being of other citizens. Most of the most strenuous and essential labor in any society is performed by unskilled workers: excavation, water and waste disposal works, sanitation, cleaning and janitorial services, agricultural work and food processing; care for children, the elderly, and the severely disabled, and so on. These workers are

³⁹ Freeman 2018a, 162, quoting Rawls, TJ 290/257-258 rev.; also 529/463-464 rev.

taken for granted and not respected in America, largely because of a surplus labor supply that is not protected under the default *laissez faire* labor contract. In many European countries, where unskilled labor receives far more recognition and respect for its crucial role in maintaining the public good and well-being of all members of society, workers are not made to feel humbled by what they do, as is so often the case in American capitalism where they are unprotected, exploited and abused by profit-maximizing employers who are subject to no regulation. Work can be monotonous but still meaningful if recognized and respected for what it is, as being crucial to society and its members, and workers are respected for their crucial contributions, not taken for granted, exploited, and professionally abused. Providing unskilled workers with protections, and opportunities to exercise powers and responsibilities while on the job would go a long way towards elevating others' respect for unskilled workers and their self-respect for themselves in American society.

VI

Freedom of Occupation and Free Association

Within One's Occupation

Finally, like Alan Thomas, Edmundson contends here and also in his book that an enforced system of worker owned and self-managed or co-managed firms violates freedom of occupation and association (Edmundson 2017, 32). He raises this issue here suggesting that if everyone were required to work for shareholder firms with co-determination (or presumably also in worker-managed firm) then freedom of association for workers and

entrepreneurs would be violated.⁴⁰ The implication is that workers in every occupation would have no choice but to join some co-managed firm, and could not work in private partnerships or as individual practitioners or entrepreneurs, or in private foundations not controlled by their employees.

Again, as with syndicalism, nowhere do I suggest that all shareholder firms or private foundations, regardless of size, require co-determination measures that include a substantial percentage of their workers/employees. Just as Edmundson does not appear to hold that all means of production in a socialist economy should be publicly owned and managed but that individual proprietors, partnerships, and entrepreneurs should be allowed to flourish and exercise their creative abilities, (Edmundson, 2017, 39-42) I believe too that in a POD or liberal socialism there should be several permissible forms of occupational association, as well as individual proprietors and practitioners, and that both large worker-managed and co-managed firms with worker councils would be among them, along with traditional privately owned small businesses – restaurants, shops, small manufacturing firms, partnerships – that do not exceed certain size limits (e.g. 25-50 employees). We differ only in that, whereas Edmundson holds that very large firms – “the commanding heights of the economy,” including “systematically important financial institutions” (42) – should be publicly owned and managed, in a POD these normally would be privately owned and managed either by workers themselves or in co-determination arrangements with representatives of private shareholders, or managed by trustees of private foundations who exercise fiduciary roles, on the model of private universities. So, there should be no

⁴⁰ Edmundson says: “Productive enterprises within a market economy are not all of a piece. Co-determination at the level of the firm and profit-sharing cannot be imposed across all firms in an economy without significantly curtailing the rights of both entrepreneurs and those who would like to work for them.”

issues with freedom of occupation and association in one's workplace in a POD, not any more than in Edmundson's hybrid socialist/private property democracy arrangement that allows for smaller privately-owned businesses and private entrepreneurship. Thus, I do not think that my view violates liberal concerns of value pluralism Edmundson raises with respect to different forms of employment.⁴¹

Freedom of occupation and choice of workplace is sometimes included among the basic liberties by Rawls, and sometimes as part of fair equality of opportunity. It is safe to assume that it is guaranteed by both, in several different ways discussed below.⁴² Moreover, freedom of association is clearly one of the basic liberties protected by the first principle. But it is a separate question whether the first principle applies to protect *economic freedoms* to form and join *economic associations* and therewith protects all or most forms of corporate or group organization in employment that individuals would freely contract into. Unlike classical liberals such as Hayek, Friedman and Tomasi, I do not think that either the basic liberty of association or freedom of occupation and choice of

⁴¹ He cites Chiara Cordelli's "Privatization without Profit" and the "externalization function" served by private businesses. See Cordelli 2019.

⁴² Rawls clearly states that freedom of occupation is a basic liberty protected by the first principle in later works: in *Political Liberalism* it is part of freedom and integrity of the person along with freedom of movement, (PL 232, 335, see also 228, 230) and in the *Restatement*, it is protected by "the priority of liberty," (JF 158) and is necessary for the development and exercise of citizens' capacity for a conception of the good. (JF 169) On the other hand, Rawls also mentions free choice of occupation and freedom of movement as being distinct from the basic liberties and instead as connected with or "protected by fair equality of opportunity" (PL 76, 181; JF 58). Finally, in *Theory* he is non-committal or he mentions freedom of occupation simply in connection with (fair) equality of opportunity. (e.g. TJ rev. 240-241, 242, 243, 272; see also, JF 78). Though he refers to "the important liberty of freedom of occupation" (TJ 242) nowhere is it clearly said to be a *basic* liberty, unlike later in PL.

workplace guarantee the economic freedom to contract into business associations or any form of economic organization that individuals choose so long as it does not violate others' rights and liberties. No liberal (as opposed to libertarian) would defend the freedom to form and join cartels or other price fixing schemes that undermine competitive markets – even though no one's rights in particular are violated by such agreements and associations. The prohibition on such free contracts and business associations is justified in order to both preserve equality of diverse opportunities, and also prevent price fixing, monopolization of resources, and further other reasons of economic efficiency compatible with the difference principle. It is also not a violation of freedom of occupation or of association for a society to decline to authorize the many forms of limited liability joint stock corporations so typical of capitalism since the 19th century, requiring instead business partnerships or full liability business corporations. Within a liberal egalitarian view such as Rawls's, the reasons that limited liability joint stock corporations (LLCs, S-corporations, C-corporations, partnerships vs. limited partnerships, joint ventures, trusts, and so on) are justified is *not* a basic liberty of economic association, but rather considerations of economic efficiency and ultimately (in so far as they are justified at all) the difference principle in Rawls's view. These forms of economic association are no more required by the basic liberty of free association and of occupation than are hedge funds, mutual funds, private equity and other closed-end funds, and many other investment mechanisms. If there were a basic freedom of occupational association that extended to protect all forms of business associations along with economic freedom of contract (as Tomasi and classical liberals and libertarians contend) then – since basic liberties cannot be restricted for reasons of economic efficiency – democratic decisions to restrict any of these forms of business association and

investment would be violations of the first principle of justice. This is clearly not Rawls's position.

Freedom of economic association in occupational employment is an important freedom that warrants protection, but it is not among the basic liberties. It does not extend to business and occupational associations, certainly not in the same way that freedom of association extends to intimate personal relations and friendships, or religious, political, charitable, and other forms of association protected by liberty of conscience and freedom of thought. Rawls justifies freedom of association because it is complementary to and necessary for freedom of conscience. (PL VIII, 335).⁴³ It is the freedom of *personal and political associations* that is among the personal and political liberties protected by the first principle. Freedom of economic association – in the sense of freedom to form and join most any kind of economic arrangement with others one chooses – is not conceived as a basic liberty any more than is its necessary condition, freedom of economic contract. The reasons for freedom of economic associations are, like freedom of economic contract, largely regulated by the second principle of justice, especially but not limited to the difference principle. It is a mistake to interpret Rawls as classical liberals such as Tomasi do, as holding that the first principle guarantees economic liberties of all varieties in the same way that it guarantees personal and political liberties. This clearly was not Rawls's view, nor is he committed to it in any way (as Tomasi claims) by his justification of basic liberties in terms of background conditions necessary for full and informed exercise of the moral powers of

⁴³ "Liberty of conscience and freedom of association are to secure the full and informed and effective application of citizens' powers of deliberative reason to their forming, revising, and rationally pursuing a conception of the good over a complete life." (PL 335)

practical reasoning. (On this see my reply to Jessica Flanigan's comment).

I agree then with Edmundson (and Thomas) that different forms of economic association are guaranteed by Rawls's principles of justice. But these are predominantly guaranteed by the second principle of justice, including both fair equality of opportunity and the difference principle. Freedom of occupation and choice of workplace, and freedom of economic associations that do not undermine the position of the least advantaged, are preconditions for individuals to have the fair opportunity to take advantage of diverse employment as well as educational and cultural opportunities in an economy that is designed to be to the greatest advantage of the least advantaged. In so far as freedom of occupation and occupational association are basic personal and economic liberties protected by the first principle, *the range of occupations and occupational associations that the first principle gives individuals the freedom to practice and choose among are those that are allowed or guaranteed by the second principle of justice.* This is a further sense in which democratic equality and the democratic interpretation of the second principle reflect back upon and structure the first principle of justice. Unlike freedom of conscience and freedom of thought and expression, individuals do not have the freedom to engage in occupations or join forms of economic association that undermine the economic system designed to realize the second principle of justice, including the difference principle.

Perhaps this is why Rawls often locates "freedom of occupation and choice of careers against a background of diverse opportunities," both among the basic liberties themselves, and also among the primary social goods guaranteed by fair equality of opportunity principle and the second principle of justice. I think the best way to interpret Rawls here is: that individuals clearly should have a basic personal liberty to determine their choice of

occupation and place of work, or if they work, and they have the freedom to leave a particular position (a right of exit) and take up work elsewhere at any time. These are, as Rawls suggests in *Political Liberalism* among the basic freedoms of the person along with freedom of movement, and are protected as constitutional essentials. (PL 228, 232, 335), Like freedom of personal associations, they would also seem to be among the conditions of freedom of conscience as well in so far as our occupations are often among the primary ends we find worthwhile and that give structure and meaning to many individuals' lives. Still, the range of permissible occupations and permissible forms of employment associations that individuals are free to choose among is not to be determined by the principle of equal basic liberties, but by the second principle of justice. Conflating these two separate questions – the range of permissible occupations and economic associations vs. the basic liberty to choose which permissible occupation and economic association one works within – leads to the classical liberal position that *any* economic occupation or form of business association is protected, unless it violates others' basic rights and liberties. This is the result of conflating freedom of association of all kinds with freedom of economic contract. Straightaway one can see that leads to the libertarian position that economic freedoms cannot be restricted even to prohibit monopolies, cartels and other business arrangements that undermine fair equality of diverse opportunities, the difference principle, and economic efficiency itself.

To sum up, in any POD or liberal socialist society individuals should have the freedom to work as individual worker-proprietors, independent laborers for hire, or as entrepreneurs who want to create and run a business of their own, which is suitably regulated by requirements of the difference principle. Also, the freedom to form business partnerships with others in free association is protected, again suitably regulated by the second principle of

justice. Nothing prevents small businesses of this kind under either POD or liberal socialism. The question is rather whether, once firms that reach a certain size – when they threaten to undermine the fair value of political liberties, FEO, or the position of the least advantaged – should rights of co-management and/or rights to own shares be afforded to their employees? Or alternatively, on Edmundson’s democratic socialist position, should they be publicly owned in a (liberal) socialist economy, with fair compensation (perhaps) going to their owners. The latter position appears to be Edmundson’s view, limited perhaps to “the commanding heights of the economy” that are to be publicly owned and publicly managed, instead of managed or co-managed by workers themselves. I will not take a position on the wisdom of democratic socialism at that level. But if mandatory co-determination in privately owned firms that exceed a certain number of workers is required by law instead (as in Northern European countries) – with worker-owned and managed firms as another possible alternative arrangement – I do not see how that limits workers’ freedom of occupation and employment association any more than does Edmundson’s public ownership and democratic control of large firms that are “the commanding heights of the economy.”

I regret that I am unable to respond to many other points of difference with my book that Bill Edmundson discusses in his challenging comment, but I have gone on too long already. I am especially grateful for his critical comments and the opportunity they provide to clarify in my own mind my position.

2

Reply to Alan Thomas

I greatly appreciate Alan Thomas' contribution to this symposium. His views on property owning democracy are very close to my own, though we often arrive at that position from somewhat different philosophical angles and differ in some respects in our understanding of it. Thomas' book, *Republic of Equals: Predistribution and Property-Owning Democracy* (2017) is the most significant and sustained philosophical defense of property-owning democracy yet written. There Thomas joins liberal republicanism's fundamental idea of non-domination in political and personal relations together with Rawls's theory of justice as fairness, to yield a position very similar to Rawls, except for Thomas' contention that property-owning democracy is mandated by Rawls's principles of justice, and that liberal socialism conflicts with them. Since this is one of the few points of disagreement that we have, I'll focus my comments mostly on Thomas' arguments in his book, against Rawls's defense of liberal socialism (§ 3 below), then afterwards in § 4 his argument against my own suggestion (in chapter 4 of my book) that Rawlsian fair equality of opportunity should be construed to "guarantee citizens continuing opportunities throughout their lives to exercise economic powers, and responsibilities" in their place of work (Freeman, 163). Before that, I discuss in § 1 Thomas's distinction between predistribution and redistribution, then in § 2 his claim (and Bill Edmundson's also) that Rawls' own view requires that the decision for (or against) property-owning democracy should be made at the constitutional stage on grounds of Rawls's first principle of justice, and not left up to legislative revision.

I

Predistribution and Redistribution

Liberal societies typically involve competitive market economies for the efficient allocation of productive resources and labor, and to a large extent the distribution of income and wealth as well as in determining the price of consumer goods. Taxation redistributes income and wealth that result from market activity, and is necessary to pay for national defense, public safety, maintaining the legal system, and many other public goods. Though liberals differ in their assessment of the range of public goods to be funded by government, the debate between classical and high liberals is not so much over redistribution of market outcomes for these legitimate purposes. Instead the debate is primarily over *individual entitlements to income and wealth*: whether (as classical liberals and libertarians maintain) market distributions of income and wealth determined by the (efficient) price system are themselves just (for reasons of desert, for example) because of individuals' property rights and pre-existing claims to the entire income received from market transactions and other consensual transfers; or whether (as high liberals contend) just entitlements to income and wealth require (some degree of) redistribution of market outcomes according to one or more "patterned principles" of justice, such as luck egalitarian principles, restricted utility, or the difference principle.

Rawls envisioned a regulated competitive market economy as an essential component of both property-owning democracy and liberal socialism, since markets are essential to guarantee freedom of occupation and choice of workplace, diverse opportunities, and

the efficient allocation of productive resources.⁴⁴ He clearly thought non-market transfers, through taxation and redistribution of market outcomes, were necessary for both the provision of public goods and the fair distribution of income and wealth according to the difference principle. “Social resources must be released to the government so that it can provide for the public goods and make the transfer payments necessary to satisfy the difference principle” (TJ 246). Taxation and redistribution of market distributions are also essential for purposes of mitigating inequalities of income and wealth that are necessary to maintain the fair value of political liberties, and fair equality of opportunities (TJ 245).

The predistributive/redistributive distinction is controversial (as Thomas notes).⁴⁵ Whether income and social benefits fall into one or the other class often depends on one’s political point of view. For libertarians and classical liberals who hold that individuals have strong property rights in *all* income and wealth that they gain by market or other consensual transfers, all taxation, even when justified, is redistributive of existing entitlements. Justifiable taxation is for classical liberals a charge to one’s rightful earnings and possessions, a debt owed to governments, similar to any other debt owed to private individuals. Taxes are not necessary to establish a just distribution to economic entitlements, which is pre-established by the legitimate market distributions and other consensual transfers already in place.

⁴⁴ See for example, *A Theory of Justice*, 239-40, 240-241, 272. References to TJ will be to the 1999 revised edition, unless the original 1971 edition is otherwise noted.

⁴⁵ Some philosophers express doubts about the distinction between predistribution and redistribution. See Martin O’Neill in O’Neill – Williamson 2012, 75-100; also Randall 2019, ch. 6, “Property-Owning Democracy and Predistribution.”

By contrast, Rawls and other liberal egalitarians maintain that property rights in income and wealth are not determined by such a historical process of first possession and a legitimate chain of freely transferable claims of ownership. Instead just distributions come about by a different procedure: a “social process” that involves markets but also includes taxation and compliance with other rules and procedures of basic social and economic institutions that are designed according to principles of justice. According to Rawls’s “social process view”,⁴⁶ though paying one’s fair share of taxes may be redistributive in a trivial sense – in the same way that cashiers turning over the cash and credit slips collected on others’ purchases each day is redistributive – there is no redistribution in the substantial sense of people’s rightful possessions or entitlements being transferred without regard to their consent. For people often do not have full property rights or entitlements in their entire market or gift income to begin with, but instead rights only in the sums remaining after their fair share of taxes is subtracted.⁴⁷

The predistributive/redistributive distinction concerns not simply taxation, but how individuals come to acquire *entitlements* to income and wealth and other social benefits guaranteed by societies. Rawls says that property-owning democracy avoids the concentration of wealth characteristic of welfare state capitalism, not by redistribution of income to those with less “at the end of each period” but rather by the widespread ownership of productive assets and human capital “at the beginning of each period.” (TJ rev., xv; JF 139). He is referring to each citizens’ distributive shares

⁴⁶ “By contrast [with Locke’s historical process view], as a social process view, justice as fairness focuses first on the basic structure and on the regulations required to maintain background justice over time for all persons equally...” (JF 54).

⁴⁷ This is one of the main points of Murphy and Nagel 2002.

of income, wealth and social benefits being determined primarily by (1) income earned from employment, and (2) just returns to the economic assets (through dividends, profits, interest, and rent) held by each citizen in a property-owning democracy. Income from employment is “predistributive” in part because it includes returns to the exercise of “human capital” that is built up over years through education and training. Publicly funded education of all forms secured by fair equal opportunity principle are also predistributive benefits – child development, schooling, university education, and employment training and retraining – as is universal health care, which is necessary for all citizens to take advantage of the diverse opportunities available to them (Thomas 2017, 117-118). Also, though not mentioned by Rawls, universal capital endowments, or demogrants guaranteed to citizens at some point in early adulthood⁴⁸ and universal basic income paid yearly might be considered predistributive entitlements if regarded as a citizen’s rightful shares of the joint social product.⁴⁹ Finally, so-called “social insurance” or social programs required by POD – retirement benefits; unemployment insurance; family allowances; child care allowances, and elderly and disability care allowances paid to caretakers, etc. – that are justifiable on grounds of FEO and/or the difference principle can all be regarded as “predistributive” in the broad sense Alan Thomas discusses in his comment, since they are guaranteed by pure procedural justice.⁵⁰ If

⁴⁸ See Ackerman – Alstott 1999 and more recently Piketty 2020, 979-981.

⁴⁹ van Parijs – Yannick Vanderborght 2017.

⁵⁰ Like Ackerman and Alstott, Thomas rejects the metaphor of “social insurance” in his book (Thomas 2017, 130-131) since it misrepresents the predistributive egalitarian “ideas of economic citizenship and stakeholding [as] the correct ways to conceptualize and justify capital pooling social programs.”

so, then none of these entitlements involve “redistribution” of pre-existing entitlements in order to satisfy Rawls principles of justice.⁵¹

Thomas as I understand him ties what he calls “predistributive egalitarianism” to pure procedural justice within a social process view in a similar way: whatever outcome results from a social process that complies with the rules of institutions designed to satisfy the principles of justice is itself just. Rawls’s view is not redistributive since it does not involve reallocating pre-existing entitlements that have been reached by some prior procedural process, such as market distributions and other consensual transfers. Rather the “pattern” of distributive entitlements (if there is one) implicit in the principles of justice is built into the institutional rules that individuals are expected to comply with, and is the outcome of everyone’s compliance with the rules. The important point is that on this understanding, “redistribution” is not to be understood as redistribution of legitimate entitlements from market or other outcomes. “Predistribution” in the broad sense of the establishment of distributive entitlements by pure procedural justice requires redistribution of market outcomes. It is not redistribution for people to pay taxes for public goods required by justice, since they do not have complete rights to all income they receive from market and other consensual transfers. For the same reason it is not redistribution of pre-existing entitlements for citizens to pay their fair share in taxes on their market income or accrued wealth or on gifts and inheritances when this is needed to pay for income supplements, family allowances, or other social entitlement programs required by the principles of justice, or pay a

⁵¹ Thomas also discusses in recent work how monetary policy, Keynesian fiscal policies, government regulation and other government functions involve predistribution measures that influence distributive outcomes and the just distribution of income and wealth and powers and prerogatives in a property-owning democracy.

progressive tax on income and wealth to mitigate inequalities in order to achieve the fair value of the political liberties. One of the problems with the capitalist welfare state is just that taxation for purposes of satisfying the social minimum and other entitlements involves the redistribution of pre-existing entitlements established by market and other consensual transfers, in order to provide welfare benefits that meet the basic needs of the less advantaged. Welfare entitlements in welfare state capitalism thus reallocate pre-existing entitlements, and are not the outcome of a predistributive social process that embodies pure procedural justice.

I do not then have any reservations about the claim that Rawls's position is predistributive rather than redistributive in the sense Thomas discusses, when understood in this broad sense of 'predistribution,' which is tied to "pure background procedural justice" within a social process view (JF 54). For it is still compatible with Rawls's position that redistributions of market outcomes and accrued wealth are permissible for purposes of paying not simply for public goods and the expenses of running government functions, but also to pay the entitlements necessary to maintain the social minimum and for social benefits that citizens are guaranteed according to the principles of justice. Even though government transfers of entitlements originally require redistribution of income and wealth acquired through market transactions and other consensual transfers, these entitlements themselves are not redistributive but rather "predistributive" in Thomas' sense: they are guaranteed by the rules of a social process the requirements of which entitle individuals to benefits because their actions or circumstances comply with institutional rules and procedures that conform to the principles of justice.

Finally, Thomas mentions Hayek's misunderstanding of Rawls when Hayek claimed that he "had no basic quarrel with" Rawls.⁵² Hayek initially took Rawls's pure proceduralist view – that outcomes are just if they result from institutions of the right kind – as an important point of agreement between them. Hayek evidently assumed Rawls was referring to capitalist free market institutions in which there are no constraints on resulting inequalities in distribution. Hayek later acknowledged⁵³ that he was mistaken and that there was a great distance between their views; for he had failed to understand the strongly egalitarian constraints on background institutions (the "enablers" as Thomas says) that Rawls placed on just institutions, institutions that Hayek would never accept. Among these is the qualified property system required by the difference principle, that rejects the capitalistic property rights Hayek takes for granted that sustain classical liberal conceptions of distributive justice.

II

Constitutional vs. Legislative Determination of the Economic System.

Rawls says that the first principle does not guarantee either a right to private property in the means of production (TJ 54, JF 138) nor a right to participate in the control of means of production that are socially owned (PL 298), implying that the decision between a private property economy vs. socialism is to be determined ultimately by the second principle of justice in conjunction with "historical conditions and the traditions, institutions and social forces of each country" (TJ rev., xvi). He also contends that issues

⁵² Hayek 1973, vol. 2, *The Mirage of Social Justice*, xiii and 100.

⁵³ See interview of Hayek with James Buchanan at: <https://bleedingheartlibertarians.com/2013/10/hayek-on-hayek-on-rawls/>

of distributive justice and the second principle are not constitutional essentials, that the difference principle is not part of the constitution, and that the second principle applies at the legislative stage (PL 229, 237n, JF 48-49). One might reasonably conclude that Rawls thought that the decision between economic systems (POD vs socialism) is also not a constitutional decision, but this is not altogether clear since elsewhere he seems to suggest otherwise.⁵⁴ In any case, Thomas, like Bill Edmundson, claims that the decision between POD and liberal (or democratic) socialism *should be decided* at the constitutional stage, rather than the legislative stage. This implies either that the difference principle should be made part of the Constitution, or that the second principle is entirely irrelevant to determining the economic system. The latter position is Edmundson's view since he maintains the fair value of political liberties requires socialism and that the second principle without the fair value requirement is compatible with welfare state capitalism. Thomas' position is just the opposite, that the principles of justice, especially the first principle, require a property-owning democracy.

What this debate is about is not simply the question of constitutionally insulating the economic system against legislative change. Rather the real issue is: what kinds of reasons are relevant to determining the economic system? Rawls himself assumes that the nature of the economic system is to be determined by the three kinds of reasons implicit in all three requirements in the two principles of justice: equal basic rights and liberties, fair equality of opportunity; and the difference principle. It would be a peculiar

⁵⁴ Rawls says about socialism (somewhat ambiguously): "*Collective decisions made democratically under the constitution determine the general features of the economy, such as the rate of savings and the proportion of society's production devoted to essential goods*" (TJ 248, emphases added) –, which would seem to suggest that democratic control of means of production itself can be constitutionally guaranteed, even if not guaranteed by the first principle.

move for Rawls to endorse Edmundson's position that the difference principle is simply irrelevant to determining the economic system, since its primary requirement is that it requires that society adopt the economic system that makes the least advantaged members of society better off than any other economic system. The point of this principle would be seriously compromised if the decision between POD and socialism depended solely on which system best guarantees the fair value of the political liberties, or the worth of some other basic liberty. The relevance of the difference principle then would be restricted to deciding those particular measures that maximally benefit the least advantaged within a socialist or POD economic system – even if they might be more advantaged under the alternative system.

Thomas' own view resembles Edmundson in that he also holds that the economic system should be determined at the constitutional stage in order to guarantee the basic liberties.⁵⁵ Like Edmundson, Thomas also says that the "fact of domination" including individuals' will to dominate others when they gain economic, social and political advantage, should be recognized by Rawls as a "circumstance of justice." But unlike Edmundson, Thomas contends that socialism, both the liberal socialism that Rawls endorses and the democratic socialism Edmundson professes, is among the economic systems that encourage domination and the violation of the fair value of political liberty as well as other basic liberties. Moreover, Thomas seems to hold that in a liberal or democratic socialist regime, some workers can politically dominate others in ways that result in unfair distribution of income and wealth that conflicts with both freedom of occupation and association, and reciprocity required by the

⁵⁵ Thomas 2017, § 2, "I share Edmundson's belief that when we guarantee the fair value of the political liberties, only a constitutional guarantee [of the economic system] will prove sufficiently robust."

difference principle. This is an intriguing argument Thomas makes in an important chapter against liberal socialism that is in his 2017 book, and is the subject of the next section.

III

Liberal Socialism and Freedom of Occupation

Rawls describes liberal socialism as an economy where “the means of production are publicly owned and that firms are managed by workers’ councils say, or by agents appointed by them” (IJ 248). In *A Republic of Equals* Thomas argues that liberal socialism as depicted by Rawls – conceived as a mandatory system consisting only of worker-cooperatives who lease economic resources from the government – is exploitive of workers, since it fails to protect the worth of basic liberties, in particular the “fair value” of freedom of occupation and choice of careers. The reason for this seems to be two-fold. First, the labor market is “thin” – workers have no option but to work for one or another worker cooperative in a liberal socialist regime – and the value of workers’ primary asset – labor itself, their human capital – is undervalued because they have no right of exit to a different form of economic association other than another worker cooperative. The lack of such a right of exit to another form of economic association violates the “fair value” of their Rawlsian basic liberty of occupation and choice of careers.

Second, because workers have no other options than to work for socialist worker cooperatives since it is the only permissible occupational association, they are exploited by others, including workers who are less productive. “My claim that workers will be subject to exploitation depends on the claim that they will not be given the fair return on their labor, not simply an efficient return as defined wholly by the value of that labor on a competitively

efficient market” (Thomas 2017, 228). Thomas’ argument that workers do not receive the value of their labor is largely based on Scott Arnold’s argument against market socialism, that it involves exploitation because more productive workers do not receive the value of their contribution – their marginal product – since wages are democratically determined within the firm by workplace democratic decisions.

Thomas sums up his position in this way:

All of the foregoing has served to demonstrate that Rawls was wrong: mandatory market socialism, at least, will not express his principle of reciprocity. It will violate it. Rawls’s scheme of basic liberties guarantees freedom of occupational choice, but this value is systematically undermined in a mandatory system of worker-owned cooperatives. You are free to go and be exploited anywhere, that is, paid less than your full productive contribution. In a property-owning democracy this is a choice that a worker may be inclined to make, being generally disposed to risk taking when it comes to income from labor with a hold of capital guaranteed. Workers may indeed choose to be “underpaid” from a strictly economic point of view, but in a mandatory comprehensive market socialist economy, this choice is made for you. Society as a whole has legislated a situation where you are exploited wherever you choose to work (*ibid.*, 245).

I am not in a position to assess the strengths and weaknesses of liberal socialist economy in terms of their economic efficiency. Thomas discusses several objections by John Roemer and others which address the inefficiencies of workers’ cooperatives under conditions of both liberal socialism and property-owning democracy. These include their failure to innovate, as well as their tendency to avoid hiring new workers since that will reduce workers’ shares of income from labor and (in POD) presumably

their share of capital as well.⁵⁶ What bothers me about 'Thomas' argument (following Scott Arnold's criticisms of liberal socialism) of the exploitive unfairness socialist worker cooperatives is that it appears to assume that workers are due *as a matter of justice* the economic value of their marginal contribution. If so, then it seems to conflate or at least it closely ties the question of the fair value of a person's labor together with the economic value of their marginal product under efficient labor market conditions.⁵⁷ Thomas seems to admit the questions are closely tied when he says:

My claim that workers will be subject to exploitation depends on the claim that they will not be given a fair return on their labor, not simply an efficient return as defined wholly by the value of that labor on a competitively efficient market: which standard am I using, justice or efficiency? My official Rawlsian position... is that those two criteria only align in a just society (where the assumptions of chain connectedness and close-knittedness have been vindicated)..." (Thomas 2017, 238)

In a property-owning democracy with multiple forms of occupational association, workers will know the market value of

⁵⁶ Meade and others have suggested that one way to address this problem is to pay newly hired workers for a certain period only the value of their marginal product, perhaps for a fixed term until they reach a level of seniority – however long a period is required to incentivize existing workers to make new hires. J. E. Meade, 'The Partnership Enterprise,' in Meade 1993, 119-124. *Liberty, Equality, and Efficiency*, (New York: Palgrave MacMillian) 119-124

⁵⁷ Thomas might insist he is not doing that but rather that the problem is (1) that he is trying to make the point that mandatory market socialism denies workers certain kinds of knowledge carried by the price system; and (2) that this problem will not exist in a POD which has opportunities to work in a variety of arrangements, including worker owned cooperatives, that will enable workers to realize the fair value of freedom of occupation.

their labor and will have the freedom to decide whether to work within a worker-cooperative, (where evidently they will still be exploited but will freely assent to it) or in one of several other employment arrangements they choose. Thomas claims “the labor market within mandatory market socialism denies the worker certain kinds of knowledge carried by the price system” (*ibid.*, 228). Thomas’s argument seems to be, not that workers do not receive the fair value of their labor and are exploited because they receive less than their marginal product, but rather that receiving the fair value of one’s labor depends upon having a diversity of occupational arrangements and associations of employment to choose from, some of which pay the value of worker’s marginal product. Only POD, but not liberal socialism, can satisfy this standard.

I question the assumption that worker cooperatives in either a liberal socialist or property owning democracy cannot adapt to the circumstances and democratically decide to pay workers according to alternative wage schedules – according to seniority (as unions often do), or labor time and effort, or marginal product, average product, productivity, etc., or some combination of these. Regardless of that question, what worries me about the criticism is the assumption that not having the opportunity to receive the market value of one’s marginal contribution is *itself* exploitive of workers and denies workers “the fair value of their labor.”

In my book, chapter 1 § 5, entitled “The Argument from the Fairness of Market Distributions”,⁵⁸ I question the marginal productivity theory of just distributions – “to each according to their marginal contribution” – as an appropriate basis for determining the fair returns to capital and to labor in a capitalist

⁵⁸ Freeman 2018a, 31-39 of chapter 1, entitled ‘Capitalism in the Classical and High Liberal Traditions,’ previously published in *Social Philosophy and Policy* 28 (2), July 2011: 19-55.

economy. Taking a cue from Rawls, I contend that one's marginal product depends on many fortuitous factors – including “brute” market luck the consequences of which workers are not responsible for and that are beyond their or often anyone else's control. These fortuitous factors include density of population and the surplus or scarcity of the labor supply and other resources; the “natural lottery” and how many other persons happen to have similar skills in the area; a person's social background, class, and family culture; natural accidents and social misfortunes, environmental and climate conditions, etc. The argument that distributive shares going to labor (not to mention capital) should hinge on the market value of worker's “marginal contributions” grounds distributive justice in accidental contingencies that are (as Rawls says) “arbitrary from a moral point of view.” Given the arbitrary contingencies that beset competitive markets in labor and capital, the classical liberal argument that workers and capitalists both are exploited when they do not receive the value of their marginal contributions is ironic, to say least. For it turns on its head Marx's claim that workers are exploited for this very reason – namely that they receive only the market value of their labor – their marginal product – and that the excess labor value of their contribution is extracted by owners of capital in the form of profits, interest, and rent. At least if workers were to receive the average product that flows from their labor, rather than their marginal product – the price for labor that goes to the last worker hired – there would be *some* argument for exploitation of workers by other workers that Thomas and Scott Walker allege. But even then, the so-called “product” of labor is still beset with the same arbitrary contingencies. In fairness to socialism, to avoid exploitation and pay workers the fair value of their labor, they should be paid for their *effort and their labor time*, factoring in the strenuousness, dangers, unpleasantness of their positions, as well as time devoted to educating skills necessary for the job. But even

this assumes a questionable pre-social conception of what workers deserve as the standard for determining the justice of distributive shares.

Of course, Thomas, in appealing to the classical liberal argument that workers are exploited by other workers in market socialist worker cooperatives, is not arguing that the marginal productivity theory of just distributions is the appropriate theory to determine the justice of distributive shares. He instead accepts Rawls's principles of justice, including economic reciprocity guaranteed by the difference principle. But if so, then why is the market information about how much one would receive for one's own labor in an efficient market process according to the marginal theory of just distributions relevant to deciding the justice of distributions within worker cooperatives in a competitive liberal socialist economy? Why is this information, largely based in factors that are "arbitrary from a moral point of view" pertinent if this standard does not decide the fair value of individuals' labor?

Thomas contends that the problem is that "the labor market within mandatory market socialism denies the worker certain kinds of knowledge carried by the price system" (Thomas 2017, 228), and that this is a violation of the fair value of freedom of occupation and choice of careers. But how should the idea of the 'fair value' of a basic liberty such as freedom of occupation be understood? Can fair value of basic liberties be interpreted in economic terms, especially terms that invoke economic efficiency of the labor market? The fair value of political liberties clearly is not assessed in terms of their economic value, but rather in terms of "fair opportunity for equal political influence," which Rawls says parallels the principle of fair equality of opportunity to compete for open positions. By analogy with the fair value of the political liberties, the fair value of freedom of occupation and choice of workplace should be assessed in terms of having fair equality of

access to “diverse opportunities which opportunities allow the pursuit of a variety of ends and give effect to decisions to revise and alter them” (JF 38). These would include diverse professional and educational opportunities that enable citizens to effectively develop their “human capital” and freely exercise their productive capacities within the framework of an economic system that satisfies the principles of justice. But not having the opportunity to choose to receive the value of one’s marginal contribution seems even less necessary here for the fair value of freedom of occupation – since it is decidedly not the appropriate standard for determining just distributive shares – than not having the opportunity to be paid according to the labor value one produces. What is more important to the fair value of freedom of occupation is having the diversity of opportunities to educate and develop one’s capacities and choose and pursue a profession from wide variety of professional opportunities within an economic framework that embodies the institutional requirements of the difference principle.

If this is a more reasonable way to decide the fair value of freedom of occupation, – in terms of fair equality of diverse educational opportunities to develop one’s capacities and to compete for diverse occupations and social and economic positions in a social system determined by the principles of justice – it is hard to see how liberal socialism is undermined for reasons of the first principle, or why POD should in a better position under all circumstances than liberal socialism. That would seem to depend on whether the economic system in question, here liberal socialism, complies with the second principle and leaves the least advantaged better off than in any other system. This may be liberal socialism, Rawls says, or it may be property-owning democracy, depending on historical and cultural conditions in a society. If it is indeed true that liberal socialism has all the efficiency problems Walker, Roemer, Thomas and others foresee, then it would be

rejected by the difference principle. There is no need to claim that basic rights and liberties of occupation, or association, are violated.

IV

Freedom of Occupational Association

At certain places in his book Thomas suggests that mandatory market socialism violates both the right of exit which is part of freedom of occupation, and also violates freedom of association of workers, since they only have one form of economic association – worker controlled firms – within which to exercise their productive capacities.⁵⁹ The same would be true of a property-owning democracy that allowed only worker-owned and managed firms – syndicalism – which Edmundson attributes to my position. The problem is that worker controlled firms do not leave workers free to associate in whatever economic forum they choose – whether worker cooperatives, capitalist joint stock firms, partnerships, non-profit firms, sole proprietorships, etc. A virtue of property-owning democracy, Thomas contends, is that it allows for and perhaps encourages all of these occupational forms of free association in employment, and thereby “thickens” the labor market with greater options for free choice of occupation and association.

Rawls says in discussing the imperfections of markets: “It is important that a competitive scheme gives scope for the principle of free association and individual choice of occupation against a background of fair equality of opportunity. . . . A basic prerequisite

⁵⁹ Thomas 2017, 228, where he says: “If freedom of occupation is not a basic liberty, then it can be derived from those that are – such as freedom of association. Summarily, under mandatory market socialism, this kind of liberty is denied its fair value because the labor market is so thin. A property-owning democracy, by contrast, gives citizens both a right of exit and gives that right its fair value by ‘thickening’ the labor market.”

is the compatibility of economic arrangements with the institutions of liberty and free association” (IJ 272-273). Still I am skeptical of the argument that freedom of occupation’s right of exit and the basic liberty of freedom of association require a *basic economic freedom to occupationally associate* in whatever form of employment association individuals choose. It’s true that the fair equality of opportunity principle presupposes the primary good of “diverse opportunities,” but freedom to choose among diverse occupational opportunities does not require that each occupational position be made accessible via every feasible form of occupational association. Also, many forms of occupational association may be required by the difference principle, for reasons of economic efficiency, among others. But I do not see the grounds for the argument that it is a *basic liberty* of individuals to form, join, and exit from every form of occupational association, including one wherein they receive the value of their marginal product. This basically conflates the basic liberty of association with the (*laissez faire* freedom) of economic contract, which clearly is not a basic liberty (IJ 54). In justifying freedom of association, Rawls argues that it is complementary to *freedom of conscience*, thus necessary “to secure the full and informed and effective application of citizens’ powers of deliberative reason to their forming, revising, and rationally pursuing a conception of the good over a complete life” (PL 335). There is no suggestion here that the specification of the basic freedom of association for Rawls requires *economic rights and liberties of occupational association, to contract* and combine into a maximal or even wide variety of economic organizations. To give freedom of association such an economic interpretation implies the classical liberal freedom of economic contract to form economic combinations of all varieties, and employers’ power to set wages and determine working conditions according to economic agents’ bargaining power. This resembles John Tomasi’s contention that near-*laissez faire* economic liberties are required by

the first principle of justice, which Thomas clearly denies later (ch. 10) of his book.

Rawls regards freedom of association in employment as an “important liberty,” but this does not imply that it is a basic liberty in the way that freedom of personal, religious, and moral associations that are protected by freedom of conscience. It is important since it is conducive to diverse opportunities for all as required by fair equality of opportunity and in meeting the demands of the difference principle. The price of arguing that freedom of economic association is a basic liberty is that it tends to render certain economic freedoms typical of capitalism unassailable rights and liberties protected by the first principle. Capitalist forms of economic association then cannot be infringed or restricted for the sake of the second principle, including fair equality of opportunity or to promote the position of least advantaged under the difference principle. How then is society to respond to capitalist conglomerates or free-wheeling hedge funds that buy up profitable businesses, fire all the workers and sell off all assets, if these are protected forms of economic association and doing business under the first principle? The first principle, given its strict priority over the second, is not the way to address economic rights and liberties of association and combination of economic interests within a democratic egalitarian conception of justice.

Thomas’ argument against mandatory market socialism (or mandatory worker-controlled firms) and in favor of freedom of multiple permissible economic associations is better couched in terms of Rawls’s second principle of justice. If mandatory market socialism or worker-controlled firms are economically inefficient and violate economic reciprocity as Thomas contends, then these are relevant reasons implicit within the difference principle itself for opposing these and other mandatory forms of economic

association. Similarly the requirements of fair equality of opportunity are that individuals have *diverse opportunities of employment* (JF 58), and arguably these should include diverse opportunities for economic association, like many of those Thomas endorses. To be restricted in choice of workplace to work *only* for worker-managed firms in an economy where government owns the means of production arguably denies fair equality of diverse employment opportunities. This argument from the second principle also does not run the danger of having to weigh off claims made pursuant to FEO or the difference principle when they conflict with the demands of certain forms of occupational association that tend to undermine the position of the least advantaged – such as the laissez-faire employment contract.

Finally, regarding Thomas' contention that mandatory socialism violates economic reciprocity by exploiting workers and taxpayers: It may be true that worker cooperatives in liberal socialism involve some workers taking unfair advantage of others in the sense of not doing their fair share; but in the sense that this is true, it might be true in most any economic system, including those where workers are paid their marginal product. I don't see that marginal productivity theory is the appropriate way to decide whether workers receive their fair share, far less so that it is the appropriate criterion for deciding whether exploitation of workers and taxpayers always takes place in mandatory market socialism.⁶⁰ The appropriate criterion for deciding whether productive reciprocity is met by an economic system once again would have to be the difference principle itself, not some prior theory of economic desert that is independent of economic institutions that satisfy the

⁶⁰ After all, marginal productivity theory is a criterion Nozick and other libertarians use to argue that capitalists are exploited by minimum wage laws, collective bargaining by workers, etc., since they are required to pay workers more than their marginal product.

difference principle. If liberal socialism can do that, as Rawls maintained, then it satisfies requirements of productive economic reciprocity, so long as workers do their fair share as required by those institutions – even if their distributive shares are in large part decided by democratic decisions among workers within the firm. This does not considerably differ from collective bargaining contracts where workers – some of whom are more productive than others – are paid the same as others at their level of seniority and their labor time. I do not see a compelling case for unjust exploitation when workers are paid in this way, especially if the difficulty, dangers, and unpleasantness of their work are taken into account, and when education and professional expertise are considered.

To summarize, the basic freedom of occupation guarantees the freedom to enter *permissible* occupations, not just any lucrative activity one freely chooses. The occupations that are permissible are decided by Rawls second principle of justice, not by the first principle (with the exception of those “occupations” that violate basic rights and liberties Rawls recognizes). Moreover, unlike the fair value of political liberties, the institutions required to guarantee the fair value of freedom of occupation with its right of exit cannot be decided by appeal to first principle considerations either, such as the institutions necessary to fully exercise and adequately develop the moral powers. Instead the question of the fair value of freedom of occupation also must be settled by appeal to the second principle of justice with its requirements of the diversity of fair opportunities and the difference principle. The same applies to freedom of occupational association, which presupposes freedom of economic contract. Unlike freedom of personal, religious and other non-economic associations protected by liberty of conscience, freedom to form and join any form of occupational association one chooses that does not violate others rights is not a basic liberty. Still, individuals have the right to join and exit any

permissible form of occupational association, which is implicit in the basic freedom of occupation. But which forms of occupational association are permissible is, like freedom of economic contract, to be decided by the second principle of justice and its guarantees of fair equality of diverse employment opportunities and the economic position of the least advantaged members of society.

V

Property-Owning Democracy and Powers and Prerogatives in the Workplace

Rawls conceived of social and economic powers and prerogatives as part of the index of primary social goods whose fair distribution is governed along with income and wealth by the second principle of justice. Like income and wealth, inequalities of social and economic powers and prerogatives are permissible so long as this is compatible with the difference principle, and individuals have fair equal opportunities to occupy employment positions that exercise them. Rawls says, inequalities allowed by the difference principle are “justifiable only if the difference in expectations is to the advantage of the representative man who is worse off, in this case the representative unskilled worker” (TJ 78/68 rev). Given the importance of social and economic powers and prerogatives in “giv[ing] scope to various self-governing and social capacities of the self”,⁶¹ it would not be rational for the representative unskilled worker behind the veil of ignorance to accept a social minimum with absolutely no economic powers and prerogatives whatsoever; or to accept employment positions that gave them no discretionary prerogatives and permit themselves to be dominated both within and outside their employment. Powers

⁶¹ Rawls, “Kantian Constructivism in Moral Theory,” in Rawls 1999, 313.

and prerogatives are then an essential part of the social minimum in my understanding of Rawls's view.

As I also discuss in my reply to Edmundson I go further than this in chapter 4 of my book and suggest in effect that economic powers and prerogatives guaranteed the least advantaged by the social minimum are not fungible and cannot be bargained away in the workplace, either as a condition of employment or for higher wages. In order to guarantee their inalienability and highlight the importance of economic powers and prerogatives for all citizens, I suggested that among the diverse opportunities required by fair equality of opportunity should be the opportunity to exercise the basic minimum of economic powers and prerogatives guaranteed by the difference principle. Just as the first principle requires an inalienable equal opportunity for political agency, so too fair equality of opportunity requires that all working members of society have an inalienable fair opportunity for economic agency through the exercise of certain powers, prerogatives and responsibilities regardless of their employment position.

This is interpreted both by Thomas in his book, as well as Edmundson (together with Robert Taylor, John Tomasi, Jason Brennan and others) as my having argued that worker-owned and self-managed firms are a mandatory requirement of fair equality of opportunity in a property-owning democracy, as are worker-managed firms in liberal socialism. As Thomas in his book says: "Freeman's requirement rules out any kind of democratic deficit in the workplace – even a deficit compensated for by more money" (Thomas 2017, 261). If true, my argument would be subject to all the objections that Thomas, Taylor, and others raise against mandatory liberal socialism discussed in the previous section.

It was not my intention to argue that worker managed cooperatives and workplace democracy are the *only* form of economic association allowed by fair equal opportunity in either

property-owning democracy or liberal socialist society; nor do I think a careful reading of what I have written bears that interpretation – certainly not Thomas’ claim of “workplace democracy” (*ibid.*, 260) or “mandating ongoing workplace control, as of right, for all workplaces” (*ibid.*, 262). Clearly Rawls himself did not think that. But Rawls I believe did think, or at least was committed to the position that a basic minimum of social and economic powers and prerogatives should be guaranteed the least advantaged unskilled worker by the social minimum under the difference principle. These powers of economic agency can be exercised in a variety of employment associations and settings in a property-owning democracy, including not just worker-managed firms, but also in co-determination and profit-sharing arrangements within shareholder-owned firms, also within smaller associations such as partnerships, individual proprietorships, small businesses with employees, and simply by day laborers for hire. In this regard, I do not think that my view (or Rawls’s) differs from Thomas’, except that he claims that multiple forms of economic association are required by the first principle freedoms of occupation and association, whereas I (and Rawls I believe) contend they are to be justified in terms of the second principle of justice.

Still, Rawls did not assign an independent role to fair equality of opportunity as I did in the distribution of a basic minimum of economic powers, prerogatives, and responsibilities, nor explicitly contend that these powers of economic agency were inalienable. Now with respect to my contention that the principle of FEO demands economic agency that includes “ongoing opportunities to exercise economic powers and *some degree* of freedom and control in their work thereby assuming a degree of freedom and responsibility” and that this is an “essential” element of property-owning democracy that is inalienable: Thomas contends (like Robert Taylor) that my position assumes a kind of perfectionism,

that resembles John Tomasi's "perfectionist idea that control over one's work, is, indeed, just as important a liberty as the basic liberties." The best way to understand my claim that these economic powers are inalienable is that they preempt the standard capitalist labor contract, where the default assumption is that the terms of employment are completely determined by the employer, and involve no powers or prerogatives whatsoever; but rather, the workday is completely at the discretion of the employer, the employee can be assigned any unpleasant or dangerous task the employer pleases and fired for no good reason, and this is all presented as take-it-or-leave-it, especially with respect to unskilled working class employees, who have the formal right to freely exit particular jobs but for whom there is "no exit" from these exploitive working conditions.

As Elizabeth Anderson contends, the *laissez-faire* contract is the standard default employment contract in the U.S., and automatically applies to the vast majority of unskilled workers – especially agricultural workers, most of whom are migrants, as are many housecleaners, landscapers, meat processing industry and others who constitute a large portion of the workforce in the U.S. Employment for these low paid unskilled workers is a form of "private government," Anderson contends, a workplace "dictatorship" that even extends beyond work to condition workers' activities outside work during the course of their free time (Anderson 2017, x).

I argued in my book that workers' having adequate powers in their workplace to avoid such dominance in their employment is required by the second principle of justice, including both fair equality of opportunity and the difference principle. That workers have not only adequate income and wealth but also a fair share of economic powers and prerogatives enables them to effectively exercise and indeed maximizes the "worth to the least advantaged"

of their basic rights and liberties, which Rawls says is “the end of social justice” (TJ 179). Moreover, it is among the essential bases of self-respect for free and equal moral persons and democratic citizens in a well-ordered democratic society governed by the principles of justice. Certain fundamental worker powers and prerogatives should be guaranteed by law, in the same way that anti-discrimination, sexual harassment, and safety laws currently regulate employment contracts. Just as workers cannot bargain away their safety, or their protections against discrimination and sexual harassment on the job, so too they should not be allowed to bargain away entirely the most fundamental powers of economic agency. What the most fundamental powers of economic agency are that should be legally guaranteed within any permissible association of employees in a POD can be left up to argument and democratic legislative determination. (In my reply to Edmundson I suggest that basic minimum powers and prerogatives be determined by reference to those needed to maintain the self-respect of the representative least advantaged worker.) Co-determination rights may well be among them in the case of firms that reach a certain size, as they are in Nordic social welfare states, and perhaps worker councils within the workplace as well. As I also contend in my book, some degree of discretion, powers, prerogatives and responsibilities are a condition of meaningful work for free and equal moral persons.

To support this latter claim regarding the conditions of meaningful work, I appealed to Rawls’s Aristotelian Principle (TJ, § 65), the “psychological law” that individuals’ sense of well-being and self-respect in large part depends upon their engaging in activities – including meaningful work – that exercise and develop their higher capacities. Hardly anyone enjoys being dominated, exploited, or disrespected in their workplace in the manner allowed by the *laissez-faire* employment contract. A society that guarantees its members fair equal opportunities to develop and exercise their

capacities for productive activity, including their knowledge and skills, enables them to engage in “meaningful work in free association with others” (IJ 257). Thomas and Taylor contend that this is an appeal to perfectionism, which violates liberal neutrality, and that workers ought to be free to decide if they want to work in firms with no worker powers and higher pay (Thomas 2017, 261).⁶²

Regarding the charge of violation of liberal neutrality in excluding certain forms of economic association, such as employment positions which provide workers with no powers and prerogatives and presumably are based in *laissez-faire* contract: Liberal neutrality – an “unfortunate” term, Rawls says, since its connotations are highly misleading, PL 191) – is best understood as grounded in basic liberties of conscience, freedom of personal associations, and freedoms of the person that are necessary to act upon one’s conscientious religious, moral and philosophical convictions. Like the basic freedom of association, it does not apply indiscriminately to protect different forms of economic association, nor does it guarantee *laissez-faire* freedoms of economic association just as it does not authorize *laissez faire* freedoms of economic contract. Clearly governments do not need to be neutral towards monopolies, cartels and other economic associations who act in restraint of trade; nor must they maintain neutrality with respect to different kinds of employment contract. Employers cannot insist that employees give up their rights against racial, religious, and sex discrimination or sexual harassment. Nor can they insist, I contend, that workers abandon all discretionary powers and prerogatives in the workplace, such as time for

⁶² “The price of Freeman’s argument against even an affluent welfare state capitalist society seems to be a commitment to a perfectionist ethical ideal where control of one’s workplace is a part of the good life. Freeman denies this. . . .It is not clear to me, however, why transposing a perfectionist claim into the idiom of psychology avoids the problem – even if the psychological generalization is true” (Thomas 2017, 262).

restroom breaks, lunch, or safety protections, or require workers to only vote for one political party and practice a specific religion. Guaranteeing these protections and prerogatives against employers' arbitrary decisions is not perfectionism, but rather a matter of mutual respect among free and equal moral persons.

It is nonetheless true that Rawls, like J.S. Mill, endorses a kind of naturalized perfectionism in the Aristotelian Principle as part of his theory of the good and argument for stability in Part III of *Theory*. According to this “psychological law,” it is rational for individuals to incorporate into their rational life plans activities and occupations that exercise and develop their distinctly human capacities; otherwise they become bored and jaded by their work and (to borrow a term) “alienated” from what is experienced as meaningless monotonous tasks. The Aristotelian principle informs Rawls’s account of the stability of the institutions of a well-ordered society, including property-owning democracy and liberal socialism. My claim then would be that a POD or liberal socialist economy that guarantees basic worker powers and prerogatives is a condition of meaningful work, not *because* it realizes perfectionist values, but *because* it is *more stable* than a capitalist, POD or liberal socialist economy that allows workers to enter laissez-faire employment contract and be completely controlled or dominated by their employer, both during their workday and outside it. A society in which workers have the “option” of laissez-faire employment contracts with no protections or prerogatives for workers will soon become one in which the default labor contract for unskilled workers guarantees no powers or protections for workers, for the simple reason that it is most profitable for employers. Such a society is less stable; it does not command the allegiance of its least advantaged members or guarantee them institutional conditions for self-respect.

So the fact that my argument for the fair distribution of powers and prerogatives in the workplace appeals to perfectionist psychological tendencies characteristic of human beings to argue for the stability of a well-ordered society does not imply perfectionism as a moral conception, any more than does Rawls's appeal to the social bases of self-respect. Still, the argument for the inalienability of a basic minimum of economic powers is not simply a stability argument grounded in the Aristotelian principle; nor is it one that makes just institutions purely instrumental to realizing the human good or human flourishing, as perfectionism historically has been conceived. It is rather primarily a complex argument that appeals to such non-perfectionist principles and ideals of mutual respect, economic reciprocity, social equality, and the social conditions of self-respect; these in turn imply that laissez-faire employment contracts and associations unjustly deny workers – especially the least advantaged who have no feasible alternatives – minimal fair opportunities to exercise social and economic powers and prerogatives in their workplace. “Lacking a sense of long-term security and the opportunity for meaningful work and occupation is not only destructive of citizens’ self-respect but of the sense that they are members of society and not simply caught in it. This leads to self-hatred, bitterness, and resentment”.⁶³ Mutual respect, productive reciprocity, and the social bases of self-respect and social equality are not fungible assets that can be bartered away. The fact that some workers may not find any such ‘meaning’ or value in work that protects their health and safety, prevents them from being exploited, and enables them to freely exercise their productive capacities, and who would rather trade their rights to fair opportunities and the exercise of economic powers and

⁶³ PL, lvii in the 2005 Expanded Edition. Rawls says this as justification for making government the employer of last resort, but it applies equally well to unskilled workers who confront a labor market with no protections and prerogatives in the workplace, or outside it.

prerogatives for greater income is no more relevant than is peoples' willingness to sell their rights to vote or rights to not be discriminated against on grounds of race, religion and gender, or sexually harassed. As with any inequality of primary social goods in Rawls's account, the question: whether or not it is rational, from the point of view of the least advantaged unskilled worker, to guarantee a social minimum of economic powers and prerogatives as part of the index of primary social goods that constitutes the social minimum guaranteed by the difference principle and protected by fair equality of opportunity. It is not rational for free and equal moral persons to completely alienate all economic powers and prerogatives guaranteed by the second principle of justice. This has nothing to do with liberal neutrality or perfectionism, but is grounded in moral values of mutual respect, self-respect, productive reciprocity, and social equality, in addition to meaningful work as a condition of the stability of a well-ordered property-owning or liberal- socialist democracy. There is a distinct difference between justice being instrumental to perfectionist values, which is perfectionism, vs. relying on perfectionist psychological propensities under favorable circumstances to realize values of justice and the stability of a well-ordered society.

3

Reply to Jessica Flanigan

Jessica Flanigan raises many poignant objections to the ideas that I present and defend in *Liberalism and Distributive Justice*, including ideas that are central to Rawls's egalitarian conception of justice. I regret that I can respond here only to some of the many challenges she presents to both my and Rawls's views. But I am very thankful to her thought-provoking essay, especially because it defends a libertarian position, which is very different from the Rawlsian liberal egalitarianism that I argue for, as do the other four philosophers whose comments are presented here. One great benefit of responding to Flanigan and other classical liberal or libertarian philosophers is that they force me to clarify ambiguities and imprecisions which I may not have been aware of previously – which I will try to do in the following comments.

I

Indeterminacy of Justice as Fairness

One of the main themes of Jessica Flanigan's comment is that Rawls's theory of justice is so complex and its assumptions so vague that they can be interpreted to support different and conflicting conceptions of justice, even including libertarianism. This is a different kind of argument from the more common criticism, that Rawls's assumptions are mistaken. Nozick for example rejects the original position on the assumption that, given pre-social libertarian property rights, there is no significant role for a hypothetical social contract to play. And utilitarians contend that the maximin rule of choice is irrational and that by assuming the Bayesian principle of insufficient reason instead, Rawls's framework justifies the principle of average utility. Flanigan's

argument is that, even if we accept Rawls's many assumptions, they admit of such different interpretations that libertarianism is a reasonable conclusion, as much if not more so than Rawls's own principles of justice.⁶⁴

The argument that Rawls's basic assumptions are compatible with (if indeed they do not imply) some form of classical or libertarian liberalism was made prominent, as Flanigan notes, in John Tomasi's book, *Free Market Fairness*. Jerry Gaus, Kevin Vallier and others have made similar arguments. Tomasi argues that despite Rawls's explicit denial that laissez-faire rights and liberties are among the basic liberties, nonetheless given Rawls's assumption – that basic liberties are those necessary, as Rawls says, for the “full and informed exercise and the adequate development” of the two moral powers – then “thick economic rights and liberties” must be among those guaranteed by Rawls's first principle of justice. The consequence is to validate the justice of laissez-faire property and contract rights and market distributions of income and wealth, and therewith negating any independent distributive role for the difference principle and fair equality of opportunity. Moreover, Tomasi, like Jason Brennan and other libertarian liberals, contends that the unintended consequences of laissez-faire economies (joined perhaps with a social safety net) indeed maximizes the position of the least advantaged without intentional design, so there is no need for an independent standard

⁶⁴ Offhand, one might think that there is no possible way that libertarianism could guarantee the fair value of equal political liberties, since many libertarians do not regard even formally equal political rights and liberties as among the equal basic liberties. Libertarians such as Nozick and Jason Brennan deny that even formally equal political liberties are rights that should be guaranteed. They would deny that equal political rights are necessary for the full and informed exercise of the moral powers.

of distributive justice such as the difference principle to assess the fairness of libertarian property rights in free market distributions.

These and similar arguments by libertarians are central to Flanigan's thesis – that justice as fairness can reasonably be interpreted to support libertarian rights and liberties. These are good faith arguments, I assume. But the fact that libertarians make such arguments from Rawlsian premises does not mean they interpret Rawls correctly or that Rawls's assumptions are indeterminate, as Flanigan alleges. One must look at libertarian interpretations of Rawls one by one to decide that and whether there is a reasonable reply to them. Here I can only briefly comment on John Tomasi's argument, which supports my convictions that libertarians do not simply interpret Rawls's premises differently; rather they *misinterpret* them by both ignoring crucial assumptions and arguments, and by altering other assumptions to fit with their libertarian view.

Rawls says that basic liberties are those that are essential to the full and informed exercise and adequate development of the moral powers of free and equal moral persons generally, who are members of a democratic society.⁶⁵ He means the moral powers of ideal representative persons, (cf. TJ 56) not simply some people who happen to have one or another conception of the good that requires laissez-faire rights and liberties. The moral powers are capacities necessary for practical reasoning and action – capacities to be rational and reasonable (PL 108). Rawls also contends they are necessary capacities for free and equal moral persons' engaging in fair social cooperation. Rawls also says that, "necessary for the exercise of the moral powers," is the development of "the intellectual powers of judgment, thought and inference." (PL 81) He then argues that basic rights to liberty of conscience and

⁶⁵ *Political Liberalism*, VIII, 325, 332-333.

freedom of thought, freedom of association, the integrity and freedom of the person (including freedom of occupation and movement), and the protections guaranteed by the rule of law are all generally necessary to the full and informed exercise of the moral powers. These are not controversial rights and liberties among liberals on the left and the right. The same is true of the right to hold personal property since, as Rawls contends, without the guarantee of a secure place to reside and exclusive control of personal possessions a person cannot be a free and independent moral or rational agent engaged in social cooperation who effectively exercises other basic liberties and takes advantage of fair opportunities. What is especially controversial among liberals to the right and socialists to the left of Rawls is his denial that both laissez-faire economic rights and liberties and socialist rights to participate in control of means of production are basic liberties. This would require showing that one of the other (not both) is necessary for the full and informed exercise of the moral powers. Also subject to question by liberals on the right is Rawls's claim that equal rights of political participation and the guarantee of their fair value are among the basic liberties necessary for the full exercise of the capacity for a sense of justice.⁶⁶

John Tomasi insists that laissez-faire freedom of contract and “thick” property rights to own and control means of production are basic liberties, since they are indeed necessary for the full exercise of the moral powers (or his interpretation of them, the capacity for “self-authorship”) And many libertarians and classical liberals (such as Jason Brennan) would deny Rawls's claim that equal political rights of participation, and certainly the guarantee of their fair value where this requires mitigating capitalist inequalities of wealth, are necessary for the full and informed exercise of the

⁶⁶ This will be discussed later.

capacity for a sense of justice, even in a democratic society where citizens are regarded as free and equal.

Offhand, it seems that libertarian rights of unlimited accumulation of economic wealth, nearly unregulated freedom of economic contract, and so on, seem no more necessary to full and informed exercise the moral powers than does democratic participation in socialist control of means of production – indeed even less so since at least democratic rights are open to *everyone's* exercise in their workplace, and are not just limited to the small portion of the population who own and control means of production. The majority of people in liberal democratic societies do not seek or want to exercise such extensive laissez-faire economic freedoms, nor do the less advantaged have any realistic opportunity to do so; nonetheless, they all appear to be able to fully exercise their capacities to be reasonable and rational quite well without these extensive economic rights, liberties and opportunities.

Tomasi nonetheless contends that thick economic liberties are justifiable for the “same reasons” that Rawls says that a right to hold personal property is a basic right. But how can this be so? Rawls’s argument is that having exclusive control over personal belongings, secure living quarters, and adequate resources to meet one’s basic needs are a condition of *every citizens’* personal independence and their effectively exercising other basic liberties, executing their rational life plans, and their forming valuable relationships,. This resembles Hayek’s claim that private property is justified so that all have a “private sphere” within which to plan and control their lives. But neither Rawls’s nor Hayek’s reasons for personal property can justify extensive economic rights of unlimited accumulation and private control of productive wealth and laissez-faire contract rights that classical liberals and libertarians contend for. Moreover, even if it be conceded that

individuals' exercising *qualified* private ownership of economic means of production were necessary for their individual independence or a private sphere,⁶⁷ this at most opens the door to a generous social democratic welfare state or property-owning democracy with widespread private ownership of economic wealth by *all* citizens. But these alternatives require far greater taxation, regulation, and redistribution of market distributions and other consensual transfers than Tomasi's classical liberalism or certainly libertarianism can tolerate.

I see no convincing connection between basic laissez faire economic rights and liberties and the social conditions necessary for the full and informed exercise of the moral powers of practical reason of citizens generally. I suspect the real reason for arguing that thick capitalist economic liberties are basic liberties in Rawls's sense is that *some people* in American society desire and have a conception of their good that requires an unfettered entrepreneurial and acquisitive lifestyle and the allegedly good consequences that unassailable protection of economic liberties can bring for them, including greater wealth and greater options for choice. As Tomasi says, "the exercise of thick private economic liberty is *for many citizens* a condition of responsible self-authorship" (Tomasi 2012, 183).⁶⁸ This means simply that for many people in a

⁶⁷ This is neither Rawls's nor Hayek's contention. Hayek contends, not that *all*, but only *some people* need to have control of means of production, which provides others with opportunities to work and pursue their own purposes.

⁶⁸ Likewise, Tomasi says, "*For many people*, independent economic activity is an essential, ongoing part of a well-lived life. *This* is why market democracy sees private economic liberty as a requirement of political autonomy" (Tomasi 2012, 183). On similar grounds Kevin Vallier contends that the parties in the original position will choose a principle of equal basic liberties that includes thick private economic rights and liberties. It is because private economic liberties are so integral to their rational life plans, much in the way that religion is integral to the

capitalist economic system, essential to *their particular conceptions of the good* is that they *be* capitalist entrepreneurs and/or owners of productive resources and wealth with thick economic rights of use, control, and consumption. Of course, this is true of many people in American society. But the desirability of laissez-faire capitalist lifestyles and wealth for some cannot serve as a basis for including thick economic liberties among the equal basic liberties for all persons. Simply because certain rights and liberties are essential conditions for many people to pursue their particular choice of occupations and life plans is not a reason to make them basic rights and liberties for free and equal citizens generally.

For rights and liberties to be basic in Rawls's sense, they must be necessary to the full and informed exercise and adequate development of the moral powers of *citizens generally*, those who are reasonable and rational and desire to cooperate with others on terms all can accept in their capacity as free and equal moral persons. Rawls's account of moral personality is based in a normalized ideal of representative moral persons who conceive of themselves free and equal citizens. He says, the "scheme [of basic liberties] is always to be assessed from the standpoint of the

life plans of religious people, that they will not want to gamble with their economic freedoms. The problem with this is that in Rawls's original position behind the veil of ignorance people have no more grounds for assuming that entrepreneurship is integral to their life plan than they have for believing that democratic participation in socialist economic decisions is part of their life plan. As I argue below, the analogy with freedom of religion is misdirected. People may not know they have a religion either, but what they are protecting by choosing freedom of conscience is a more general freedom to decide not just religious but also philosophical, moral and evaluative convictions that orient their actions and give meaning to their lives. This basic liberty protects the freedom to affirm, advocate, and vote for laissez faire economic liberties, but it does not guarantee these as basic liberties, any more than it guarantees freedom to democratically participate in socialist decisions about the means of production.

representative equal citizen. From the perspective of the constitutional convention or the legislative stage (as appropriate) we are to ask which system it would be rational for him to prefer.” (TJ 179 rev.) Behind the veil of ignorance at any stage of the 4-stage sequence the representative citizen does not know his/her/their particular conception of the good. The representative equal citizen instead appeals only to the higher-order interests all citizens have in common – in fully developing their moral powers of practical reasoning. The argument for each of the basic liberties is that they among the necessary institutional conditions for free and equal citizens to realize these fundamental interests and pursue a wide range of rational conceptions of their good. The fact that some citizens may have particular economic interests furthered by laissez-faire liberties, and others may have interests furthered by worker-control or socialist ownership of the means of production, is of no relevance to identifying the basic liberties, since none of these particular interests are necessary to the full and informed exercise of the moral powers in the fundamental cases they are exercised.

Tomasi and others reply that this cannot be the correct interpretation of Rawls’s basic liberties. For many citizens are atheists but still develop and exercise their moral powers without taking advantage of freedom of religion. Others refuse to vote or exercise other equal political liberties and take no interest in public life but still can have an effective sense of justice. But atheists *do* exercise their freedom of religion, by refusing to have one. Freedom of religious belief is but one aspect of freedom of conscience, which includes freedom of philosophical and moral beliefs, and the freedom to form conscientious convictions and live according to the permissible values and pursuits that give meaning to one’s life. Moreover, the failure of particular people to regularly exercise a basic liberty, such as equal political liberties, surely cannot be a reason to deny that the liberty is not normally

necessary to the effective exercise of the moral powers among representative free and equal persons who aim to fully exercise their capacity for a sense of justice. Rather it is evidence that a person has failed to take advantage of the basic liberties that enable him or her to *fully* exercise their moral powers in an *informed* manner. Freedom of thought, expression, inquiry and discussion are not taken advantage of by many recluses or by ascetic monks who have taken a vow of silence and recite prayers most of their day. But it would be extraordinary to claim that this proves that this basic liberty is not necessary to the full and informed exercise of the capacities for practical reason and judgment of free and equal citizens. Likewise, the failure of some people to exercise equal political liberties by voting, engaging in political debate and deliberation, etc. due to their political indifference does not mean these liberties are not necessary in a democratic society for development and full and effective exercise of the sense of justice of citizens generally. Rather it suggests either a sense of political futility which is common among the poor in libertarian and classical liberal societies, or that their moral sense of justice is not fully developed since they exhibit little interest to participate in public discussion or in the application of principles of justice to laws and social policies.

Moreover, like other basic liberties, the formal right to equal political liberties is a precondition of *social equality* and *equal respect* among free and equal citizens, which are fundamental bases of self-respect in a democratic society. As a necessary condition of being recognized as a social equal, political equality is, Rawls says, a crucial condition for the full and effective exercise of the capacity for a sense of justice. Whether or not citizens choose to exercise their equal political liberties is beside the point: Someone has to exercise political authority, and it demeans liberal citizens to deny them equal political rights of participation—to vote, run for office, politically assemble, join and form political parties, and engage in

political speech, debate and deliberation. The denial of equal political liberties is public recognition that some people are not social equals or active members of the political community, but rather are in the class of political subordinates who are unqualified to take part in public political life. This undermines others' respect for them as equals, which damages individuals' sense of self-respect. They become politically passive and disengaged, and the adequate development and full exercise of their capacities for justice are hindered.

So Flanigan's position that Rawls's position regarding the basic liberties is indeterminate and that it can reasonably be construed to justify *laissez-faire* economic rights and liberties is I believe simply inaccurate. The other evidence Flanigan cites to support the claim that libertarian conclusions are equally defensible given Rawls's own assumptions is Jason Brennan's and Tomasi's contentions that the least advantaged fare better in capitalist economies with a welfare state than they do in any other economic system, including property owning democracy and liberal socialism. There is no historical example of a property-owning democracy or liberal socialism as Rawls conceives them. (Yugoslavia, often cited as an experiment in market socialism is hardly an example since it was neither a liberal nor a democratic society that guaranteed basic liberties, fair equal opportunity, equal opportunity for political influence, or a social minimum designed to conform to the difference principle). Brennan and Tomasi nonetheless contend that capitalism is in a far superior position to satisfy the difference principle than either POD or liberal socialism. Since the safety net has been shredded in the US the past 40 years and the least advantaged, many of whom work, are homeless with some living in absolute poverty on less than \$2000 per year, we have to look elsewhere for support of the Brennan/Tomasi thesis – to the social democratic welfare states of Scandinavia. Though capitalist, these cannot serve as examples of the liberal libertarian safety net state

since their overall tax rate is between 50-60%, which is necessary to pay for a wide range of public goods, educational benefits, universal health care and other social insurance programs.. Given the redistributive tax rate, these hardly count as libertarian or classical liberal economies in any sense Flanigan describes. They are instead well-regulated social democratic welfare states with strong labor unions which have co-determination rights, work councils and other features of a property- owning democracy. There is no example of a libertarian economic system with basic economic rights and liberties of the kind Tomasi describes in which the least advantaged fare anywhere near as well as in these social democratic welfare states.

Nonetheless, it is still the case that in Sweden and other welfare state economies in Western Europe, the least advantaged (the bottom 20%) have virtually no economic wealth at all, and the bottom 50%, exactly half the population, have only 5-8% of national wealth depending on the country, while the top 10% enjoy 54-60% (60% in Sweden, 58% in France, and 54% in UK) and the top 1% have 20-25 % of national wealth in these countries.⁶⁹ It is only to be expected that the least advantaged are still worse off in the US with its shredded safety net, which more closely approximates the libertarian society that Flanigan defends. So, the claim that libertarian capitalism satisfies the difference principle better than a POD where income and wealth are widely distributed across all members of society seems highly suspicious at best, if not wishful thinking.

Finally it is noteworthy that Tomasi has a different understanding of the moral powers than Rawls, which may play some role in his argument. The capacity for “self-authorship” is not simply the capacity to be rational or reasonable. It is rather a

⁶⁹ See Piketty 2020, 130, 195-196, comparing France, Sweden, and the UK.

perfectionist capacity to be a fully autonomous agent capable of creating one's values and designing one's own life. This conflicts with Rawls's political conception of the person and political liberalism, since there are reasonable comprehensive conceptions that reject autonomous self-determination as essential to the human good. Tomasi alters some of Rawls's assumptions and misinterprets others. In addition Tomasi and other libertarians and classical liberal interpreters ignore many of Rawls's crucial assumptions underlying his argument for the principles of justice. The arguments from democratic reciprocity, publicity, and the social bases of self-respect, are crucial to Rawls's arguments for the principles of justice and an egalitarian understanding of the difference principle. There is little attempt to show how libertarianism better satisfies these crucial assumptions than does Rawls's account of the principles of justice. Likewise, the fair value of political liberties and fair equality of opportunity are crucial to Rawls's economic egalitarianism and his arguments against welfare state capitalism and in favor of property-owning democracy and liberal socialism. Understandably, Flanigan and libertarians such as Tomasi, Brennan, Freeman, Lomasky, and others might simply reject many of these assumptions and principles – most notably Brennan's and others' rejection of democracy, and therewith equal political liberties and the fair opportunity for equal political influence. But if so then Flanigan cannot claim that it is so difficult to identify the crux of disagreements between orthodox Rawlsians and libertarians – each sharing the same premises but interpreting them in different ways and applying principles inconsistently. (Flanigan 2020, 68) Libertarians do not share the same premises at all with Rawls. They reject many of his premises, misinterpret others, and insert different premises of their own making, when it is convenient.

I conclude that some of the most prominent arguments cited in support of Flanigan's thesis are flawed; they do not support the

contention that Rawls's theory of justice reasonably can be interpreted to justify libertarianism or classical liberalism.

II

Liberal and Illiberal Libertarians

II.1. *What is Libertarianism?* As I discuss in my Preface, I regard Libertarianism in my book as a distinct doctrine that assigns strict priority to absolute property rights over all other moral principles and values. As such, property rights and liberties are not inalienable basic rights or liberties in Rawls's sense, but rather take priority over all other rights and liberties. On the assumption that persons have absolute property in their person, "there are no rights but property rights".⁷⁰ Chapter 2 is devoted to a discussion of the ideal libertarianism of Robert Nozick and others (such as Murray Rothbard, John Hospers, Jan Narveson). I take this to be the orthodox libertarian position. This paper was begun in the early 1990's at a time when libertarianism in philosophy was largely identified with Nozick's and similar ideal libertarian positions.⁷¹

Subsequently, Jason Brennan and others now use the term 'libertarian' more broadly, to apply to any position that defends the position that (nearly) laissez-faire economic liberties and private property rights are basic and on a par with the basic personal liberties of conscience, thought, association, and tastes and pursuits. These include the classical liberalisms of Milton Friedman and the Chicago School, Hayek and the Vienna School, James Buchanan's, David Gauthier's and Gerald Gaus's liberal Hobbesian contractarianism, and the Kantian classical liberalism

⁷⁰ Rothbard 1977, 238, quoted in chapter 2 of Freeman 2018a, 75-76

⁷¹ John Tomasi helpfully commented on the paper in 1993 when we were at the Princeton Center for Human Values, and it is relied upon in his first book, Tomasi 2001.

of Loren Lomasky, John Tomasi, and others who develop these and similar views. I term these ‘classical liberal’ views, since all these philosophers endorse the liberal basic social institutions that I contend distinguish liberalism from the orthodox libertarian position I discuss in my book. For purposes of this paper I will call classical liberal positions ‘liberal libertarian’ views, as opposed to the orthodox libertarianism of Nozick and others, and also hybrid libertarian views that occupy a position between classical liberalism and orthodox libertarianism.

Following Tomasi and Jason Brennan, Flanigan depicts libertarians in this broadly liberal sense in such a way that libertarians could endorse some, all, or, like orthodox libertarians, none at all, of the basic liberal institutions that I contend constitute liberalism of both the classical and high liberal traditions. Libertarianism in this broad sense includes the classical liberal endorsement of a social safety net and government’s duty to provide a decent social minimum that prevents people from abject poverty. Libertarianism in this broad sense is an expansive position on Flanigan’s view. On this basis Flanigan, again following Tomasi, says that libertarianism is even consistent with welfare state capitalism, therewith blurring the distinction I make between the classical and the high liberal traditions in chapters 1 and 2, and perhaps between left and right libertarianism as well. On this broad understanding of libertarianism, the only liberal positions that are non-libertarian are Rawls’s, Dworkin’s and similar left liberal egalitarian, priority, or sufficiency views that reject thick economic liberties and support a robust welfare state, POD, or some form of liberal socialism.

I think it is important to distinguish the classical liberal safety net from the social minimum endorsed by welfare state capitalism. The safety net evolved from poor relief granted in the Poor Laws in Britain, initially promulgated during the Elizabethan era,

endorsed by Hobbes, and refined up through the 19th century by the establishment of workhouses and other Dickensian institutions that required recipients of poor relief to work for benefits—ideas that are still very much alive today in the Republican party’s conditioning welfare and Medicaid benefits on work requirements for those who are allegedly capable. Friedman and Hayek endorsed the social safety net, the former on grounds that public charity for the poorest is a public good, the latter on Hobbesian grounds that it is needed to prevent lawlessness by the abjectly poor. The welfare state originated in a different idea than did the classical liberal Poor Law safety net; namely, the idea that people have a political if not a moral *right to a social minimum* that guarantees at least their essential needs and enables them to live a worthwhile life beyond the subsistence level. The important difference is that the idea of a right to a social minimum that meets essential needs does not mesh with the fundamental libertarian/classical liberal idea that property rights are on a par with or even superior to other basic liberal liberties, nor with the presumption that individuals have complete rights to their entire market income and consensual transfers of wealth in its entirety. This is I argue in chapter 1 of my book a fundamental distinction between the classical and high liberal traditions, and also marks a distinction between the classical liberal safety net and the guaranteed social minimum of the democratic welfare state.

II.B. *Flanigan’s Hybrid Libertarianism*: Now to turn to Flanigan’s suggestions regarding the version of libertarianism she endorses. Unlike Tomasi, Vallier, Gaus and other classical (or if you will “libertarian”) liberals influenced by Rawls, Flanigan renounces Rawls entirely. Instead she embraces features of Nozick’s position, thereby exhibiting what I call elsewhere a kind of *hybrid libertarian* view.⁷² She defends absolute freedom of contract like Nozick, and

⁷² See Freeman 2018c.

therewith complete alienation of all rights, including basic rights and liberties, even if this results in “voluntary servitude” (as she calls it). I prefer the term ‘involuntary servitude’ since it is the nature of slavery that it is coercive with no right of exit, and hence is involuntary; this remains true in spite of the fact that one might have formally entered a contract in the past where one agreed to all this. To meet Flanigan halfway I’ll refer to “voluntary involuntary servitude,” or better “involuntary servitude contracts.”⁷³

What makes her libertarianism hybrid is that, in addition to involuntary servitude contracts, Flanigan also seems to defend a social safety net. Following Jason Brennan, she says that with such a guarantee of a safety net, the usual objections to voluntary involuntary servitude – presumably, that it is entered into only out of desperation in response to abject poverty—do not apply. Now, recognizing a social safety net implies accepting that people are going to have to be taxed to pay without their consent for benefits

⁷³ The fact that a person voluntarily entered into coercive servitude at time t1 in the past does not change the fact that it becomes involuntary at any time afterwards t2..., when the person wants to end the coercive relationship and is denied the opportunity to do so. One might say all contracts are coercive since they are legally enforceable. But few legitimate contracts involve specific performance as a remedy for breach; most instead require paying money damages or restitution. Being coercively required to remedy the breach of a contract, even a slave contract, by restitution or payment of money damages is not the kind of coercion involved in chattel slavery. But specific performance of a slave contract is, since then one is coercively forced to be a slave, another’s property. That’s what makes specific enforcement of slave contracts different from specific performance of other contracts. Though one may be coercively required to sell and transfer one’s house pursuant to a purchase and sale agreement, one retains all the rights of free and equal persons. But that’s not the way that involuntary servitude contracts are coercive either: for by rendering one’s person the property of another, a person is no longer a free and equal person, but instead is legally regarded as a mere thing.

for others. This is a serious departure from the orthodox libertarian view. This also suggests that freedom of contract is not after all absolute on Flanigan's hybrid libertarian view, since it implies that in the absence of a social safety net, involuntary servitude contracts are entered under conditions of duress and are void and unenforceable (or at least voidable). If Flanigan is willing to restrict freedom of contract so that it does not apply to enforcement of servitude contracts in the absence of a social safety net, this raises the question whether this opens the way to restrictions on the enforcement of similar contracts applied against other financially desperate persons who make agreements under similar circumstances of duress (such as those who enter servitude agreements to pay huge medical expenses to save their lives or those of family members?) Or what about people who enter servitude contracts out of emotional desperation – because they have been jilted or divorced or lost a loved one and now think life is not worth living? But not enforcing servitude contracts for reasons of these kinds of circumstantial duress does not resolve the real problem with involuntary servitude contracts: It is not (simply) that they would allow exploitation and enslavement of economically or emotionally desperate people. It's that such contracts authorize the gross violation of fundamental human rights that guarantee respect for persons as such, regardless of their circumstances or their voluntary actions. It is grossly immoral for individuals to own and treat other human beings as if they were livestock, and unjust and uncivilized for a society to recognize any such contractual rights and coercively enforce human enslavement, regardless of the circumstances or the fact of prior consent.

In defense of the enforcement of involuntary servitude contracts, Flanigan questions my argument that political enforcement of involuntary servitude contracts is an abuse of public political power and makes other citizens complicit since political power is exercised in their name as democratic citizens.

She says that if this is supposed to be a *reductio* of libertarianism, then why is not also the “the fact that protecting freedom of expression as basic would make people at public universities complicit in protecting illiberal and offensive speech ...not a *reductio* of liberalism”? She continues that my argument is an example of the problems with Rawls’s theory of justice and reflective equilibrium – that it “is very sensitive to people’s pre-theoretic intuitions – people view a counterintuitive implication of freedom of contract as disqualifying for the liberty but do not take a similarly counterintuitive implication of freedom of speech as disqualifying”

My argument was not intended as a *reductio* nor does it depend on reflective equilibrium (which I discuss below). Rather my argument states what I assume to be an obvious and unqualified moral fact—that slavery is in itself a heinous moral wrong that violates the most basic moral rights, including rights to the integrity and freedom of the person. Thus, coercive enforcement by governments (or anyone else) of involuntary servitude contracts, even if voluntarily contracted into, is also a great moral wrong, as well as an abuse of public political authority that implicates democratic citizens who are ultimately responsible for the exercise of political power. I do not see the alleged similarity with offensive, illiberal speech which may be morally wrong as well, but that is protected by freedom of thought and expression. No one’s basic rights and liberties are violated by it or by tolerating offensive speech, including those who are the object of such speech – we do not have a basic right not to be offended (unless offensive speech rises to the level of threats of harm or imminent violence). It is because slavery is such an egregious wrong, as is torture, rape, dismemberment, and many other physical and psychological abuses of persons, that the right to bodily and psychological security, integrity and freedom of the person are fundamental and inalienable human rights that cannot be bargained away. Such

actions remain great moral wrongs even when people antecedently consent to them and are given no right of exit, or fail to object and resist their mistreatment when the acts of enslavement, dismemberment, rape, torture, etc. are carried out.

This reflects a fundamental problem with orthodox Libertarianism and with hybrid views which endorse the enforcement of the alienation of basic human rights: it is that, because of absolute freedom of coercive contract and property in persons, there *are no absolute moral wrongs* that cannot be made permissible so long as some poor soul or person in desperate straits has been cajoled, or put under duress by circumstances or third parties, to give their consent at some time in the past to be coercively abused and mistreated in the future. It is because orthodox Libertarianism recognizes no absolute moral wrongs that cannot be cured by consent that it is at best only half a moral conception of justice. It does not recognize certain fundamental unqualified moral duties owed to persons as such – of mutual respect, mutual assistance, and duties not to harm or injure others. All moral prohibitions and injunctions come qualified with the condition, “unless done with a person’s binding and coercively enforceable consent.” The libertarian argument that equal respect for persons not simply allows contractors but requires the state (or protection agencies hired to do so) to coercively enforce contracts of involuntary servitude, rape and sexual abuse, dismemberment, or whatever atrocious acts wicked imagination allows, defies moral imagination. Small wonder that Flanigan in the passage quoted above rejects reflective equilibrium because it is “very sensitive to people’s pre-theoretic intuitions” about the moral limits to freedom of contract.

III

Methodological issues: Ideal theory, Facts and Principles

III.A. *Ideal Theory*. Rawls's argument from the original position involves testing alternative conceptions of justice by inquiring whether they would be generally acceptable and willingly complied with among free and equal reasonable and rational persons in a well-ordered society whose basic social and political institutions perfectly comply with requirements of justice. In chapter 8, I defend Rawls against Amartya Sen's criticism of this assumption of strict compliance made within ideal theory. Sen argues we do not need to engage in ideal theory to recognize injustice or know what we must do to alleviate it.⁷⁴ This charge begs the question since Rawls's theory has different criteria for identifying injustices than does Sen's consequentialist account, and the two theories respond to and remedy many unjust inequalities in different ways.⁷⁵ Sen, Charles Mills and others also contend that since justice as fairness was designed to apply to an ideal well-ordered society, Rawls's theory is inapplicable to us and is irrelevant for our non-ideal circumstances. This allegation is made in spite of the many occasions that Rawls applies justice as fairness directly to assess injustices in non-ideal circumstances, and his discussions of what must be done to rectify existing injustices.⁷⁶ This also begs the

⁷⁴ Sen 2009, 100-102 on the redundancy of Rawls's "transcendental" ideal theory.

⁷⁵ Sen for example rejects the priority of basic liberties and the difference principle, and argues for welfare state capitalism, which Rawls contends does not adequately address political, social and economic inequalities.

⁷⁶ See for example Rawls's extended discussions in *A Theory of Justice* of toleration of the intolerant in TJ § 35; the duty to comply with an unjust law, TJ § 53; civil disobedience TJ §§ 55, 57, 59; conscientious refusal to comply with unjust orders, laws, and decrees, §§ 56, 58; in *Political Liberalism*, his discussions of the injustices of historical restrictions on freedom of political expression and US

question and must be argued for, since the fact that a conception of justice is designed *for* an ideal society does not mean it does not apply *to* determine injustices in a non-ideal circumstances – and it was Rawls’s intention to provide standards that do just that. Finally, libertarians and conservatives argue this ideal of society itself is both unachievable and undesirable (Gaus, Schmidtz, Tomasi, Brennan, etc.). Rawls contends there is nothing intrinsic to human psychology or political economy and sociology that prevents the realization of a well-ordered society of justice as fairness, and indeed that such a society realizes essential human goods, such as our social capacities for justice and social cooperation. Whether such a society is desirable of course depends upon whether liberal egalitarians or libertarians have the better argument. Flanigan repeats many of these criticisms, and then raises other objections against the method of reflective equilibrium.

Generally, the rejection of ideal theory evidences an unwillingness to engage with the most fundamental questions of normative moral and political philosophy. For ideal theory and the assumption of strict compliance is in one form or another characteristic of the history of moral and political philosophy. Social contract theories since Hobbes, Locke, Rousseau, and Kant assume general agreement by free and equal persons to terms of cooperation everyone willingly complies with. In addition,

Supreme Court’s refusal to mitigate the effects of wealth in politics and protect the fair value of political liberties, PL Lecture VIII, §§ 10-12; in the *Restatement*, his discussion of the several ways laissez-faire and welfare state capitalism and command economy socialism violate the principles of justice, JF §§ 41-42; his rejection of procedural democracy, JF § 44; and the injustice of head taxes, JF §48 – not to mention the many places where he condemns racial and gender subordination, discrimination, and inequality; discrimination against gays and lesbians, and so on because they violate the principles of justice.

contractualism, Kant and Kantian moral philosophy, rule and indirect utilitarians, and other consequentialists (including R.M. Hare) have long sought to determine the validity of moral rules and principles by universalizing norms and inquiring as to the consequences of everyone's accepting and fully complying with them.⁷⁷ To contend that such universalized principles are not applicable to us because some people in our circumstances reject them and cannot be motivated to comply either misses the point of a fundamental idea in moral and political philosophy or is a refusal to engage with it.

It is then a rather peculiar objection when Flanigan, citing David Enoch's criticisms of ideal theory, says:

As in the case of public reason then, the idealization of full compliance is unrelated to the underlying motivation for the view (modeling what people would choose under impartial conditions). (Flanigan 2020, 84).

The suggestion is that many of Rawls's assumptions are ad hoc, and rigged to yield the conclusions he seeks, (as Flanigan also suggests in repeating R.M. Hare's well-known criticism).

Full compliance is an unfortunate way to illustrate the accusation that Rawls makes ad hoc assumptions, as is public reason as well. To begin with, I would hesitate to simplify Rawls's "underlying motivation" as simply "modeling what people would choose under impartial conditions." Like universalizability and strict compliance, the impartial moral point of view is also

⁷⁷ The common sense test, "What if everyone did that?," that R. M. Hare himself relies upon is an oversimplification of Kant's categorical imperative.

characteristic of the history of moral and political philosophy, and there are several different ways to construct and combine these fundamental ideas.⁷⁸ Regarding Rawls's motivations for appealing to both ideas, he says the social contract among free and equal moral persons made in the impartial conditions of the original position is designed to correspond with the features of a well-ordered society. These include the public knowledge and unanimous acceptance of and full compliance with the principles of justice by all free and equal moral persons in a well-ordered society. "These and other aspects of a well-ordered society are incorporated into the description of the original position by the contract condition".⁷⁹ So the parties in the original position are to agree only to principles that the free and equal moral persons whom they represent can also generally agree to and willingly comply with in a society where the requirements of these principles are impartially enforced. The same is true of the idea of public reason in political liberalism, which correlates with the publicity assumption in the original position – that the fundamental principles of social cooperation and their justification not be surreptitiously hidden from public view, but be publicly known and acknowledged by all reasonable members of society. Public reason is grounded in the publicity condition, and requires that the underlying reasons for laws and public policies that everyone is expected to comply with are publicly known and justifiable to free and equal moral persons. Rather than being ad hoc these requirements of public justification to everyone in terms of shared reasons all reasonably accept are conditions of the freedom and the

⁷⁸ In addition to Rawls, also Hume, Adam Smith, Kant, Sidgwick, Hare, Parfit, Nagel, Scanlon, Sen, Barry, and many others construct a version of the impartial or moral point of view, and several of them combine it with an assumption of strict compliance.

⁷⁹ Rawls 1999, 250.

political autonomy of free and equal moral persons who are democratic citizens.

It is no surprise then that Hare would say that both the publicity condition and full compliance in *Theory* is rigged, since the parties in the original position reject utilitarianism in large part (Rawls contends) because it cannot satisfy the full publicity condition and still maintain general acceptance and full compliance with utilitarian principles by all citizens in a well-ordered society.⁸⁰ Maintaining economic reciprocity, the social bases of self-respect, equality of basic liberties, and the maximin argument also play a significant role in Rawls's argument against utilitarianism in comparison with the principles of justice. All these same reasons apply equally forcefully to rule out the choice of libertarianism in the original position. (JF 83, cf. PL 262-265) Thus, what might seem ad hoc to utilitarians, libertarians and other advocates of inegalitarian positions are in fact reasonable assumptions that are implicit in the fundamental intuitive ideas underlying Rawls's view: free and equal moral persons who cooperate on terms of reciprocity and mutual respect that all willingly accept and can comply with in their capacity as democratic citizens. Like utilitarians, the fundamental disagreement libertarians have with Rawls's principles of justice begins with their rejecting Rawls's specification of his Kantian ideal of free and equal moral persons and his contractarian ideal of social cooperation on terms that are generally acceptable and justifiable to all persons in their capacity as free and equal democratic citizens. Libertarians, like the utilitarians who claim to also occupy Rawls's framework, in fact specify the conceptions of persons and society differently than

⁸⁰ Economic reciprocity, the social bases of self-respect, and the maximin argument also play a central role in Rawls's argument that the parties would reject utilitarianism.

Rawls, and then do the same with other fundamental Rawlsian ideas, including the conditions of impartial agreement, public reason, and reasonable justification to others. As Rawls indicates (JF 83), it requires very different assumptions than those Rawls makes in the original position to arrive at the extensive property rights and vast economic inequalities that are characteristic of libertarian views.

III. B. *Facts and Principles*. One further criticism of Rawls's ideal theory Flanigan raises is that it is "intermediate", and not fully idealized, since Rawls makes certain allegedly arbitrary factual assumptions about persons and society in the original position and a well-ordered society.⁸¹ Flanigan says Rawls's and other Intermediate ideal theory is unstable and arbitrary. But Rawls's reason for interweaving factual assumptions within ideal theory is precisely to define a realistically possible and stable ideal society, a "realistic utopia" that is within the range of human capabilities. "An important feature of a conception of justice is that it should generate its own support" (TJ 137-138/119 rev.). Basically, if a conception of justice "for a democratic society" cannot be publicly known, generally accepted, and serve as a basis for practical

⁸¹ The parties in the original position Rawls states, "... know the general facts about human society. They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology. Indeed the parties are assumed to know whatever general facts affect the choice of the principles of justice. There are no limitations on general information, that is, on general laws and theories, since conceptions of justice must be adjusted to the characteristics of systems of social cooperation which they are to regulate, and there is no reason to rule out these facts. It is, for example, a consideration against a conception of justice that, in view of the laws of human psychology, men would not acquire a desire to act upon it even when the institutions of their society satisfied it. For in this case there would be difficulty in securing the stability of social cooperation. An important feature of a conception of justice is that it should generate its own support" (TJ 137-138/119 rev.).

reasoning and public deliberation, then it is practically irrelevant *for a democratic society* for the most part – still relevant for intellectual and educative purposes of course, but not for practical purposes (except for those with subversive interests).

In chapter 9 of my book, “Constructivism, Facts, and Moral Justification,” I address this aspect of Rawls’s theory, in responding to G.A. Cohen’s criticisms of Rawls’s factual assumptions. Rawls assumes that humans are social beings with a sense of justice and that under favorable social conditions, they normally want to justify themselves to others and do what is right and just. He seeks to discover the conception of justice that is most compatible with laws of moral psychology and our sense of justice and other natural human proclivities and general facts about moral psychology and political sociology. There are at least three reasons for this: First, if principles of justice are to impose moral requirements on our conduct that we can be reasonably expected and held responsible to comply with, they should be within the reach of our distinctly human capacities and compatible with our social capacities, including our sense of justice. Second, for Rawls principles of justice should be not simply within our reach and consistent with our sense of justice, but they should also affirm or be “congruent” with (rather than undermining) the human good, giving everyone sufficient reasons to want to do what justice requires under conditions where all are assured that others comply with its requirements. Finally, a third factual assumption about human motivation underlies the publicity condition: it is that the fundamental principles of justice that govern human relations should be *stable* under conditions where they are publicly known and serve as principles of practical reason and justification of social institutions and our social and political relations.

The problem with ideal theory which does not take into account general facts about human psychology, social cooperation, and

what we are capable of, but rather appeals only to “pure reason” and rational intuitions to discover fundamental practical principles, is that these principles place demands on persons that are not realistically possible for all to willingly comply with, even when they want to do what is right and just. Pure altruism – having impartial concern for promoting the desires or interests of everyone, regardless of one’s own interests – is a clear example of a disposition which Rawls assumes is not realistically possible. People have and it is part of their good that they have special relationships and purposes they especially value and which they conceive as essential to their individual good. Likewise it is unrealistic to assume that the least advantaged members of society can willingly accept, comply with and support utilitarian or libertarian social and economic institutions, when their well-being is being sacrificed so that those more advantaged can better realize their particular interests, such as their capacities for utility or “self-authorship” or some other perfectionist ideal.

None of this is to say that libertarian social norms are not within human capacities, but rather that uniform compliance and their general acceptability, such as it is, are at best a *modus vivendi*: one that depends on its being the product of a social contract under existing conditions, where everyone knows their circumstances and advantages and disadvantages compared with others. “To each according to their threat advantage” is not a moral conception, nor is it compatible with the human good. Ideal libertarian theory such as Nozick’s privatized nightwatchman state is utopian since its requirements could not be willingly complied with by all reasonable and rational agents. The stability of any such non-state libertarian society is neither compatible with human nature nor congruent with the human good since it denies even the basic needs of the most disadvantaged people. Anarchical libertarianism is neither feasible nor a stable social world. Given human propensities under conditions of extreme inequality without protections for

inalienability of human rights, it results in the oppression of the less advantaged and degenerates inevitably into political oppression or a Hobbesian state of war – the fate of many attempts to realize utopian theory.

IV

Methodological Issues: Reflective Equilibrium

IV.1. Rawls's assumption of a well-ordered society wherein all agree to and comply with its governing principles of justice is an ideal of social cooperation that corresponds, he contends, with certain pre-philosophical convictions of reasonable persons who are members of a democratic society. Reasonable persons for Rawls have a sense of justice and desire to cooperate on terms of reciprocity and mutual respect that all reasonable members of society can endorse and willingly comply with. The pre-philosophical "considered convictions of justice" of reasonable persons is a crucial assumption within Rawls's method of justification, reflective equilibrium, and provides the basis for Rawls's "constructivist procedure," the original position. Flanigan devotes much of her discussion to alleged problems with reflective equilibrium as a method of discovery and justification of moral principles. Flanigan raises several challenges to reflective equilibrium, which require far more discussion than I have space for here. Here I only have space to make some general remarks in response to her criticisms and hopefully will have the opportunity to revisit others later.

Rawls initially set forth reflective equilibrium to avoid the epistemic and often metaphysical commitments of rational intuitionism, which has characterized much of the history of moral philosophy since Plato. Rational intuitionism as Rawls describes it involves the appeal to certain abstract principles or reasons claimed

to be self-evident, certain, or otherwise undeniable— which then provide the foundations for further moral assumptions and conclusions.⁸² Rawls argued that reflective equilibrium is a more appropriate method of discovery and justification in moral philosophy since it avoids controversial epistemic and moral assumptions. Instead of assuming that there are any such unassailable a priori principles or non-natural moral facts, and that we have a special capacity of rational intuition through which we know them, Rawls argued that all of our reasonable considered moral convictions of justice, both general and particular, should be taken into account, organized, duly considered, and critically assessed. The most reasonable and fixed convictions among these are to be relied upon to discover the conception of justice that—after comparison with other reasonable moral conceptions—is found most compatible with our considered moral convictions in “general and wide reflective equilibrium.” This holistic account of moral justification in political philosophy is highly complex since it requires that we give due consideration and assign appropriate weight and relative importance to *all the relevant reasons*—including moral and rational principles and general facts that are relevant to arguing for and justifying principles of justice for the basic structure of a democratic society. Of course, as Flanigan emphasizes, people might disagree about these matters—as is normally the case in philosophical disagreements and this is to be expected—and the only way to resolve or narrow the scope of these

⁸² Rawls’s example of rational intuitionism is Sidgwick’s “philosophical intuitions,” which include the principle of impartial benevolence, to maximize the good impartially construed; the principle of equity, that similar cases are to be treated similarly, and the principle of no-time-preference, to have equal concern for all the parts of a life. Sidgwick relies upon these philosophical intuitions as the foundation for the classical principle of utility – “universal hedonism”— the most reasonable “method of ethics” he claims.

disagreements is through continued discussion that explains and gives reasons for one's judgments regarding the weight and relative importance one assigns to the reasons that are the source of disagreement.

IV.2. Flanigan however says reflective equilibrium is especially sensitive to pre-philosophical intuitions about cases or theories, and that different people can arrive at different conclusions without misapplying the method in any way.⁸³ It is true that reflective equilibrium starts with and relies in part on reasonable persons' unbiased pre-philosophical considered moral convictions – their “reflective intuitions” if one insists using the term – which are combined with our considered philosophical judgments at all levels of generality. There is no way to avoid appeals to considered convictions of value, right, and justice at crucial points in moral philosophy, whether they be abstract philosophical intuitions or considered convictions regarding specific cases. The important question is what one should try to do with these moral convictions. Sidgwick's argument for the classical principle of utility did not stop with his philosophical intuitions and their purported implication of the principle of utility, but in order to confirm the principle of utility he tested it against the considered judgments of common sense morality, to confirm that the utilitarian principle can explain, clarify, and justify the considered moral convictions, duties, and obligations of common sense morality. While Sidgwick's version of reflective equilibrium was not complete – the philosophical intuitions were still unassailable on his view—still

⁸³ Citing Kelly – McGrath 2010, Flanigan also says reflective equilibrium is subject to the objection that it is too conservative because it privileges widely shared judgments. Given that Rawls's conception of justice justifies an egalitarian property-owning democracy or liberal socialism, it is not clear what this objection comes to, especially when compared against Flanigan's liberal libertarianism, which largely rationalizes the reigning ideology of 19th and early 20th century laissez-faire American capitalism.

Sidgwick defended the principle of utility he claimed to derive from them by arguing that general utility is more consistent with our considered moral convictions at all levels of generality than are alternative moral conceptions.

Without some such form of at least partial reflective equilibrium, it is simply philosophical dogmatism to insist that one's abstract philosophical intuitions are self-verifying and that their implications and consequences are not to be tested against our considered moral convictions of justice. It is hard to know how to reason with someone who insists that their philosophical intuitions are not subject to being questioned or qualified when these intuitions conflict with the vast majority of other considered philosophical and common-sense moral intuitions reasonable people have. I've argued in effect that the extreme libertarian intuition that individual liberty entails absolute rights of property and freedom of contract, to the degree that these include the right to alienate all of one's basic rights and liberties and render oneself another's property to be disposed of at will, conflicts with virtually all other considered moral convictions we have regarding the dignity of persons, respect for human life, and the security, integrity and freedom of human beings. Of course, orthodox libertarians disagree and can reply with arguments that appeal to other considered moral intuitions, such as a different conception of what human dignity and respect for persons as equals involves. But then they are engaged in a process of argumentation that itself appeals to our coming to a reflective equilibrium on the moral principles they advocate and considered moral convictions and reasons we presumably share. There is no reasonable alternative to relying on reflective equilibrium at some level in moral philosophy

or in moral reasoning about justice.⁸⁴ The attempt to narrow its scope by focusing exclusively on certain philosophical intuitions and the reasons that support them, and then dismiss or exclude giving due consideration to conflicting considered moral convictions and comparisons with alternative conceptions of justice, is just to cut off philosophical deliberation and debate before it is completed.

IV.3. As an alternative to Rawls's and other comprehensive moral conceptions, Flanigan argues for a "more piecemeal" approach to political philosophy, at the level of non-ideal theory and that focuses on particular policy issues. She gives several examples of libertarian arguments against restrictions on businesses. She also notes that feminists raise similar objections, and chides me for not discussing policies in my book.⁸⁵

One way to understand Flanigan's piecemeal approach is – like many criticisms of ideal theory – as a proposal to abandon the fundamental questions of political philosophy and instead engage in philosophically informed discussions of public policy. This might seem to avoid the infuriating complexity of reflective equilibrium and of foundational questions more generally. But if philosophical discussions of public policy are to be anything more than edifying displays of moral intuitions, they must ultimately involve appeals to abstract philosophical considerations, including moral reasons, principles, and outcomes that justify policy proposals. And where do these come from, and how are we to

⁸⁴ Here I agree with T.M. Scanlon, who says: "... it seems to me that this method, properly understood, is in fact the best way of making up one's mind about moral matters and about many other subjects. Indeed, it is the only defensible method: apparent alternatives to it are illusory" (Scanlon 2003, 149).

⁸⁵ Regarding Flanigan's remarks on the dearth of philosophical discussions of policy issues in my book, I have subsequently published two recent papers in the area, one addressing severe cognitive disabilities, and the other, religious appeals in public political debate. See Freeman 2018b and 2020.

decide their relative weight and degree of importance compared with one another and when they conflict with other moral or policy considerations? Typical of the libertarianism that Flanigan defends is a kind of intuitionism that presupposes certain moral principles and reasons and that eschews both ideal theory (unlike Nozick, Gauthier, and other libertarians and classical liberals) and also eschews other abstract philosophical arguments for more general principles (as in Hayek, Gaus, Buchanan, and other classical liberals). But while her piecemeal approach within non-ideal theory may avoid the abstract philosophical arguments of ideal theory, it does nonetheless presuppose and often involves the application of abstract libertarian rights and principles. For what makes non-ideal theory “non-ideal” is that it is an application – whether knowingly or not – of the principles, reasons, and ideals within ideal theory.

I do not mean to devalue this piecemeal approach to political philosophy, for it is of great philosophical as well as practical importance. Non-ideal theory demonstrates the relevance of ideal theory to addressing and resolving the injustices of our non-ideal conditions. But it is important to recognize that a non-ideal piecemeal approach does embody a kind of method of doing philosophy that implicitly assumes and is guided by more abstract philosophical principles and reasons. Libertarian discussions are guided by their general acceptance of *laissez-faire* principles and property rights, and “piecemeal” libertarian discussions involve the application or guidance of these principles. But the more general philosophical questions of ideal theory still remain: how are we to justify libertarian *laissez-faire* property rights and economic liberties, in light of our other commitments to individual freedom for all, social equality, human welfare and well-being, and so on? There’s no escaping these questions. So, in the end the “piecemeal” approach is philosophically dependent on the more general fundamental questions of political philosophy. And how are these principles to be justified?

If one denies reflective equilibrium entirely, then philosophical intuitionism seems the default position. Even naturalism in moral philosophy (which Rawls is also criticized for incorporating into his arguments for stability) requires appeals to fixed philosophical intuitions at some point if it eschews reflective equilibrium entirely. And philosophical intuitionism is often typical of libertarian arguments. Libertarians regard absolute property rights and freedom of contract as undisputable requirements of individual freedom. So Nozick just assumes without argument that in a Lockean state of nature appropriation of unowned things, whether by first possession or investing one's labor, results in absolute property rights to a thing, without seriously considering other alternatives. Given the nature of absolute property – that it involves rights of exclusion against all the world and absolute restrictions on others' freedom—there is no serious attempt to show that absolute property rights realize individual freedom and do so better than other alternative qualified conceptions of property rights implicit in the liberal welfare state or property-owning democracy.

Flanigan and other intuitionist libertarians engage in a similar enterprise, but at a more local level. They take certain policy problems, propose libertarian solutions, and then defend them by arguing that the consequences of rejecting these libertarian solutions involve unacceptable implications, such as the violation of certain important rights, or loss of welfare to the less advantaged, and so on. But this still leaves the bigger question of how a society justifies to its members the absolute property and contract rights that are in the background of such policies and that are applied in this particular instance. Perhaps the assumption is that by assembling large numbers of piecemeal arguments, we are validating these libertarian principles. But that is a kind of partial reflective equilibrium, where the assumption is that general principles are validated by arguing that they conform to our

considered moral convictions in particular cases. It is an application of the method implicit Sidgwick's *Methods of Ethics* to libertarianism. Begin with certain philosophical intuitions about property rights and economic freedom of contract, together with other freedoms, and then verify them by arguing that they result in implications when applied that are more reasonable than alternative distributive principles of justice, such as utility, the difference principle, etc. This method may escape some of the complexities and ambiguities alleged to be implicit in Rawls's method of general and wide reflective equilibrium, which seeks to bring all relevant considered convictions of justice, general and particular, into reflective equilibrium with principles of justice. But the partial method does so at the expense of dogmatically assuming that certain abstract philosophical intuitions are simply given and unassailable.

Finally, Flanigan endorses R.M. Hare's frustration with Rawls, his claim that the argument is so "rigged" as to lead to the conclusions Rawls seeks. This resembles the contention by David Enoch that public reason philosophers such as Rawls make ad hoc assumptions. To make good on this claim, one has to show why the assumptions are "rigged" or ad hoc, and are not integral to Rawls's fundamental assumptions. Hare is frustrated because Rawls's assumptions indeed seem to lead to the conclusions Rawls says they do. Hare might make different assumptions – for example he assumes a sympathetic spectator who knows all relevant facts about persons and their desires and applies Sidgwick's principle of impartial benevolence (both of which Rawls rejects for reasons implicit to his position), then ends up concluding that the utilitarianism is the most reasonable conception of justice. The real debate here is not about whether assumptions are rigged or ad hoc, but whether the assumptions are reasonable or true and fit with other assumptions made, and whether they lead to the conclusions inferred from them, and then

fit with our considered judgments in general and wide reflective equilibrium better than other reasonable alternatives. Rawls contends that on this score, utilitarianism does not fare well. I believe the same is true of libertarianism.

4

Reply to Alexander Kaufman

I

Kaufman on the Significance of Fair Equality of Opportunity

Alex Kaufman in his contribution focuses on the fair equality of opportunity principle, which he regards as occupying a central place in Rawls's account of distributive justice. He develops this claim at length in his important book, *Rawls and Egalitarianism*. Kaufman contends that the difference principle has a more limited role in Rawls's account of distributive justice than is customarily understood. He rightly contends that the difference principle is not an allocative or prioritarian principle of the kind John Roemer envisions, which directs society to maximize the income and wealth going to the least advantaged. In Section 2 of his paper, "Reasoning about the Justice of Social Institutions," Kaufman justifiably claims that to merely focus on the difference principle as Rawls's standard of distributive justice falsifies Rawls's theory. Though Kaufman later suggests that I am guilty of doing this, I think he makes an important point. In this connection, it's important to note that Rawls himself refers to the difference principle as addressing "distributive justice in the narrow sense," which suggests that the difference principle does not seek to address all requirements regarding the just distribution of income and wealth in a democratic society. As Kaufman makes clear, both the first principle and fair equality of opportunity imposed significant distributive requirements and constraints. The fair value of political liberties requires mitigation of economic inequalities

that undermine equal rights of political participation with equal opportunity for political influence—here Rawls discusses the important role of inheritance and wealth taxes to mitigate the concentration of wealth (TJ 246-247 rev.). Moreover, the principle of basic needs is presupposed by the first principle and imposes a social minimum independent of the difference principle that guarantees a minimum “level of social and material well-being and of training and education.” (PL 166) It is a “constitutional essential” Rawls says that is required to guarantee adequate resources to enable society’s members to effectively exercise their basic liberties and take part in political and social life. (PL 7, 166, 228-229) As I contend in my reply to Salvatore and Thomas, under ideal conditions Rawls does not seem to think of this guarantee of basic needs as a demogrant or universal guarantee to a basic income granted to all; rather it is regarded as a “principle of redress” (a term he uses elsewhere) that addresses the needs of all who are unable to adequately support themselves for reasons of disability, bankruptcy, age, etc.⁸⁶

Rawls is also clear that the just savings principle conditions the social minimum required by the difference principle, (TJ 266 rev.) as apparently does the duty of assistance of burdened peoples (LP

⁸⁶ See here TJ 244 rev., where Rawls, in discussing the distributive institutions of a property-owning democracy, says “the transfer branch guarantees a certain level of well-being and honors the claims of need.” Earlier he says, TJ 243 rev. “Finally, the government guarantees a social minimum either by family allowances and special payments for sickness and employment, or more systematically by such devices as a graded income supplement (a so-called negative income tax).” This is ambiguous, since in TJ, unlike later works, Rawls normally uses ‘social minimum’ in connection with the difference principle; but then family allowances and special payments for sickness also would seem to apply to people who are unable to work, whereas graded income supplements would seem to apply under the difference principle to those who work but whose combined income from wages and shares of wealth do not rise to the social minimum set by the difference principle.

106-113). But Kaufman puts his greatest emphasis on the principle of fair equality of opportunity (FEO) as a distributive principle of justice. Kaufman, like Scanlon and others (including myself in chapter 3) contend that: given that FEO aims to even out the effects of the social class individuals are born into, then in order to give those born with similar natural talents the same chances of education and culture and to compete for social and economic positions (IJ 245 rev.), FEO requires fair distribution of not simply educational and job training resources throughout citizens' careers, but also prenatal care, universal child care and development benefits to less advantaged families; a universal health care system, and other resources, to enable all citizens to develop and exercise their capacities so that they can take fair advantage of the educational, employment and cultural opportunities available to them throughout their lifetimes.

I agree with all this, as I think chapters 3-4 and elsewhere in my book make clear.⁸⁷ Kaufman's striking thesis however is that these requirements of the fair equal opportunity principle are so substantial that they significantly delimit the difference principle's role in the ultimate determination of the fair distribution of income and wealth in a democratic society. This is where Kaufman distinguishes his position from mine. He contends that I overemphasize the role of the difference principle, and underestimate the significant distributive requirements of the basic-needs principle and fair equality of opportunity. As Kaufman says:

⁸⁷ More generally, see the lengthy half page list of page references under "fair equality of opportunity" in the index to my book, where FEO is addressed nearly 60 times throughout the book.

Freeman in some instances treats the requirements of a social minimum and fair equality of opportunity as mere preconditions to the application of the difference principle to questions of justice. To the extent that he isolates his analysis of the institutional requirements of the difference principle from his discussion of the other two requirements of distributive justice, Freeman slights the integrated character of Rawls's approach to reasoning about justice. In addition, I will argue, Freeman underestimates the scope of the requirements of fair equality of opportunity (Kaufman 2020, 109).

Later Kaufman says that, though I endorse the many requirements of fair equality of opportunity, still I regard it as merely a supplement to the difference principle. By contrast, Kaufman says of the fair equality of opportunity principle: "This principle does not set out requirements of justice *supplementary* to the difference principle. Rather the equal opportunity principle sets out the *primary requirements* of distributive justice in institutions." Here I disagree. Fair equality of opportunity gains a secure footing only once the economic system required by the difference principle is determined and in place.

II

The Respective Roles of Fair Equality of Opportunity and the Difference Principle

II.1. To assess Kaufman's criticisms of my position, it would be helpful to review what I take to be the respective roles of the fair equality of opportunity principle and the difference principle. I do not see FEO as merely supplementary to the difference principle, but rather as *complementary* to the difference principle and also to the first principle of justice. Like the first principles' guarantee of equal basic liberties and fair chance for equal political influence,

FEO plays a major role entirely independent of the difference principle in establishing the *social equality* of democratic citizens, regardless of natural or social characteristics or economic position.⁸⁸ Though rarely realized in practice, open positions with formal equality of opportunity is a fundamental precondition of social equality. Fair equality of opportunity presupposes formal equality of opportunity, and adds that for it to be fair, a society must go to considerable lengths to take substantive measures that guarantee similar chances of child development, education, training, and cultural benefits for persons similarly motivated, so that all may occupy open social positions and offices solely on grounds of qualities and efforts reasonably related to relevant duties and tasks of these positions. (TJ 245-246) I agree with Kaufman that FEO has substantial distributive effects in this and in other respects – not simply in the fair distribution of child development, educational, job training, and cultural benefits to citizens, but also in imposing restrictions on economic inequalities which reinforce and may even add to those restrictions required by the fair value of the political liberties. (TJ 246 rev.)

Furthermore, fair equality of opportunity presupposes the primary good of “*diverse opportunities*, which opportunities allow the pursuit of a variety of ends and give effect to decisions to revise and alter them.” (JF 58). To provide such diverse opportunities a complex variety of public goods are required or otherwise justifiable by fair equality of opportunity (Freeman 2018a, 121-122). In addition to the usual stock of public goods (national defense, public safety, courts and trials and the legal system itself,

⁸⁸ See TJ 91 rev. where Rawls says “We can associate the traditional ideas of liberty, equality and fraternity with the democratic interpretations of the two principles of justice as follows: liberty corresponds to the first principle, *equality to the idea of equality in the first principle together with fair equality of opportunity*, and fraternity with the difference principle” (emphases added.)

including the law of property and contract and means of civil redress, etc.) there are the public education system and educational subsidies for universities and their students, universal child care and early childhood development programs, public health, water and waste disposal works, also a complex modern transportation infrastructure, medical and scientific research, and so on, all of which are preconditions for the possibility of the “diverse opportunities,” fair access to which is required by the fair equal opportunity principle. Moreover, FEO sets the conditions for the fair distribution of social and economic offices and positions that involve the exercise of “powers and prerogatives of office and positions of authority and responsibility.” These are all an impressive array of requirements and social benefits that are subsumed under fair equality of opportunity, and Kaufman is right to emphasize their central importance to justice as fairness.⁸⁹

In all these respects, FEO should be regarded as a principle of distributive justice in a broad sense, that it concerns the fair distribution of diverse opportunities and the many benefits this requires to all members of society. Nonetheless, on my view, Rawls himself did not primarily conceive of FEO as a distributive principle “in the narrow sense” of the fair distribution of income and wealth among society’s members in exchange for their contributions to social and economic activity. Instead, first off, he regarded FEO as a *principle of social equality* in the following sense: In the fair distribution of diverse opportunities for child

⁸⁹ In addition to all this, I go one step further than both Rawls and Kaufman in my book to suggest that FEO should be expanded to guarantee not only the fair opportunity *to compete* for open positions that exercise powers and prerogatives, but also the fair opportunity for all *to exercise* certain guaranteed economic powers, prerogatives and responsibilities within one’s place of work. Therewith FEO guarantees to all working citizens certain rights of economic agency. See Freeman 2018a, 159-163. I discuss this aspect of FEO in connection with my comments on Edmundson’s, Thomas’ and Salvatore’s papers.

developmental, educational and cultural benefits and in the competition for social and economic positions, FEO eliminates formal class distinctions and prohibits unjust discrimination on the bases of race, ethnicity, gender, religion, nationality, sexual preference and other morally irrelevant criteria. Secondly Rawls regarded the fair distribution of formally equal opportunities as a precondition for economic justice and the fair distribution of the remaining primary goods of income and wealth and powers and prerogatives according to the difference principle.⁹⁰ It is in this latter connection that he says: “The role of the principle of fair opportunity is to insure that the system of cooperation is one of pure procedural justice. Unless it is satisfied, distributive justice could not be left to take care of itself, even within a restricted range” (TJ 76 rev.). I assume Rawls is referring here to distributive justice “in the narrow sense,” by which he means distributions in conformity with the institutions that comply with the difference principle. On my understanding of Rawls, though FEO requires and controls the distribution of opportunities to occupy social and economic offices and positions, and also access to public goods and many social benefits (such as education, health care), the principle is not itself a distributive principle “in the narrow sense” that specifies substantive standards for the *fair distribution of the primary goods of income, wealth, and economic powers and prerogatives among socially productive citizens themselves*. (Again, this is Rawls’s understanding, unlike my “friendly amendment” to FEO, which does impose distributive conditions in the narrow sense in that it guarantees to all citizens certain fundamental economic powers

⁹⁰ Here I assume that the final primary social good Rawls specifies – the social bases of self-respect – is conditioned by distributions and the basic structure of institutions that conform to all three principles as well individuals’ compliance with their natural duties of justice, mutual respect, and so on. It is then the institutions of the basic structure of society in conformity with the principles and other requirements of justice that provide the social bases of self-respect.

and prerogatives.) Rather if FEO is to be regarded as a principle of distribution for Rawls, then its role is to specify the substantive *preconditions for the fair distribution of “diverse opportunities”* to provide citizens access to the “offices and positions” that exercise social and economic powers, prerogatives and responsibilities, and also diverse opportunities to enjoy the “benefits of culture.” FEO then regulates the fair distribution of diverse opportunities and of the social benefits (child care, public education and health care) to specific individuals that make it possible for them to develop and educate their capacities and fairly compete for and take fair advantage of these diverse opportunities themselves mandated by fair equal opportunity. FEO is for Rawls to be sure a *precondition* of economic reciprocity among productive citizens and the fair distribution to them of income and wealth, powers and prerogatives according to the difference principle in exchange for doing their “fair share.” But fair equal opportunity is not itself a substantive principle of distributive justice of these primary social goods in the “narrow sense” that Rawls addresses with the difference principle.

II.2. Now I’d like to say some more about how I conceive the distinctive role of the difference principle:

A. *First Role of Difference Principle.* The difference principle addresses the fair distribution of income and economic wealth that results from the social product jointly created among productive economic agents. Moreover, for Rawls it also addresses the fair distribution among economic agents of economic powers and prerogatives exercised with respect to economic resources and in the production of income and wealth. Here is where the difference principle determines questions of ownership and control of the means of production, and the fair distribution of workers’ and other economic agents’ rights, powers, and prerogatives in their employment. This is the first fundamental role of the difference

principle. In order to fulfill this its primary role—the fair distribution of income, wealth, and economic powers and prerogatives – the difference principle must assume a second fundamental role.

B. *Second Role of Difference Principle – Economic Justice and “The Choice of a Social System”*. Rawls’s position is distinctive, as Alan Thomas and Alex Kaufman emphasize, in that the fair distribution of income and wealth among socially productive agents is not an allocative question, but rather is one of pure procedural justice. This means that the difference principle, in order to fill its role as a principle of distributive justice, also takes on the more general role as a principle of economic justice to be applied to determine “the choice of a social system,” (as Rawls says). In the comparison of alternative social and economic systems the difference principle serves as the criterion that decides what is the most just economic system for a particular society: it is the system that makes the least advantaged better off than any alternative. We can surely recognize unjust distributions without the difference principle – they are all around us. But we cannot finally ascertain what a fair distribution of income and wealth, or economic powers and prerogatives is – until we first know the social and economic system and institutions that make the least advantaged members of society better off in their share of the relevant primary social goods than all alternative systems. Once such a system is in place and economic agents have fully complied with its rules and done their fair share within the institutions of that economic system then distributive shares are fully just. These institutions and their distribution provide the standards by which to assess the institutions and justice of distributions within existing economic systems in non-ideal circumstances. This fundamental role of the difference principle – in determining “the choice of a social system” – is I fear underestimated within Kaufman’s position.

C. Third Role of Difference Principle – The Justice of Social and Economic Positions. FEO provides the standard by which to assess the fair distribution of opportunities to occupy the social and economic offices and positions that exercise powers and prerogatives, authority and responsibilities, as well as educational and child development benefits necessary to that fair distribution. But assuming the first principle and FEO are satisfied, it is the difference principle that ultimately determines the justice of the social and economic system itself within which individuals compete for these positions and receive these benefits. In doing so, the difference principle decides *the justice of these social and economic offices and positions themselves, the nature and scope of the powers and prerogatives that attend them, and the fair distribution of these powers and prerogatives among social and economic positions.* For example, in non-ideal conditions such as our own – a non-ideal system located somewhere between Liberal Equality and the System of Natural Liberty according to Rawls’s typology in TJ § 12 – people of all social ranks might conceivably one day very roughly approximate fair equal opportunities to compete for and occupy social and economic positions under the FEO principle, assuming that the necessary substantial educational and developmental benefits were made available to all. (Recall that Rawls envisioned the combination of FEO with the principle of efficiency in the system of Liberal Equality). Still, the US puts no restrictions on economic inequalities and only very few on the concentration of economic powers and prerogatives. Accordingly many of the positions individuals might have fair equal opportunity to compete for in our capitalist system are themselves unjust because occupants of these positions possess such extraordinary powers and prerogatives of economic control, and they are legally permitted to exercise them in ways that disadvantage not just workers and employees but also the least advantaged members of society. Among such positions, for example, are those that have sole or monopoly ownership of

large economic conglomerates which exercise extraordinary social and economic powers (such as Amazon, Walmart, Fox News, Microsoft, Facebook, and so on); or membership on corporate boards that exclude representatives of workers or the public; or corporate executives and officers with nearly unfettered control over assets and employees; or hedge fund or corporate managers who exercise powers to dismiss all employees and dissolve profitable businesses to sell off their assets for hundreds of millions of dollars. None of these offices and positions, nor the economic positions necessary to sustain them would exist in a social-economic system that complies with the difference principle—whether property owning democracy, liberal socialism, or a social democratic welfare state.

It is then not simply the fair distribution of income and wealth among productive economic agents that is at issue under the difference principle. The difference principle also determines the nature, scope, and limits of the legitimate powers, prerogatives and responsibilities that attend the many offices and positions that are themselves to be fairly distributed according to the FEO principle. It is because the fundamental question of the structure and justice of the economic system itself – including questions of the justice of ownership and control of means of production, the distribution of economic powers and prerogatives among economic agents, and the kinds of legitimate social and economic positions themselves that are open for competition under conditions of FEO – that I regard the difference principle as of such fundamental importance in Rawls's theory of justice. Rather than being an appendage to fair equality of opportunity and other distributive principles, as Kaufman seems to suggest, the difference principle defines the just social and economic framework within which economic agents cooperate, and specifies the legitimate rights, powers, prerogatives and the many social and economic positions subject to conditions of fair equal opportunity

of access within a just economic system. Even were the benefits of the fair equal opportunity principle to be specified and realized as far as possible across different economic systems – welfare-state capitalism, property-owning democracy and the social democratic welfare state, liberal and command economy socialism – we could not assess the justice of each of these social and economic systems, their legitimate offices and social and economic positions, and the fair distribution of income, wealth, and powers and prerogatives among these positions independent of the difference principle.

It is for these reasons that I devote substantial attention in chapters 3 and 4 to the application of the difference principle under ideal and non-ideal conditions, and its application to capitalism and the welfare state, property-owning democracy, and liberal socialism. Kaufman contends that I devote too much attention to the difference principle and its distributive effects, slighting the importance of the fair equal opportunity principle. But here, I aim to follow Rawls himself, who defines the primary role of the fair equality of opportunity principle in relation to distributive justice narrowly construed in terms of the difference principle. Here too it's relevant that Rawls wrote over 120 pages on the difference principle in his many works, and made over 170 references in the indices, with no more than 30 pages and fewer than 50 index references on fair equal opportunity.⁹¹ Were fair equality of opportunity to have the predominant role as a principle of distributive justice within Rawls's account of justice, it seems Rawls would have devoted far more attention and discussion to working out its details than he did. Instead, he left FEO and its implications unclarified in many respects, as he did with the distributive implications of the fair value of political liberties, and focused his

⁹¹ See TJ, § 14, 73-78; § 46, 264-266; § 77, 447-448.

attentions primarily on the complex roles of the difference principle.

III

Remarks on Kaufman's Interpretation of Fair Equality of Opportunity

Now Kaufman is not unmindful of the crucial role of the difference principle. He says: “[T]he difference principle, while lexically subordinate to the principle of fair opportunity, nevertheless transforms both the operation of the fair opportunity principle and the proper understanding of its aims.” But he elaborates this sentence not to bring out the structural implications of the difference principle in “the choice of a social system,” including property owning democracy or liberal socialism, but rather in its distributive effects with respect to fair equality of opportunity. Kaufman says:

For example, while the fair opportunity principle, considered in isolation, would seem to require equal attention to inequalities of opportunity at every level of income and wealth, consideration of the factors that justify the difference principle requires the conclusion that “to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable social positions” (IJ 86).

I understand the referent of the clause Kaufman quotes from Rawls here differently. Put in context, Rawls's statement here refers, not to the difference principle, but to the principle of redress, which Rawls contrasts with the difference principle. In

particular, in discussing the difference principle, Rawls says (here I italicize the entire sentence that Kaufman quotes from):

[T]he difference principle gives some weight to the considerations singled out by *the principle of redress*. This is the principle that undeserved inequalities call for redress, and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for. *Thus, the principle holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable social positions.* The idea is to redress the bias of contingencies in the direction of equality. In pursuit of this principle greater resources might be spend on the education of the less rather than the more intelligent, at least over a certain time of life, say the earlier years of school.

The principle Rawls is referring to in this (italicized) sentence is not I believe the difference principle, but rather the principle of redress. It is then the principle of redress, not the difference principle, that is said by Rawls to require giving “more attention to those with fewer native assets and to those born into the less favorable social positions.” Rawls goes on to say immediately afterwards:

Now the principle of redress has not to my knowledge been proposed as the sole criterion of justice, as the sole aim of the social order. It is plausible as most such principles are as only a prima facie principle, one that is to be weighed in the balance with others (TJ 100-101 orig./86 rev.).

Here it is noteworthy that the principle of redress is in effect a luck egalitarian principle. For as Rawls says: “The idea is to redress the bias of contingencies in the direction of equality.” In a sentence that shortly follows, Rawls explicitly rejects the principle of redress as the correct reading of the difference principle: “Now the difference principle is not of course the principle of redress.”

Then, on the following page, Rawls says of the difference principle:

It does not require society to try to even out handicaps as if all were expected to compete on a fair basis in the same race. But the difference principle would allocate resources in education, say, so as to improve the long-term expectations of the least favored. *If this end is attained by giving more attention to the better endowed, it is permissible; otherwise not.*” (TJ 101/87 rev., emphases added)

Here Rawls does not mention fair equality of opportunity but says that the difference principle would allocate educational resources to improve the position of the least favored, and suggests that to achieve this end, devoting greater educational resources to the *better endowed* is permitted –but *only* if that improves the prospects of the least advantaged, “otherwise not.” This is hard to reconcile with Kaufman’s claim that “The difference principle therefore qualifies the application of the fair opportunity principle to require that in providing education and other services to ensure equal opportunity, society should devote more immediate attention to the needs of the least advantaged.” Rawls, as I understand him, holds that, unlike the luck egalitarian principle of redress, neither FEO nor the difference principle *requires* compensating the naturally and socially disadvantaged with greater educational benefits than the more advantaged may have. He

clearly thinks that educational resources are to be allotted “according to their worth in enriching the personal and social life of citizens, including here the least favored,” and that directing resources for this purpose becomes more important as a society progresses (TJ 92 rev.). But still this does not exclude allotting resources “according to their return as estimated in productive trained abilities” (TJ 92 rev.). As he says earlier, so long as this improves the long-term prospects of the least favored, it is *permissible* to devote more resources to the education of the better endowed. One example here might be publicly funding higher education, especially medical, engineering, and natural and social science education and research that benefits the less advantaged as well as everyone else.

On these points, Kaufman and I seem to disagree in our understanding of Rawls: I do not think that either the fair equal opportunity or difference principle *require* that *greater* educational resources be devoted to the natural and social disadvantaged than is devoted to the rest of society. Still I agree with Kaufman that the fair equality of opportunity principle and the difference principle combined *require* society to devote substantial child developmental, educational, job training and retraining, and health care benefits to the naturally and socially disadvantaged, so that they can fully develop their capacities and enjoy the benefits of culture, and do so in such a “way as to provide for each individual a secure sense of his own worth” (TJ 101/87 rev.). This may indeed result in a society, particularly in non-ideal circumstances of extensive poverty and vast inequalities such as in the US, having to devote greater resources to enable the naturally and socially disadvantaged to take advantage of educational, employment, and cultural opportunities. I agree with Kaufman’s interpretation here, and his work magnifies the crucial importance of this fact. I only disagree with the contention that a society *must* provide the naturally and socially disadvantaged with comparatively greater

opportunity benefits, since that in effect makes fair equality of opportunity and the difference principle both luck egalitarian principles of redress and compensation for disadvantage. If that were the required interpretation of Rawls's second principle, it would imply that society could satisfy the principle of redress interpretation of FEO by devoting greater educational resources to increase the opportunities of the less endowed than to the better endowed. But by increasing the opportunities of the least advantaged in this particular way, the tradeoff is that the less advantaged are worse off in absolute terms than they otherwise would be in their share of income, wealth and economic powers and prerogative – the primary goods that come under the difference principle. For society has neglected to devote sufficient educational and other resources to developing the talents and skills of the better endowed “so as to improve the long term expectations of the least favored.” (*ibid.*)

In saying that “society should devote more immediate attention to the needs of the least advantaged” (Kaufman 2020, 111), Kaufman seems to interpret the fair equal opportunity principle similar to the way that luck egalitarians understand substantive equality of opportunity: as being in effect a luck egalitarian principle that compensates the less advantaged with greater developmental, educational and employment opportunities, independent of questions of the economic benefits of income, wealth, and economic powers and prerogatives this brings for them. Perhaps Kaufman's point is that fair distribution of these primary social goods according to the difference principle will take care of itself so long as fair equal opportunity is guaranteed, with opportunities being distributed in ways that favor the least advantaged. But I see little reason to have that degree of confidence. We can imagine a public educational system that provides no benefits to the more advantaged but requires them to pay full tuition to cover their complete costs, while putting all

public funds into educational and child development benefits for the less advantaged. Such extensive affirmative action for the less advantaged might result in greater equalization of substantive opportunities, but it would not be to the greatest advantage of the least advantaged in terms of their share of income, wealth, and economic powers and prerogatives. There is a tradeoff in maximizing substantive opportunities for education and employment for the LAG, and it comes in the substantially reduced shares of income, wealth, and economic powers and prerogatives that otherwise would go to them.⁹²

Conclusion

Kaufman says in concluding his discussion, “The difference principle ensures that institutions assign priority to realizing opportunity for the least advantaged persons, that opportunity is understood in terms of the chance to realize equal citizenship, not the opportunity to leave others behind...” (Kaufman 2020, 116).

⁹² Kaufman’s argument is not helped by the priority rule Rawls sets forth for non-ideal conditions: “an inequality of opportunity must enhance the opportunities of those with lesser opportunity.” This is not a principle that says LAG are themselves due *greater* substantive opportunities than those with greater advantages, but rather just the opposite, that in circumstances where they have fewer opportunities than the more advantaged, the inequality of opportunities must benefit them. From the preceding page it is clear that Rawls is here talking about nonideal circumstances of a hierarchical class society like the privileged land-owning classes Burke and Hegel argue for, which denies even formal equality of opportunities; or more familiar to us, a society that denies women or racial minorities equal opportunities to compete for open positions. Rawls says the only way to justify such an unequal arrangement is to show not only that everyone including those with fewer opportunities benefit from inequality of opportunity, but also demonstrate that they would be worse off under conditions of equal opportunity, and that “a wider range of more desirable alternatives is open to [those with lesser opportunities] than would otherwise be the case” under conditions of equal opportunity (I] 265).

This is the important point that Kaufman's view brings out – that in the position combining the difference principle with FEO – Democratic Equality – the difference principle qualifies the Liberal Equality interpretation of FEO, such that greater focus on opportunities of the least advantaged class is required, and FEO is not guided by the principle of efficiency to create a meritocratic society that leaves the least advantaged behind. I agree with this important point, which Kaufman underscores so well. But neither the difference principle nor FEO require “assign[ing] priority to realizing opportunity for the least advantaged persons” (*ibid.*), since, as Rawls says, the difference principle is not the compensatory principle of redress – a luck egalitarian principle. Opportunities to occupy diverse social and economic positions is but one of the primary social goods, whose distribution is regulated by the second principle—the fair equality of opportunity principle. By focusing primarily on the fair distribution of diverse opportunities regulated by fair equality of opportunity principle, to the exclusion of the fair distribution of income, economic wealth, and economic powers and prerogatives among all working members of society, Kaufman's interpretation neglects the fundamental role of the difference principle in determining “the choice of a social system” – whether property-owning democracy, liberal socialism, or the capitalist welfare state – and its essential role in deciding the fair distribution of income, wealth, economic powers and prerogatives, therewith ownership and control of the means of production and their fair distribution. On my interpretation of Rawls's second principle, none of these are questions are to be determined by the fair equality of opportunity principle.

5

Reply to Ingrid Salvatore

In chapter 4 of my book, entitled “Property-Owning Democracy and the Difference Principle,” I reconstruct and expand upon Rawls’s argument against what he calls “welfare-state capitalism.” He argues that WSC cannot satisfy any of the three essential requirements of his principles of justice.

Welfare-state capitalism... rejects the fair value of the political liberties, and while it has some concern for equality of opportunity, the policies necessary to achieve that are not followed. It permits very large inequalities in the ownership of real property (productive assets and natural resources) so that the control of the economy and much of political life rests in few hands. And although, as the name ‘welfare state capitalism’ suggests, welfare provisions may be quite generous and guarantee a decent social minimum covering the basic needs, a principle of reciprocity to regulate economic and social inequalities is not recognized. (Rawls, JF, 2001, 137-138)

Later Rawls says:

In welfare-state capitalism the aim is that none should fall below a decent minimum standard of life, one in which their basic needs are met, and all should receive certain protections against accident and misfortune, for example, unemployment compensation and medical care. The redistribution of income serves this purpose when, at the end of each period, those who need assistance can be identified. Yet given the lack of background justice and inequalities of income and wealth, there may develop a discouraged and depressed underclass many of whose members are chronically dependent on welfare. This

underclass feels left out and does not participate in the public political culture” (*ibid.*, 139-140).

I contend in my book that a primary reason Rawls argues that WSC, so conceived, cannot satisfy his principles of justice is that he sees the “guiding goals and principles” of WSC as grounded in restricted utilitarianism.⁹³ Rawls says, “it seems safe to assume that if a regime does not try to realize certain political values, it will not in fact do so” (JF 137). Regardless how much confidence its advocates put in the invisible hand, the workings of a capitalist economy geared towards maximizing aggregate or weighted utility is not going to make the least advantaged members of society better off (measured in terms of their share of income, wealth, social and economic powers, and the bases of self-respect) than they would be in an economy that is intentionally designed to satisfy the principles of justice.

A sizable literature defending some form of welfare state capitalism on non-utilitarian grounds has appeared in the thirty

⁹³ Rawls says that restricted utility’s “concept of a minimum as covering the needs essential for a decent human life is a concept for a capitalist welfare state.” (JF 129) Edmundson challenges my (and I believe Rawls’s) understanding of WSC as grounded in restricted utilitarianism. In my reply to him I discuss several reasons for interpreting Rawls’s account of WSC as grounded in restricted utility. For example, Rawls says in TJ that “the term ‘welfare’ in ‘welfare economics’ suggests that the implicit moral conception is utilitarian.” (TJ § 41, 229) Moreover, immediately after referring to restricted utility’s conception of the social minimum in the capitalist welfare state, Rawls alludes to his subsequent comparison (in JF, Part IV) between welfare state capitalism and property-owning democracy, which suggests that there too he regards WSC as being based in restricted utilitarianism.

years after Rawls last addressed these issues in the early 1990's.⁹⁴ Most notable is Ronald Dworkin's Kantian luck egalitarian account, and also defenses by Jeremy Waldron, Bruce Ackerman, Philippe van Parijs's arguments for universal basic income, and others. I say in my discussion in chapter 4 that Rawls did not consider these alternative conceptions of the welfare state – in part this is because they were developed after 1990, when he last wrote on these issues – and I left open the question whether these non-utilitarian accounts were susceptible to his criticism as the utilitarian conception of the welfare state he addressed. (Freeman 2018a, 144). In the past several years, other defenses of welfare state capitalism have arisen in response to Rawls's criticisms. Many of these argue that if we understand the welfare state differently than Rawls – either as not grounded in utilitarianism but in some other conception of justice (including justice as fairness itself),⁹⁵ or not grounded in capitalism but rather in social democracy⁹⁶ – then welfare-state capitalism better realizes the requirements of the principles of justice than does either property-owning democracy or liberal socialism. Libertarian liberals such as John Tomasi and Jason Brennan thus contend that, since capitalism maximizes wealth, it is in the best position to maximize the position of the least advantaged members of society. These accounts rely on (an overly-sanguine if not Panglossian understanding of the benefits

⁹⁴ Though *Justice as Fairness: A Restatement* was published in 2001, it was largely written in the late 1980's and completed in the early 1990's, as the editor Erin Kelly says in the *Editor's Foreword*, xii, before the publication of *Political Liberalism* in 1992. Also, the Preface for the 1999 Revised Edition of *A Theory of Justice*, where Rawls discusses property owning democracy and the welfare state, was prepared for and published in the 1987 French translation.

⁹⁵ For example, John Tomasi, Jason Brennan, Kevin Vallier, and Jessica Flanigan, also Bill Edmundson's comment in this symposium.

⁹⁶ Martin O'Neill, Christian Schemmel, Jeppe von Platz, and also Ingrid Salvatore in this volume, among others.

of) the capitalist invisible hand, and thus deny Rawls's contention that if a regime does not seek to realize the difference principle, it will not in fact do so. (JF 137). Others contend that Rawls is mistaken in contending that WSC cannot guarantee the fair value of political liberties or fair equal opportunity, and that with a substantial enough social minimum WSC should also be able to satisfy the difference principle.⁹⁷ They argue that the social democratic welfare state of the kind achieved in Nordic democracies, especially Sweden (at least prior to the neo-liberal turn in the 1990's) is best situated to realize Rawls's principles of justice.

Ingrid Salvatore's contribution is among those who contend that a social democratic interpretation of the welfare state is in as good if not better position to realize Rawls's principles than does the alternatives Rawls defends. Salvatore accepts my interpretation of Rawls's understanding of the welfare state as grounded in restricted utility, but contends that Rawls focuses only on the "residual" welfare state that is characteristic of fundamentally capitalist economies, such as in the United States and in some respects in Britain. The residual view is grounded in capitalism and sees the welfare state as an appendage to it. It descends from the English Poor Laws, she contends, and confers its welfare benefits on the "losers" within a capitalist economy, primarily on people who are unintentionally impoverished or have fallen into poverty because of unemployment, disabilities, or retirement. She contrasts the "residual" with the "inclusive" European welfare states in both Northern and Southern Europe, which were not designed to address (only) the inevitable problems of poverty within a fundamentally capitalist economy. Rather, European welfare states at their best had a more egalitarian aim and were designed to

⁹⁷ See O'Neill 2012; Christian Schemmel 2015; Schefczyk 2013; von Platz (forthcoming).

prevent people from falling into poverty in the first place, by putting in place complex networks of social insurance programs that guarantee the well-being of all members of society. Inclusive welfare states, especially the social democratic variety, provide social-insurance measures with universal benefits for all citizens – health care, high quality public education, child care, retirement pensions, etc.⁹⁸ Inclusive welfare states arose Salvatore contends either as “corporativist” responses to socialism, as in Germany, Italy, perhaps France and other southern countries; or they were designed to realize social democratic egalitarianism, as in Nordic countries, especially Sweden.

I think Salvatore’s and others’ distinction between the residual and the inclusive welfare state is very helpful in understanding important differences within the welfare state. Inclusive welfare states are not consciously designed to comply with utilitarianism, but are influenced to some degree by more egalitarian positions such as socialism. But I hesitate to identify Rawls’s characterization of welfare state capitalism only with the residual welfare state, or with the welfare state that once existed and still exists though to a lesser degree in the U.S. The residual welfare state is patterned on the classical liberal model of the “social safety-net” state. On Rawls’s account by contrast the capitalist welfare state can provide a “quite generous social minimum,” which is not true in the United States or in so-called ‘residual’ welfare states where the social minimum is conceived as a “safety net” for those who have fallen into or always been in a state of poverty. Moreover, even the US has a “bargain basement social democracy,” as Thomas Piketty

⁹⁸ See Schemmel 2015, who contends the social democratic welfare state does better than POD in meeting many requirements of the difference principle, and that democratic socialism does better than POD in providing for worker autonomy.

says.⁹⁹ Certain welfare state institutions in the US were when instituted and still are to a large degree inclusive or “universal,” including the Social Security pension and disability system, Medicare for everyone over 65, the earliest universal 12-year public education system in the world, subsidized post-secondary grants or educational loans, and unemployment insurance. Moreover between 1932 and 1980 the US had among the most progressive income and inheritance tax systems in the world. (Piketty 2020, 448-449, 453). The US does not however have universal health care or universal child care and other programs that exist in more inclusive welfare states. The US has instead a patchwork system, with Medicare which covers everyone over 65 years, Medicaid for the poor and those with serious physical and mental disabilities, and under “Obamacare,” subsidies for those who cannot afford private insurance.

Salvatore and other advocates of social democratic welfare states are surely correct in arguing, as history shows, that the inclusive welfare states of Western Europe, especially in Nordic countries, have fared far better than the increasingly ragged “safety net” approach that has come to typify the American welfare state. This is reflected in the fact that the US total tax receipts have never risen over 31% of national income, which they currently are, while they are 40% in the UK, 45% in Germany, and over 50% in France and Sweden (Piketty 2020, 457). Unlike the U.S., in European welfare states economic inequalities are not as great, representative democracy is not as tethered to promoting the interests of the wealthy, universal health care enables citizens to take advantage of employment and cultural opportunities, workers have more control and privileges within their work, and the least advantaged have greater protection through a variety of social insurance programs. Rawls recognizes that there are intermediate economic

⁹⁹ Piketty 2020, 490.

systems between POD and liberal socialism. As Salvatore emphasizes, the same is true of welfare state capitalist systems such as the social democratic welfare state, that are intermediate between POD or liberal socialism and the restricted utilitarian version of WSC that Rawls considers. As Salvatore, Schemmel, von Platz, and others argue, the social democratic welfare state is much more akin to property-owning democracy in providing social insurance measures that approximate the requirements of Rawls's principles of justice. Still the question remains whether a welfare state that is not grounded but is still *merged* with a capitalist economy can overcome the objections Rawls raises. I am still skeptical, for the following reasons.¹⁰⁰

I

Political Inequality and Welfare State Capitalism

In *Political Liberalism*, Rawls says one “guideline for guaranteeing fair value seems to be to keep political parties independent of large concentrations of economic wealth in a private property democracy, and of government control and power in a liberal socialist regime” (PL 328; repeated in JF 150). Society must then bear a large part of the cost of organizing and regulating the conduct of elections, Rawls says, and not rely on private funding of political campaigns. Notice that here Rawls is talking about insuring fair value in a property-owning democracy and liberal socialist regime, not in a capitalist welfare state. He does not mean to imply that these regulations of financing political campaigns would be sufficient to guarantee the fair value of political liberties

¹⁰⁰ See Thomas 2017, chapter 7, “Rawls’s Critique of Welfare State Capitalism,” which provides persuasive arguments against social democratic versions of the welfare state and in defense of Rawls’s position. My remarks have benefitted from his critical assessment.

in a welfare state capitalist society. Five sections later, Rawls mentions several measures “essential to maintain the fair value of political liberties”: among these are “public financing of political campaigns and election expenditures, and various limits on contributions and other regulations” (PL 357), with “the prohibition of large contributions from private persons or corporations to political candidates...” (*ibid.*, 358). He adds “more even access to public media; and certain regulations of freedom of speech and of the press (but not restrictions affecting the content of speech” in the *Restatement*. (JF 149). Rawls then condemns the U.S. Supreme Court’s decision in *Buckley v. Valeo*, striking down the 1974 Campaign Reform Act provisions that limit private contributions to political campaigns on grounds they violate freedom of political speech. Rawls claims these decisions were serious mistakes of justice that undermine citizens having “roughly an equal chance of influencing the government’s policy and of attaining positions of authority irrespective of their economic and social class. It is precisely this equality which defines the fair value of the political liberties” (PL 358).

It is easy to conclude from Rawls’s discussion of campaign finance legislation in the U.S., as some have, that Rawls thought here too that these measures were sufficient to guarantee the fair value of political liberties in the American capitalist welfare state. But Rawls implicitly denies these measures are adequate in his assertion (quoted above) of welfare state capitalism’s inability to realize the fair value of the political liberties. Rawls conceived of capitalist economies as concentrating wealth predominantly in the hands of a class of private owners, and thought that there is little possibility of insulating democratic politics from the influence of such concentrated wealth. This is one of the primary reasons for effectively dissolving the capitalist class by the protective measures of a property-owning democracy and liberal socialism. He did not think that the prophylactic measures he endorsed in *Political*

Liberalism, designed to insulate politics from the influence of concentrated wealth, were ever going to be adequate to that purpose in any capitalistic economy. As I discuss in my book (Freeman 2018a, 144-145) even if direct interference in elections by wealthy interests is neutralized by public financing of campaigns and prohibitions on private contributions, there are too many indirect ways for them to gain unequal access to the political forum and influence campaigns and the political agenda which the average person, and especially the less advantaged, do not have at their disposal. As in the U.S. the wealthiest individuals and corporations employ “experts” to deny climate change, and fund institutes, foundations, university programs, and business and law schools to relentlessly promote their libertarian economic interests.¹⁰¹ Wealthy people own and control the content of newspapers, TV and radio stations, and entire communications networks that explicitly advocate their political and economic position, enabling them to largely “control the course of public debate” (IJ orig. 225). The campaign finance measures Rawls, Dworkin, Walzer, Gutmann, and others advocate address a portion of the problem that the deleterious effects of vast wealth inequalities have in capitalist economies on citizens’ equal access to the public political forum and fair political influence. “The wide dispersal of property... is a necessary condition, it seems, if the fair value of the political liberties is to be maintained” (IJ orig. 277/245 rev. ed.).

The question raised by Salvatore’s and others’ defense of the inclusive welfare state is, what is so different about the social

¹⁰¹ See Jane Mayer’s book on the extraordinary influence of the Koch Brothers, the Olins, Mercers, Schaifes, Rupert Murdoch, and other super-wealthy Americans, on politics, the press, non-profit think tanks like the Heritage Foundation and the Cato Institute, and also universities. *Dark Money: The Hidden History of Billionaires Behind the Rise of the Radical Right*, New York, Doubleday 2016)

democratic welfare state that would allow it to overcome these problems of the distorting influence of concentrated wealth and economic inequality to guarantee the fair value of the political liberties? In its favor, the inclusive welfare state is not an appendage to capitalism like the residual welfare state, so it is not driven as much by private and public policies to maximize overall wealth at the expense of the well-being of workers, the environment, public health, and less advantaged members of society. Still, if not an appendage to capitalism, the social democratic welfare state is nonetheless an economy that *merges* capitalism with social insurance programs, and as a result still tolerates large inequalities and the concentration of wealth in a capitalist class. As Piketty says, though “social democratic society may be less unequal than other societies. . . .it remains a highly hierarchical society in economic and monetary terms.” (Piketty 2020, 492). Sweden is the most egalitarian society in the world, Piketty says, and has far less inequality of *income* than the United States because of its high marginal income tax rates,¹⁰² but Sweden still tolerates gross inequalities in ownership of property in economic *wealth*. The top 10% in Sweden still own nearly 60% of economic wealth, while the bottom 50% are far less advantaged with below 10% ownership of economic wealth. This is similar to other welfare state economies in Europe (Piketty 2020, 196, 422-423). These inequalities are not as exaggerated as in the U.S. where the top 10% now have 74% of wealth (*ibid.*, 422), but still they are not so widely different as to guarantee that all citizens’ have a fair opportunity to equally influence a democratic political process. Granted that a more substantial difference exists between the top 1% in the U.S. who have 38% of wealth, while the top 1% in

¹⁰² In 1980 the top 10% of the population in Sweden received 23% of income, and the top 1% received only 4%; whereas in the U.S. in 2018 the top 10% received 48% of income and the top 1% received 22%, almost as much as the top 10% in Sweden. See Piketty 2020, 30, 261-262.

Sweden have but 20% of economic wealth. So clearly there are good reasons to expect better protection for equal political liberties with fairer outcomes in more egalitarian social democratic welfare states like the Nordic countries. But so long as the social democratic welfare state is merged with a capitalist economy that only mildly restricts concentrations and wide disparities of wealth, how likely is it that fair value of political liberties can be realized within a deliberative democracy that concentrates its efforts on promoting justice and the common good? It is in the nature of a capitalist economy, even the social democratic welfare state, not to mitigate the concentration of wealth and equalize its distribution anywhere near the degree as a property-owning democracy that requires the widespread distribution of economic wealth across all members of society.¹⁰³

The point is that a just society has to make conscious efforts to *guarantee* the fair value of political liberties, as a matter of design.¹⁰⁴ It's not sufficient to achieve fair political value because of a fortuitous set of political circumstances. Even if it be assumed that Sweden or Norway are sufficiently egalitarian that they come close to achieving equal chances for political influence, still the basic structure of neither society is designed to ensure equal opportunity of political participation and influence for all citizens. It is only because of a set of contingent circumstances that Swedish politics were dominated by the Social Democratic Party for many years, which pursued legislation to help promote economic equality.¹⁰⁵

¹⁰³ Liberal and democratic socialism eliminate private concentration of wealth, but this does not guarantee the non-concentration of economic power and control since it is now prone to fall prey to the concentration of political and bureaucratic powers. See my reply to Bill Edmundson.

¹⁰⁴ I am indebted to Pierce Randall for this and the following paragraph.

¹⁰⁵ The Swedish Social Democratic Party formed a governing coalition in 18 of the 22 elections from 1932 to 2006, with the exceptions of 1928, 1976, 1979, 1991.

The same is true of the effects of steeply progressive taxes during the Democratic Party's political predominance from the New Deal in the 1930's through the 1960's Great Society Programs and until the eventual election of Ronald Reagan in 1980. These examples show that no basic structure can count on a permanent political majority of left- or center-left political parties. Since globalization in the 1990's and financial liberalization, Sweden has reversed many of its social democratic policies, and inequality has increased considerably. There is no reason, given current trends, to believe that Sweden's more egalitarian distribution of income is a permanent feature of its basic structure rather than a contingent outcome of rare electoral success by a particular political party.

The basic tendency Rawls identifies is that capitalist countries, whether or not they have a generous welfare state, will concentrate political power largely in the hands of capitalists, and there will be continual pressure downward to decrease government transfers and upward to privatize government functions and increase the role of markets in distributing wealth. That trend is going on in all capitalist countries currently, because there are structural features of capitalism, in ways it organizes the basic structure of society, that encourage it.

Finally, Salvatore contends that one way that residual welfare states clearly differ from inclusive ones is that the least advantaged are not politically despondent in inclusive welfare states, and have more reason to actively engage in political life. Rawls's claim – "This underclass feels left out and does not participate in the public political culture" – does not then apply in a society where social insurance programs benefit the middle class as well as the less advantaged and mitigate the need for safety net poverty programs addressed only to the poorest. This seems an accurate comparison between the residual and inclusive welfare states. But it still does not address the problems of the unequal influence the wealthy

have on elections and the political agenda in a capitalist society, and the public's knowledge of such unequal and unfair political influence.

II

Fair Equality of Opportunity and Powers and Prerogatives of Social Positions

Among the primary social goods are those Rawls describes as “powers and prerogatives of offices and positions of authority and responsibility.” The distribution of these social goods is to be determined by the second principle of justice, including both fair equality of opportunity and the difference principle. Under FEO Rawls discusses measures designed to guarantee citizens, regardless of social class, the fair opportunity to compete for offices and positions of authority and responsibility, as well as gaining fair access to educational opportunities to develop their capacities, knowledge, and skills, and take advantage of the benefits of culture. He regards universal access to health care as among the measures required for citizens to take advantage of fair equality of opportunities. As emphasized in Alex Kaufman's comment and my reply, FEO requires a high-quality public educational system, substantial support for colleges and universities with subsidies for post-secondary education, childcare and child development programs, job training and retraining throughout worker's lifetime, and other measures. These measures are or can be provided by the social democratic welfare state as well as POD and liberal socialism. The respects in which social democracy merged with a capitalist welfare state would fall short of the requirements of Rawls's principles of justice is in its failure to sufficiently mitigate economic inequalities required by fair equality of opportunities and the fair value of political liberties, and by not guaranteeing fair

economic reciprocity required by the difference principle. Since I've discussed the mitigation of inequalities elsewhere in my replies, I won't go into that further here, but will discuss the fair distribution of "powers and prerogatives."

Rawls says little about the distribution of "powers and prerogatives" themselves apart from the "offices and positions of authority and responsibility" they accompany. He means social and economic powers and prerogatives – the distribution of political powers is covered by the first principle's requirement of equal political liberties and rights of participation. Rawls says, significantly, "Powers and prerogatives of offices and positions of responsibility are needed to give scope to various self-governing and social capacities of the self".¹⁰⁶ This implies there are strong reasons to guarantee all citizens, including the least advantaged workers, at least an adequate share of powers and prerogatives in economic institutions, including their workplace. I contend in my book that social and economic powers, prerogatives, and responsibilities include powers of economic agency and that the second principle requires their fair distribution. This includes powers to exercise some degree of discretionary control over one's time and responsibilities at work, as well as workers' participation in decisions regarding the firm, such as co-determination rights.

Rawls says questions of the private vs. public democratic ownership and control of means of production should be left up to determination by application of the second principle of justice to a society's historical and cultural circumstances. There are at least three questions here. First, what are many social and economic offices and positions that exercise economic powers and prerogatives that individuals have fair equal opportunity to compete for and occupy? Second, what are the economic powers,

¹⁰⁶ Rawls, "Kantian Constructivism in Moral Theory," in Rawls 1999, 313

prerogatives and responsibilities that go with each of these positions? Third, what is a fair distribution of powers, prerogatives and responsibilities among those who occupy these many social and economic positions? One way to specify the many social and economic positions as well as the powers, prerogatives, and responsibilities that attend them is according to the demands of the economic system that best comports with the requirements of the difference principle. Assuming that freedom of economic contract and economic association is guaranteed by the difference principle to a suitable degree, many of these questions will be settled by it and considerations of economic efficiency. But this still does not settle what might be meant by the fair distribution of powers and prerogatives themselves to specific individuals, as opposed to the offices and positions that exercise them. Rawls speaks of an “index of primary social goods” as the distribuent of the difference principle, which includes powers and prerogatives along with income and wealth and the social bases of self-respect.

How are these powers and prerogatives to be specified and how are we to understand their fair distribution? One way to conceive of their specification is according to the demands of the offices and social positions that are permitted by the difference principle and that are distributed and occupied according to the FEO principle. The least advantaged are conceived as occupying a particular social position, that of the least skilled, least paid workers. Given Rawls’s claim that powers and prerogatives are necessary “to give scope to various self-governing and social capacities of the self,” as well as his suggestions that “meaningful work” is a basis for self-respect,¹⁰⁷ surely a fair distribution of economic powers and prerogatives under the difference principle

¹⁰⁷ This is one way to understand Rawls’s several references to “meaningful work” in *A Theory of Justice*. See, TJ 290/257 rev. Also, in connection with the Aristotelian Principle see TJ orig. 425/373 rev., and Social Union, TJ 529/464.

would guarantee the least advantaged a social minimum that includes certain fundamental powers, privileges and responsibilities in their work – discretion regarding breaks, rotation of tasks, and other decisions about how they spend their workday.

According to the traditional common law *laissez-faire* labor contract that is still the default assumption in the U.S., workers have no protections or even safety guarantees and only those powers, privileges and responsibilities employers allow them to exercise – normally none at all for most unskilled labor positions (migrant farm workers, cleaning and janitorial work, meat packing, etc.). Rawls says that in a well-ordered society, “the worst aspects of the division [of labor] can be surmounted: no one need be servilely dependent on others and made to choose between monotonous and routine occupations which are deadening to human thought and sensibility” (TJ 529/ 464 rev.). One reason for this is the guarantee of certain fundamental powers and prerogatives in the workplace: if they are made part of the basic minimum guaranteed by the difference principle, the *laissez-faire* employment contract would be incompatible with the second principle. If this is not guaranteed by the difference principle itself then it can be through the fair equality of opportunity principle, which has priority over the difference principle and economic efficiency. As I’ve discussed in reply to Edmundson and Thomas, I suggest in chapter 4 of my book¹⁰⁸ that the fair distribution of economic powers and prerogatives required by the difference principle include a basic minimum of discretionary powers at work that is guaranteed for the least advantaged by fair equality of opportunity principle itself – which means that this basic minimum is not subject to political or economic trade-offs or bargaining for the sake of greater income and wealth, even for the least advantaged themselves. There are better ways to guarantee fully

¹⁰⁸ See also my earlier books Freeman 2007a, 106-107; Freeman 2007b, 135.

adequate shares of income and wealth to the least advantaged – by income supplements and family allowances – than by allowing workers to alienate their powers of economic agency in the labor contract in exchange for greater income. Fair equality of opportunity then would guarantee to all citizens fair opportunities to compete for and occupy open social and economic *positions*, and in addition the fair opportunity to exercise certain fundamental powers and prerogatives of economic agency in their employment, during work, in both their day to day tasks and also in having a voice in determining the policies within the firm for which they work. Given the priority of fair equality of opportunity over the difference principle and economic efficiency, the fundamental powers and prerogatives it guarantees and that go with each social and economic position would not be subject to economic bargaining typical of laissez-faire capitalist employment contracts, nor would they be subject to collective bargaining within labor contracts in a social democratic welfare state. I discuss these issues further in my replies to both Edmundson and Thomas and will not go further into them here.

Whether guaranteed by the difference principle, FEO, or the combination of these principles, workers having discretionary powers and responsibilities are a crucial requirement of the second principle, and should be regarded as a crucial feature of property-owning democracy and liberal socialism. Without powers of discretionary control, workers are, as Elizabeth Anderson makes vividly clear in her book *Private Government*, simply the tools of their employers to be exploited for their employers' benefit. The capitalist wage contract in the U.S. is, with few exceptions,¹⁰⁹

¹⁰⁹ The exceptions regulating employment are mainly OSHA health and safety requirements on workplaces. There are also protections against employment discrimination on grounds of race, color, religion, nationality, and gender, and against sexual harassment, under Title VII of the Civil Rights Act.

grounded in 19th century common law laissez-faire law of contract, where the default assumption is that the employer has complete control over the time, activities, and responsibilities of workers during the workday, and can even monitor and restrict the workers' activities outside of work, and dismiss them for any reason. For many low wage workers, the workplace is, as Anderson explains, a virtual dictatorship during the workday, with no relief except a right of exit, with most workers having no other options except to move on to the same circumstances with another employer.

One reason I emphasize for interpreting fair equality of opportunity as guaranteeing workers some degree of economic powers, privileges and responsibility in their workplace is that it is a condition of the primary good of self-respect. In this connection Salvatore says, "For Freeman, the relation between work and self-respect, as well as the sense in which having a meaningful job is among the human goods, must be taken as a true fact of human nature, an empirical claim supported by "psychological laws" (LDJ, 162). By "human nature" she is referring here to my appeal to Rawls's "Aristotelian Principle," (TJ § 65) the "psychological law" he mentions to explain why meaningful work is among the "human goods." Of course, as Salvatore and others note, the value assigned to work is in large part cultural, and surely people can be conditioned to regard work as repugnant and live quite well, as elites so often do, but only so long as others do the necessary burdensome and repugnant work for them. But the intellectual, artistic, and other cultural activities often valued by elites itself involve a kind of labor, since they require educating and exercising distinctly human capacities. "Meaningful work" engages one's developed capacities, and excludes the deadening, exploitive and alienating work Anderson discusses, where workers have virtually no discretionary powers or responsibilities.

Salvatore and others rightly contend that the focus on workers/employees exercising powers, prerogatives, and responsibilities is a crucial feature of the social democratic welfare state, and that this is one of the major contrasts with welfare state capitalism as Rawls conceives of it. It is a major reason cited as to why the social democratic version of the welfare state satisfies the requirements of Rawls's principles of justice as well as does POD (which according to Salvatore has problems of its own that the SDWS does not have.) The powers exercised by labor unions in collective bargaining, including worker co-determination or co-management rights – to be represented and have rights to participate and vote in decisions regarding a firm's policies and personnel decisions – are among the crucial guarantees that protect the economic agency of workers and employees in the social democratic welfare state, property owning democracy, and liberal socialist regime.

I recognize that the protections and benefits workers potentially exercise in social democratic welfare states are parallel to those in a property-owning democracy or liberal socialism. But given that such benefits are often contingent upon the bargaining power of labor unions, which are subject to change and economic contingencies, I do not see grounds for the claim that social democratic benefits exceed or can even match the guaranteed powers and prerogatives of the economic systems Rawls defends. Nor is the welfare state normally associated with workers generally having ownership shares of the firms they work in and/or equity in others firms or ventures, as in POD. This is a major difference between property-owning democracy and the social democratic welfare state. POD encourages worker partial ownership of firms in a way that the welfare state does not. By receiving a share of firm profits workers acquire the added powers and prerogatives of ownership interests in the firms they work in, on top of those they already have in their capacity as employees. Workers then will be

able to identify more closely with their work and their product, and will be in some sense working for themselves, not simply for capitalist owners.¹¹⁰ Unlike a welfare state capitalist society, a society with substantial worker ownership and control of firms will not have permanent class divisions. So, it seems that, without further argument, that even on grounds of workers' powers, prerogatives and responsibilities, property-owning democracy and liberal socialism are better situated than the social democratic welfare state.

Finally, worker-owned and self-managed firms are one way to realize property-owning democracy as well as liberal socialism. Even if co-management, union representation, and collective bargaining are part of the social democratic welfare state, worker self-management and control of this magnitude is not generally associated with or encouraged by capitalism that merges with the social democratic welfare state. In a property-owning democracy worker-managed firms are supported by government and are given a fair chance to establish themselves, by temporary subsidies and other means. So, at least under ideal conditions of a well-ordered society, I do not see how the social democratic welfare state can be in a *better* position to provide greater opportunities for worker control and exercise of powers, prerogatives and responsibilities in the workplace.

III

Democratic Reciprocity and the Difference Principle:

Rawls says that in welfare state capitalism, “[although] welfare provisions may be quite generous and guarantee a decent social minimum covering the basic needs, a principle of reciprocity to

¹¹⁰ Thanks again to Pierce Randall for making this point.

regulate economic and social inequalities is not recognized. (Rawls 2001, 137-138). The barebones benefits of the social “safety net” are not intended to be “quite generous” in the American or other residual welfare states – instead they are intentionally kept to a minimum to induce recipients to join the minimum-wage workforce. On the other hand, welfare provisions can be and often are quite generous in the inclusive welfare states Salvatore discusses, especially the social democratic welfare states of Nordic countries. Rawls says that, even if welfare provisions are generous, still a principle of reciprocity to regulate economic and social inequalities is not recognized in WSC. It might be argued, however, that within the social democratic welfare state, some degree of reciprocity is realized through collective bargaining measures with labor unions which require that workers receive a greater share of income from industries they work within, and also that they exercise certain economic prerogatives within the workplace and co-determination rights within firms.¹¹¹

It’s questionable however whether collective bargaining and other measures within inclusive welfare states can be said to conform by design to an *egalitarian* principle of reciprocity – at least not the democratic reciprocity required by the difference principle. For the difference principle requires not just that economic income but also economic wealth, along with economic powers and prerogatives, be fairly distributed to maximally benefit the least advantaged. A welfare state which sought by design to structure its economy to achieve this result could hardly be called ‘capitalist,’ – not if Rawls is right and the principles of justice require either POD or liberal socialism, where the capitalist class has effectively

¹¹¹ See Jeppe von Platz’s forthcoming paper “Democratic Equality and the Justification of Welfare State Capitalism” in *Ethics*, who makes such an argument, though he denies that the social democratic welfare states should seek to realize the difference principle.

evaporated due to public or universal private ownership of economic wealth. Here again, the assumption is that, as history shows, the invisible hand, even if it “spontaneously” realizes the benefits of economic efficiency, does not “spontaneously” realize the requirements of the difference principle; they can only be achieved by intentional design. Nor can even the redistribution of income in the social democratic welfare state – through such measures as progressive taxation, income supplements, family allowances, universal health care, generous educational benefits, and other social insurance programs – adequately realize the difference principle; for economic wealth is still concentrated among a small percentage of the population, together with their predominant exercise of economic powers and control of the economy.

Salvatore discusses luck egalitarian foundations for the welfare state, which raises the question whether luck egalitarians seek a distinctive kind of reciprocity in competition with the difference principle. I contend in my book that luck egalitarian conceptions are not intended to achieve reciprocity. They are, as Scheffler and Anderson contend, fundamentally non-relational conceptions of distributive justice which do not conceive of distributive justice in terms of social cooperation among free and equal persons. Nor, I argue, do they require productive reciprocity, or “reciprocity among socially productive citizens”: that members of society contribute their fair share in exchange for the benefits of economic reciprocity. (Freeman 2018a, 149-150) Instead, luck egalitarians regard distributive justice as a matter of redress – compensating the unlucky and assisting the unfortunate, without regard to the social and economic process of production. As Salvatore says, “Their view, we can say, is purely distributive, and does not concern production” (Salvatore 2020, 154).

Salvatore also discusses the luck egalitarian “welfare-without-work view.” She says,

Anything that creates differences among us and that depends on these arbitrary elements of sheer luck, or that does not depend on our genuine choices, is morally unjustified. However, so the argument would proceed, if the reason why we redistribute equally is that people are in fact morally equal, then there can be no reason for distinguishing workers from non-workers (*ibid.*, 160).

But we can distinguish non-workers from workers, even within a luck-egalitarian view, when non-workers freely choose not to make a fair contribution to the joint social product. That is a crucial difference in Rawls’s view, which assumes productive reciprocity as a precondition of the social minimum under the difference principle. This however assumes that government guarantees full employment and serves as employer of last resort. The problem however is non-ideal conditions, where to qualify for the social minimum non-workers may be required to do work that undermines their well-being or does not draw on their special skills – which raises different problems. We have to balance making fair contributions with there being meaningful work available that people feel at home with – otherwise we are exploiting people for reasons of efficiency, as do “workfare” requirements that condition welfare on recipients’ working or looking for work and taking whatever is available.

Many of the benefits associated with welfare state social insurance programs that Rawls accepts are not tied to the reciprocity requirement of the difference principle and conditioned upon working or willingness to work during a substantial period of one’s adulthood. Earned income supplements, unemployment

insurance, retirement benefits, childcare benefits while working all are. But family allowances are designed to benefit children and cover the costs of childrearing and would not be conditioned upon work outside the family itself. Also, universal health care, including disabilities benefits throughout one's lifetime, are conditions of fair equality of opportunity and the principle of basic needs, and apply to all citizens regardless whether they work, as do educational and job training and re-training benefits. Programs designed to address inadequate income or poverty among those who are unable or no longer able to work – housing programs and vouchers, nutrition assistance, and “negative income tax” benefits – also would be guaranteed by the principle of basic needs that is a precondition of the first principle of justice and the effective exercise of basic rights and liberties.

What is not guaranteed by the second principle of justice, or so it would seem, is a universal basic income that is paid to all members of society regardless of income, to those who work, have no need to work, or are unwilling to work. “[T]hose who surf all day off Malibu,” as Rawls notably says “must find a way to support themselves and would not be entitled to public funds” (Rawls 1999, 455 n.7). Salvatore mentions Philippe van Parijs’ countering argument that the absence of compulsory work is part of “real freedom” (Salvatore 2020, 162, n.60). UBI both frees those who do not want to work from having to work, and also has the effect of raising the minimum wage employers must pay low-wage workers, thereby freeing workers from having to acquiesce in coercive working conditions which they have no choice but to accept along with low market wages in a capitalist labor market that puts little value on their labor because of a surfeit of less advantaged workers. The universal basic income seems to be a reasonable response to non-ideal conditions within a capitalist economy such as the United States, with deteriorated social insurance and welfare programs, meager wage supplements, and a

low minimum wage. UBI under such non-ideal conditions does not conflict with the requirement of productive reciprocity under ideal conditions, where the state is the “employer of last resort,” there are adequate social insurance programs in place, workers exercise basic powers and prerogatives in their work, and the economic opportunities of POD or liberal socialism are realized. These, I believe, are the background conditions that Rawls thought must be in place if society is to condition the social minimum under the difference principle on the requirement that individuals must make a fair contribution within the workforce. Rawls did not then advocate “workfare” under non-ideal conditions, especially in a capitalist society such as our own where positions for unskilled workers pay below poverty wages, and workers have virtually no protections or discretionary powers but are treated as instruments of production. When the ideal conditions that would obtain in a just POD or liberal socialist society are not in place, then I think Rawls’s position can allow for a universal basic income of the kind van Parijs suggests – assuming that it is necessary in order to persuade those who are better off to accept a basic income for the less advantaged. A non-universal basic income for the less advantaged whether they work or not would be even more preferable than UBC under non-ideal conditions; for it achieves all the advantages of UBC and does not maintain the same egregious levels of inequality between the most and least advantaged as does a universal basic income.¹¹² I think this should respond to Salvatore’s concerns with the problem of workers being increasingly squeezed and left out of the workforce under conditions of neo-liberal globalization.

¹¹² See Thomas Piketty’s remarks on the reasons for a basic income for the less advantage instead of a universal basic income for all (Piketty 2020, 1002 and 1002n).

Rawls's position should then be amenable to a UBI under non-ideal conditions of a capitalist welfare state, as a workable response to the unfairness of the capitalist labor market, and the resentful attitudes of those who are more advantaged towards programs designed to benefit the less advantaged. In an unjust capitalist economy with its inevitable gross inequalities – including the capitalist safety-net welfare state – which neither rewards workers the fair value of their labor nor provides reasonable income supplements, a universal basic income is a reasonable way to increase the social minimum required by the difference principle. This is especially so given the resistance by the more advantaged to increasing the social minimum in a welfare state capitalist economy. Like the universal retirement benefits guaranteed by the Social Security Program in the US, a UBI is more likely to be widely accepted by middle class members of a capitalist society than would greater welfare payments to the unemployed, or income supplements and other programs that address only less advantaged workers and poorer unemployed members of society.

This develops a central point of my discussion in 'Distributive justice and the Difference Principle' in chapter 3. The requirements of the difference principle differ in non-ideal conditions of a capitalist economy from measures that would apply under ideal conditions of a well-ordered society. Obviously, many measures that would be mandated by the principles of justice within a well-ordered property-owning democracy or liberal socialist economy – such as widespread private or public ownership and control of economic resources – cannot be practicably realized in non-ideal conditions of an existing *laissez-faire* or welfare state capitalist economy. In order to put into place measures designed to predominantly benefit the less advantaged, a society has to work within the constraints imposed by its existing institutions and public political culture, and make only reforms to the existing basic structure that citizens will tolerate. If a universal basic income is a

more pragmatic way to achieve the purposes of the second principle of justice in a capitalist economy like the US (where the majority of citizens do not accept the difference principle, or apparently any redistributive principle that does not benefit them), then the principles of justice themselves require that society adopt UBI and other practicable measures more likely to maximally benefit least advantaged members of society under those unjust circumstances.

Contrary to G. A. Cohen and others' criticisms of the difference principle, the conditions that would justify universal basic income rarely if ever justify other Pareto improvement measures in non-ideal conditions which are designed *primarily* to benefit the most advantaged – such as tax cuts for the wealthy. These measures are not designed to *maximally benefit* the least advantaged as required by the difference principle, nor do they have such an unintended effect. At best tax cuts for the wealthy have “trickle down” effects of marginally benefitting the least advantaged, in the course of maximally benefitting the most advantaged – thereby realizing “the principle of design” implicit in a capitalist economy devoid of redistributive measures. UBI may then be what justice requires to respond to an unjust economic system predominantly geared towards economic efficiency, distributions according to the contingencies of the invisible hand, and maximizing overall wealth in society. UBI may also be a suitable response within social-democratic welfare state capitalism as well, given the concentration of ownership of capital and the likely resentment of programs designed to exclusively benefit the least advantaged. But just because justice under non-ideal conditions tolerates or requires awarding a basic income to both the wealthy and the poor, the working and voluntarily non-working members of society alike, does not make UBI a measure that should apply in a more just society with the widespread private or public ownership and control of economic wealth whose least advantaged members are

better off than in any alternative economic system. Under ideal conditions, UBI is not simply superfluous; it is unfair to the less advantaged who have paid a share of their income for economic benefits for those who are most advantaged.

IV

Redistribution vs. Predistribution

As suggested in the preceding section, one contested feature of Rawls's difference principle is that its benefits extend to "fully cooperative citizens," which Rawls assumes are those who make economic contributions. "We are not to gain from the cooperative efforts of others without doing our fair share" (TJ 301). At one point he suggests its benefits extend only to those who work or have worked during a substantial portion of their lives (JF 179).¹¹³ A property-owning democracy is structured in such a way that economic wealth is fairly distributed among working citizens; so there will be no class of wealthy persons who live *only* off returns to capital without working during a substantial part of their lives. The "least advantaged" are then assumed to be the least paid workers, those who generally are the least skilled and least educated. Since workers all have a share of economic wealth in a well-ordered property-owning democracy, a portion of their income should normally derive from the returns to the economic assets that they own, whether in the firms they work for or in other investments. The "widespread ownership of productive assets and human capital (that is education and trained skills" (JF 139) are primary among the predistributive measures Rawls refers to. Because of predistributive measures POD does not, unlike welfare state capitalism, need to rely on "the redistribution of income to

¹¹³ I discuss this aspect of the difference principle in chapters 3, 130-131, and ch. 4 of my book (Freeman 2018a).

those with less at the end of each period” but instead guarantees its benefits “at the beginning of each period” (*ibid.*).

Salvatore in her conclusion questions the effectiveness of the predistributive aspect of Rawls’s position. She says, in referring to the evolving global economy where unemployment becomes increasingly likely:

As uncertainty becomes pervasive and the family no longer represents a safety net, managing our own affairs may become a very risky business, making the welfare state and its long-lasting commitment to individual protection the only viable choice. In this sense, POD appears to me as an old-fashioned idea, inextricably embedded in the golden era of industrialism (Salvatore 2020, 168-169).

This implies that the inclusive welfare state will protect the least advantaged working and non-working members of society and others from the risks of unemployment in a global economy by providing many social benefits and services, whereas POD, Salvatore seems to suggest, is not structured to provide such protections. Perhaps the thought here is that, since the POD is predominantly if not exclusively geared towards pre-distribution rather than redistribution, it cannot address problems of unemployment and economic recessions/depressions anywhere near as effectively as the inclusive welfare state capitalism.

I do not interpret Rawls to hold that property-owning democracy is exclusively pre-distributive, in the sense that no portion of the social minimum derives from redistribution of market outcomes to pay for social benefits to the less

advantaged.¹¹⁴ In *Theory*, Rawls clearly conceives of graded income supplements, family allowances, and sickness and unemployment benefits for those who work as requirements of the second principle, (I) 243 rev.).¹¹⁵ In his discussion of the family, he envisions that the currently unpaid labor of parents, normally women, and caretakers should be compensated, since it is “socially necessary labor” (PL 595-596, 600, JF 167). Also, the social minimum guaranteed by the principle of basic needs which is presupposed by the principle of equal basic liberties is a “constitutional essential” that applies to persons unable to provide sufficient means enabling them to effectively exercise their basic liberties; this too requires taxes and redistribution necessary to meet people’s essential needs for these purposes. (PL 7, 228; JF 44 n.7) And, as for enduring states of unemployment due to economic recessions/depressions, or fluctuations in the global economy, Rawls sees government as not only providing unemployment insurance payments, but also having an obligation to serve as an “employer of last resort,” to address unemployment, which is damaging to the self-respect of democratic citizens.

¹¹⁴ There is a sense of ‘predistribution’ that Alan Thomas and I discuss that connects it with benefits which individuals are entitled to as a matter of pure procedural justice. In this sense, one can contend that in a property-owning democracy or liberal socialism, all entitlements are predistributive as a matter of pure procedural justice – so long as it is recognized that this sense of predistribution presupposes both taxation and redistribution of market outcomes, and that individuals do not have complete rights to all market and other consensual transfers of their income and wealth in a society that conforms to the principles of justice. In this sense, predistribution of entitlements presupposes redistribution of income and wealth to which individuals are entitled.

¹¹⁵ As Thomas Piketty says, in the labor market, the equilibrium price for labor (wages) is “literally a matter of life and death for flesh-and-blood human beings” primarily least advantaged workers in Rawls’s sense (Piketty 2020, 470).

The point then is that predistributive measures should predominate over redistribution of market outcomes in a POD or liberal socialism, not that there is no need for redistributive measures at all. Clearly taxation to pay for public goods, social insurance and basic needs, and other legitimate government functions is redistributive of consensual transfers of income and wealth, but the relevant question in deciding if taxation is redistributive is whether it involves redistribution of pre-existing entitlements. Here it's significant that social insurance programs such as universal health care, social security pensions, and unemployment insurance are predistributive in the sense that (working) citizens are entitled to them when they pay their fair share for these programs during their working life, normally prior to taking advantage of them. In this regard they differ from purely redistributive programs that meet the basic needs of non-working members of society who are unable or unwilling to work. Finally, the predistributive/redistributive dichotomy is itself ambiguous and controversial, but (unlike Alan Thomas perhaps) I do not think that anything crucial rides on it in Rawls's discussion of distributive justice.

Moreover, questions of the likelihood of unemployment of the least advantaged in a global economy is not the issue that should decide between WSC and POD or liberal socialism. Property-owning democracy and liberal socialism are not barred from providing any of the social insurance measures that are characteristic of inclusive welfare state programs. Rawls is concerned with addressing the *capitalist* welfare state, but this does not mean that the social insurance measures typical of the welfare state cannot also apply also in economies that are not capitalist, including property-owning democracy and liberal socialism.¹¹⁶

¹¹⁶ The same is true of democratic socialism and command economy socialism – which also can provide greater, or fewer, social welfare benefits.

Given redistributive measures that provide everyone with a fair share of economic wealth from which they earn income, extensive educational and training benefits to build up human capital, and other measures, redistributive measures should not be as extensive or necessary in these economies as in welfare state capitalism. But what is most significant about POD and liberal socialism for Rawls, I believe, is not simply redistribution resulting in fewer redistributive social welfare programs, but rather the preconditions for democratic redistribution among all members of society: namely, it eliminates the need for a capitalist class that predominantly owns and controls productive resources, with the resulting severe political, economic, and social inequalities and unfairness this inevitably involves.

Conclusion

In concluding I will note a related point regarding redistribution that Salvatore makes: her claim that what is basically wrong with welfare state capitalism is not simply that it does not satisfy fair political value and that its social minimum is set too low to satisfy the difference principle. The added problem rather is that since it is entirely redistributive of pre-existing entitlements, any benefits to the least advantaged is in the form of welfare payments that tend to undermine the self-respect of the LAG. So, we might even grant the argument that under ideal conditions the capitalist welfare state can maximize income going to the least advantaged better than POD. Still the problem remains that WSC undermines the sense of self-respect of the least advantaged, in part because it is redistributive and capitalism affords them no economic powers or prerogatives. What is distinctive about Salvatore's version of this argument is that she rests it, not simply on self-respect but on maintaining the motivation of the least advantaged to vote and take advantage of their political liberties. The problem with welfare

state capitalism is not simply vast inequality and the fact that the most advantaged dominate the political agenda. It's that *because* of redistribution and gross inequality the least advantaged are dispirited and have no will to take part in politics. *Redistribution itself undermines the fair value of political liberties.* This is not an argument that has occurred to me. I would respond that it is only in a predistributive property owning democracy or liberal socialist society that the fair value of the political liberties can be guaranteed. But Salvatore takes a different path and brings her own argument into question, saying that it's not intrinsic to the welfare state that it has this consequence of undermining political equality and fair political value. It is rather a *failure* of the welfare state in non-ideal conditions, and especially of the residual welfare state which permits the accumulation of wealth in too few hands.

Ingrid Salvatore raises many other significant arguments I wish I could address here. I greatly appreciate her contribution and having the opportunity to respond to many of her comments. I am grateful especially for all the time and effort that she has devoted to making this symposium possible.

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