

Justice as Fairness

A RESTATEMENT

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losophy as reconciliation; for seeing that the conditions of a social world at least allow for that possibility affects our view of the world itself and our attitude toward it. No longer need it seem hopelessly hostile, a world in which the will to dominate and oppressive cruelties, abetted by prejudice and folly, must inevitably prevail. None of this may ease our loss, situated as we may be in a corrupt society. But we may reflect that the world is not in itself inhospitable to political justice and its good. Our social world might have been different and there is hope for those at another time and place.

PART II

Principles of Justice

§12. Three Basic Points

12.1. In Part II we discuss the content of the two principles of justice that apply to the basic structure, as well as various grounds in favor of them and replies to a number of objections. A more formal and organized argument for these principles is presented in Part III, where we discuss the reasoning that moves the parties in the original position. In that argument the original position serves to keep track of all our assumptions and to bring out their combined force by uniting them into one framework so that we can more easily see their implications.

I begin with three basic points which review some matters discussed in Part I and introduce others we are about to examine. Recall first that justice as fairness is framed for a democratic society. Its principles are meant to answer the question: once we view a democratic society as a fair system of social cooperation between citizens regarded as free and equal, what principles are most appropriate to it? Alternatively: which principles are most appropriate for a democratic society that not only professes but wants to take seriously the idea that citizens are free and equal, and tries to realize that idea in its main institutions? The question of whether a constitutional regime is to be preferred to majoritarian democracy, we postpone until later (Part IV, §44).

12.2. The second point is that justice as fairness takes the primary subject of political justice to be the basic structure of society, that is, its main

political and social institutions and how they fit together into one unified system of cooperation (§4). We suppose that citizens are born into society and will normally spend their whole lives within its basic institutions. The nature and role of the basic structure importantly influence social and economic inequalities and enter into determining the appropriate principles of justice.

In particular, let us suppose that the fundamental social and economic inequalities are the differences in citizens' life-prospects (their prospects over a complete life) as these are affected by such things as their social class of origin, their native endowments, their opportunities for education, and their good or ill fortune over the course of life (§16). We ask: by what principles are differences of that kind—differences in life-prospects—made legitimate and consistent with the idea of free and equal citizenship in society seen as a fair system of cooperation?

12.3. The third point is that justice as fairness is a form of political liberalism: it tries to articulate a family of highly significant (moral) values that characteristically apply to the political and social institutions of the basic structure. It gives an account of these values in the light of certain special features of the political relationship as distinct from other relationships, associational, familial, and personal.

- (a) It is a relationship of persons within the basic structure of society, a structure we enter only by birth and exit only by death (or so we may assume for the moment). Political society is closed, as it were; and we do not, and indeed cannot, enter or leave it voluntarily.
- (b) Political power is always coercive power applied by the state and its apparatus of enforcement; but in a constitutional regime political power is at the same time the power of free and equal citizens as a collective body. Thus political power is citizens' power, which they impose on themselves and one another as free and equal.

The idea of political liberalism arises as follows. We start from two facts: first, from the fact of reasonable pluralism, the fact that a diversity of reasonable comprehensive doctrines is a permanent feature of a democratic society; and second, from the fact that in a democratic regime political power is regarded as the power of free and equal citizens as a collective body. These two points give rise to a problem of political legitimacy. For if the fact of reasonable pluralism always characterizes democratic societies and if

political power is indeed the power of free and equal citizens, in the light of what reasons and values—of what kind of a conception of justice—can citizens legitimately exercise that coercive power over one another?

Political liberalism answers that the conception of justice must be a political conception, as defined in §9.1. Such a conception when satisfied allows us to say: political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason. This is the liberal principle of legitimacy. It is a further desideratum that all legislative questions that concern or border on these essentials, or are highly divisive, should also be settled, so far as possible, by guidelines and values that can be similarly endorsed.

In matters of constitutional essentials, as well as on questions of basic justice, we try to appeal only to principles and values each citizen can endorse. A political conception of justice hopes to formulate these values: its shared principles and values make reason public, while freedom of speech and thought in a constitutional regime make it free. In providing a public basis of justification, a political conception of justice provides the framework for the liberal idea of political legitimacy. As noted in §9.4, however, and discussed further in §26, we do not say that a political conception formulates political values that can settle all legislative questions. This is neither possible nor desirable. There are many questions legislatures must consider that can only be settled by voting that is properly influenced by nonpolitical values. Yet at least on constitutional essentials and matters of basic justice we do try for an agreed basis; so long as there is at least rough agreement here, fair social cooperation among citizens can, we hope, be maintained.¹

12.4. Given these three points, our question is: viewing society as a fair system of cooperation between citizens regarded as free and equal, what principles of justice are most appropriate to specify basic rights and liberties, and to regulate social and economic inequalities in citizens' prospects over a complete life? These inequalities are our primary concern.

To find a principle to regulate these inequalities, we look to our firmest considered convictions about equal basic rights and liberties, the fair value

1. It is not always clear whether a question involves a constitutional essential, as will be mentioned in due course. If there is doubt about this and the question is highly divisive, then citizens have a duty of civility to try to articulate their claims on one another by reference to political values, if that is possible.

of the political liberties as well as fair equality of opportunity. We look outside the sphere of distributive justice more narrowly construed to see whether an appropriate distributive principle is singled out by those firmest convictions once their essential elements are represented in the original position as a device of representation (§6). This device is to assist us in working out which principle, or principles, the representatives of free and equal citizens would select to regulate social and economic inequalities in these prospects over a complete life when they assume that the equal basic liberties and fair opportunities are already secured.

The idea here is to use our firmest considered convictions about the nature of a democratic society as a fair system of cooperation between free and equal citizens—as modeled in the original position—to see whether the combined assertion of those convictions so expressed will help us to identify an appropriate distributive principle for the basic structure with its economic and social inequalities in citizens' life-prospects. Our convictions about principles regulating those inequalities are much less firm and assured; so we look to our firmest convictions for guidance where assurance is lacking and guidance is needed (*Theory*, §§4, 20).

§13. Two Principles of Justice

13.1. To try to answer our question, let us turn to a revised statement of the two principles of justice discussed in *Theory*, §§11–14. They should now read:²

- (a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
- (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to

2. This section summarizes some points from "The Basic Liberties and Their Priority," *Tanner Lectures on Human Values*, vol. 3, ed. Sterling McMurrin (Salt Lake City: University of Utah Press, 1982), §1, reprinted in *Political Liberalism*. In that essay I try to reply to what I believe are two of the more serious objections to my account of liberty in *Theory* raised by H. L. A. Hart in his splendid critical review essay, "Rawls on Liberty and Its Priority," *University of Chicago Law Review* 40 (Spring 1973): 551–555, reprinted in his *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983). No changes made in justice as fairness in this restatement are more significant than those forced by Hart's review.

be to the greatest benefit of the least-advantaged members of society (the difference principle).³

As I explain below, the first principle is prior to the second; also, in the second principle fair equality of opportunity is prior to the difference principle. This priority means that in applying a principle (or checking it against test cases) we assume that the prior principles are fully satisfied. We seek a principle of distribution (in the narrower sense) that holds within the setting of background institutions that secure the basic equal liberties (including the fair value of the political liberties)⁴ as well as fair equality of opportunity. How far that principle holds outside that setting is a separate question we shall not consider.⁵

13.2. The revisions in the second principle are merely stylistic. But before noting the revisions in the first principle, which are significant, we should attend to the meaning of fair equality of opportunity. This is a difficult and not altogether clear idea; its role is perhaps best gathered from why it is introduced: namely, to correct the defects of formal equality of opportunity—careers open to talents—in the system of natural liberty, so-called (*Theory*, §12: 62ff.; §14). To this end, fair equality of opportunity is said to require not merely that public offices and social positions be open in the formal sense, but that all should have a fair chance to attain them. To

3. Instead of "the difference principle," many writers prefer the term "the maximin principle," or simply "maximin justice," or some such locution. See, for example, Joshua Cohen's very full and accurate account of the difference principle in "Democratic Equality," *Ethics* 99 (July 1989): 727–751. But I still use the term "difference principle" to emphasize first, that this principle and the maximin rule for decision under uncertainty (§28.1) are two very distinct things; and second, that in arguing for the difference principle over other distributive principles (say a restricted principle of (average) utility, which includes a social minimum), there is no appeal at all to the maximin rule for decision under uncertainty. The widespread idea that the argument for the difference principle depends on extreme aversion to uncertainty is a mistake, although a mistake unhappily encouraged by the faults of exposition in *Theory*, faults to be corrected in Part III of this restatement.

4. See *Theory*, §36: 197–199.

5. Some have found this kind of restriction objectionable; they think a political conception should be framed to cover all logically possible cases, or all conceivable cases, and not restricted to cases that can arise only within a specified institutional context. See for example Brian Barry, *The Liberal Theory of Justice* (Oxford: Oxford University Press, 1973), p. 112. In contrast, we seek a principle to govern social and economic inequalities in democratic regimes as we know them, and so we are concerned with inequalities in citizens' life-prospects that may actually arise, given our understanding of how certain institutions work.

specify the idea of a fair chance we say: supposing that there is a distribution of native endowments, those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin, the class into which they are born and develop until the age of reason. In all parts of society there are to be roughly the same prospects of culture and achievement for those similarly motivated and endowed.

Fair equality of opportunity here means liberal equality. To accomplish its aims, certain requirements must be imposed on the basic structure beyond those of the system of natural liberty. A free market system must be set within a framework of political and legal institutions that adjust the long-run trend of economic forces so as to prevent excessive concentrations of property and wealth, especially those likely to lead to political domination. Society must also establish, among other things, equal opportunities of education for all regardless of family income (§15).⁶

13.3. Consider now the reasons for revising the first principle.⁷ One is that the equal basic liberties in this principle are specified by a list as follows: freedom of thought and liberty of conscience; political liberties (for example, the right to vote and to participate in politics) and freedom of association, as well as the rights and liberties specified by the liberty and integrity (physical and psychological) of the person; and finally, the rights and liberties covered by the rule of law. That the basic liberties are specified by a list is quite clear from *Theory*, §11: 61 (1st ed.); but the use of the singular term "basic liberty" in the statement of the principle on *Theory*, §11: 60 (1st ed.), obscures this important feature of these liberties.

This revision brings out that no priority is assigned to liberty as such, as if the exercise of something called "liberty" had a preeminent value and were the main, if not the sole, end of political and social justice. While there is a general presumption against imposing legal and other restrictions on conduct without a sufficient reason, this presumption creates no special priority for any particular liberty. Throughout the history of democratic

6. These remarks are the merest sketch of a difficult idea. We come back to it from time to time.

7. This principle may be preceded by a lexically prior principle requiring that basic needs be met, as least insofar as their being met is a necessary condition for citizens to understand and to be able fruitfully to exercise the basic rights and liberties. For a statement of such a principle with further discussion, see R. G. Peffer, *Marxism, Morality, and Social Justice* (Princeton: Princeton University Press, 1990), p. 14.

thought the focus has been on achieving certain specific rights and liberties as well as specific constitutional guarantees, as found, for example, in various bills of rights and declarations of the rights of man. Justice as fairness follows this traditional view.

13.4. A list of basic liberties can be drawn up in two ways. One is historical: we survey various democratic regimes and assemble a list of rights and liberties that seem basic and are securely protected in what seem to be historically the more successful regimes. Of course, the veil of ignorance means that this kind of particular information is not available to the parties in the original position, but it is available to you and me in setting up justice as fairness.⁸ We are perfectly free to use it to specify the principles of justice we make available to the parties.

A second way of drawing up a list of basic rights and liberties is analytical: we consider what liberties provide the political and social conditions essential for the adequate development and full exercise of the two moral powers of free and equal persons (§7.1). Following this we say: first, that the equal political liberties and freedom of thought enable citizens to develop and to exercise these powers in judging the justice of the basic structure of society and its social policies; and second, that liberty of conscience and freedom of association enable citizens to develop and exercise their moral powers in forming and revising and in rationally pursuing (individually or, more often, in association with others) their conceptions of the good.

Those basic rights and liberties protect and secure the scope required for the exercise of the two moral powers in the two fundamental cases just mentioned: that is to say, the first fundamental case is the exercise of those powers in judging the justice of basic institutions and social policies; while the second fundamental case is the exercise of those powers in pursuing our conception of the good. To exercise our powers in these ways is essential to us as free and equal citizens.

8. Here I should mention that there are three points of view in justice as fairness that it is essential to distinguish: the point of view of the parties in the original position, the point of view of citizens in a well-ordered society, and the point of view of you and me who are setting up justice as fairness as a political conception and trying to use it to organize into one coherent view our considered judgments at all levels of generality. Keep in mind that the parties are, as it were, artificial persons who are part of a procedure of construction that we frame for our philosophical purposes. We may know many things that we keep from them. For these three points of view, see *Political Liberalism*, p. 28.

13.5. Observe that the first principle of justice applies not only to the basic structure (both principles do this) but more specifically to what we think of as the constitution, whether written or unwritten. Observe also that some of these liberties, especially the equal political liberties and freedom of thought and association, are to be guaranteed by a constitution (*Theory*, chap. IV). What we may call "constituent power," as opposed to "ordinary power,"⁹ is to be suitably institutionalized in the form of a regime: in the right to vote and to hold office, and in so-called bills of rights, as well as in the procedures for amending the constitution, for example.

These matters belong to the so-called constitutional essentials, these essentials being those crucial matters about which, given the fact of pluralism, working political agreement is most urgent (§9.4). In view of the fundamental nature of the basic rights and liberties, explained in part by the fundamental interests they protect, and given that the power of the people to constitute the form of government is a superior power (distinct from the ordinary power exercised routinely by officers of a regime), the first principle is assigned priority.

This priority means (as we have said) that the second principle (which includes the difference principle as one part) is always to be applied within a setting of background institutions that satisfy the requirements of the first principle (including the requirement of securing the fair value of the political liberties), as by definition they will in a well-ordered society.¹⁰ The fair value of the political liberties ensures that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class.¹¹ To explain the priority of the first principle over the second:

9. This distinction is derived from Locke, who speaks of the people's power to constitute the legislative as the first and fundamental law of all commonwealths. John Locke, *Second Treatise of Government*, §§134, 141, 149.

10. It is sometimes objected to the difference principle as a principle of distributive justice that it contains no restrictions on the overall nature of permissible distributions. It is concerned, the objection runs, solely with the least advantaged. But this objection is incorrect: it overlooks the fact that the parts of the two principles of justice are designed to work in tandem and apply as a unit. The requirements of the prior principles have important distributive effects. Consider the effects of fair equality of opportunity as applied to education, say, or the distributive effects of the fair value of the political liberties. We cannot possibly take the difference principle seriously so long as we think of it by itself, apart from its setting within prior principles.

11. [See *Political Liberalism*, p. 358.]

this priority rules out exchanges ("trade-offs," as economists say) between the basic rights and liberties covered by the first principle and the social and economic advantages regulated by the difference principle. For example, the equal political liberties cannot be denied to certain groups on the grounds that their having these liberties may enable them to block policies needed for economic growth and efficiency.

Nor can we justify a selective service act that grants educational deferments or exemptions to some on the grounds that doing this is a socially efficient way both to maintain the armed forces and to provide incentives to those otherwise subject to conscription to acquire valuable skills by continuing their education. Since conscription is a drastic interference with the basic liberties of equal citizenship, it cannot be justified by any needs less compelling than those of the defense of these equal liberties themselves (*Theory*, §58: 333f.).

A further point about priority: in asserting the priority of the basic rights and liberties, we suppose reasonably favorable conditions to obtain. That is, we suppose historical, economic and social conditions to be such that, provided the political will exists, effective political institutions can be established to give adequate scope for the exercise of those freedoms. These conditions mean that the barriers to constitutional government (if such there are) spring largely from the political culture and existing effective interests, and not from, for instance, a lack of economic means, or education, or the many skills needed to run a democratic regime.¹²

13.6. It is important to note a distinction between the first and second principles of justice. The first principle, as explained by its interpretation, covers the constitutional essentials. The second principle requires fair equality of opportunity and that social and economic inequalities be governed by the difference principle, which we discuss in §§17–19. While some principle of opportunity is a constitutional essential—for example, a principle requiring an open society, one with careers open to talents (to use the eighteenth-century phrase)—fair equality of opportunity requires more than that, and is not counted a constitutional essential. Similarly, although a

12. The priority (or the primacy) of the basic equal liberties does not, contrary to much opinion, presuppose a high level of wealth and income. See Amartya Sen and Jean Dreze, *Hunger and Public Action* (Oxford: Oxford University Press, 1989), chap. 13; and Partha Dasgupta, *An Inquiry into Well-Being and Destitution* (Oxford: Oxford University Press, 1993), chaps. 1–2, 5 and *passim*.

social minimum providing for the basic needs of all citizens is also a constitutional essential (§38.3-4; §49.5), the difference principle is more demanding and is not so regarded.

The basis for the distinction between the two principles is not that the first expresses political values while the second does not. Both principles express political values. Rather, we see the basic structure of society as having two coordinate roles, the first principle applying to one, the second principle to the other (*Theory*, §11: 53). In one role the basic structure specifies and secures citizens' equal basic liberties (including the fair value of the political liberties (§45)) and establishes a just constitutional regime. In the other role it provides the background institutions of social and economic justice in the form most appropriate to citizens seen as free and equal. The questions involved in the first role concern the acquisition and the exercise of political power. To fulfill the liberal principle of legitimacy (§12.3), we hope to settle at least these questions by appeal to the political values that constitute the basis of free public reason (§26).

The principles of justice are adopted and applied in a four-stage sequence.¹³ In the first stage, the parties adopt the principles of justice behind a veil of ignorance. Limitations on knowledge available to the parties are progressively relaxed in the next three stages: the stage of the constitutional convention, the legislative stage in which laws are enacted as the constitution allows and as the principles of justice require and permit, and the final stage in which the rules are applied by administrators and followed by citizens generally and the constitution and laws are interpreted by members of the judiciary. At this last stage, everyone has complete access to all the facts. The first principle applies at the stage of the constitutional convention, and whether the constitutional essentials are assured is more or less visible on the face of the constitution and in its political arrangements and the way these work in practice. By contrast the second principle applies at the legislative stage and it bears on all kinds of social and economic legislation, and on the many kinds of issues arising at this point (*Theory*, §31: 172-176). Whether the aims of the second principle are realized is far more difficult to ascertain. To some degree these matters are always open to reasonable differences of opinion; they depend on inference and judgment in assessing complex social and economic information. Also, we can expect more agreement on constitutional essentials than on issues of distributive justice in the narrower sense.

13. [See *Theory*, §31: 172-176, and *Political Liberalism*, pp. 397-398.]

Thus the grounds for distinguishing the constitutional essentials covered by the first principle and the institutions of distributive justice covered by the second are not that the first principle expresses political values and the second does not. Rather, the grounds of the distinction are four:

- (a) The two principles apply to different stages in the application of principles and identify two distinct roles of the basic structure;
- (b) It is more urgent to settle the constitutional essentials;
- (c) It is far easier to tell whether those essentials are realized; and
- (d) It seems possible to gain agreement on what those essentials should be, not in every detail, of course, but in the main outlines.

13.7. One way to see the point of the idea of constitutional essentials is to connect it with the idea of loyal opposition, itself an essential idea of a constitutional regime. The government and its loyal opposition agree on these constitutional essentials. Their so agreeing makes the government legitimate in intention and the opposition loyal in its opposition. Where the loyalty of both is firm and their agreement mutually recognized, a constitutional regime is secure. Differences about the most appropriate principles of distributive justice in the narrower sense, and the ideals that underlie them, can be adjudicated, though not always properly, within the existing political framework.

While the difference principle does not fall under the constitutional essentials, it is nevertheless important to try to identify the idea of equality most appropriate to citizens viewed as free and equal, and as normally and fully cooperating members of society over a complete life. I believe this idea involves reciprocity¹⁴ at the deepest level and thus democratic equality properly understood requires something like the difference principle. (I say "something like," for there may be various nearby possibilities.) The re-

14. [As understood in justice as fairness, reciprocity is a relation between citizens expressed by principles of justice that regulate a social world in which all who are engaged in cooperation and do their part as the rules and procedures require are to benefit in an appropriate way as assessed by a suitable benchmark of comparison. The two principles of justice, including the difference principle with its implicit reference to equal division as a benchmark, formulate an idea of reciprocity between citizens. For a fuller discussion of the idea of reciprocity, see *Political Liberalism*, pp. 16-17, and the introduction to the paperback edition, pp. xlv, xlvii, li. The idea of reciprocity also plays an important part in "The Idea of Public Reason Revisited," *University of Chicago Law Review*, 64 (Summer 1997): 765-807, reprinted in *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999) and *Collected Papers*.]

maining sections of this part (§§14–22) try to clarify the content of this principle and to clear up a number of difficulties.

§14. The Problem of Distributive Justice

14.1. The problem of distributive justice in justice as fairness is always this: how are the institutions of the basic structure to be regulated as one unified scheme of institutions so that a fair, efficient, and productive system of social cooperation can be maintained over time, from one generation to the next? Contrast this with the very different problem of how a given bundle of commodities is to be distributed, or allocated, among various individuals whose particular needs, desires, and preferences are known to us, and who have not cooperated in any way to produce those commodities. This second problem is that of allocative justice (*Theory*, §11: 56; §14: 77).

To illustrate: accepting the assumptions implied by interpersonal cardinal comparisons of well-being, we might, for example, allocate the bundle of commodities so as to achieve the greatest satisfaction summed over these individuals from the present into the future. As a political conception of justice, the classical principle of utility (as found in Bentham and Sidgwick) can be seen as adapting the idea of allocative justice so as to be a single principle for the basic structure over time.

14.2. We reject the idea of allocative justice as incompatible with the fundamental idea by which justice as fairness is organized: the idea of society as a fair system of social cooperation over time. Citizens are seen as cooperating to produce the social resources on which their claims are made. In a well-ordered society, in which both the equal basic liberties (with their fair value) and fair equality of opportunity are secured, the distribution of income and wealth illustrates what we may call pure background procedural justice. The basic structure is arranged so that when everyone follows the publicly recognized rules of cooperation, and honors the claims the rules specify, the particular distributions of goods that result are acceptable as just (or at least as not unjust) whatever these distributions turn out to be.

To elaborate: within the framework of background justice set up by the basic structure, individuals and associations may do as they wish insofar as the rules of institutions permit. Observe that particular distributions cannot be judged at all apart from the claims (entitlements) of individuals earned by their efforts within the fair system of cooperation from which those distributions result. In contrast to utilitarianism, the concept of allocative jus-

tice has no application. There is no criterion for a just distribution apart from background institutions and the entitlements that arise from actually working through the procedure.¹⁵ It is background institutions that provide the setting for fair cooperation within which entitlements arise.

14.3. These points can be made clearer as follows. The word “background” in the phrase “background procedural justice” above is intended to indicate that certain rules must be included in the basic structure as a system of social cooperation so that this system remains fair over time, from one generation to the next.¹⁶

Consider an example. The draft rule in a professional sport such as basketball ranks teams in the opposite order from their standing in the league at the end of the season: championship teams go last in the draft of new players. This rule provides for regular and periodic changes in the roster of teams and is designed to ensure that teams in the league are more or less evenly matched from year to year, so that in any given season each team can give any other a decent game. These changes of players are necessary to achieve the aims and attractions of the sport and are not foreign to its purpose.

The required background rules are specified by what is necessary to fulfill the two principles of justice. Later on we survey some of these as found in a property-owning democracy (Part IV).¹⁷ For example, background institutions must work to keep property and wealth evenly enough shared over time to preserve the fair value of the political liberties and fair equality of opportunity over generations. They do this by laws regulating bequest and inheritance of property, and other devices such as taxes, to prevent excessive concentrations of private power (*Theory*, §43: 245ff.).

14.4. Since the difference principle applies to institutions as public systems of rules, their requirements are foreseeable. They do not involve any more continuous or regular interference with individuals’ plans and actions than do, say, familiar forms of taxation. Since the effects of those rules are foreseen, they are taken into account when citizens draw up their plans in

15. See *Theory*, §14: 74–77, and note the distinction made there between the three kinds of procedural justice.

16. The term “background” is introduced here and is not used in *Theory*.

17. Property-owning democracy is discussed in *Theory*, chap. V, but unfortunately the contrast between it and welfare-state capitalism is not made clear enough. This defect I aim to correct in Part IV.

the first place. Citizens understand that when they take part in social cooperation, their property and wealth, and their share of what they help to produce, are subject to the taxes, say, which background institutions are known to impose. Moreover, the difference principle (as well as the first principle and the first part of the second principle) respects legitimate expectations based on the publicly recognized rules and the entitlements earned by individuals (*Theory*, §§47-48).¹⁸

The rules of background institutions required by the two principles of justice (including the difference principle) are designed to achieve the aims and purposes of fair social cooperation over time. They are essential to preserve background justice, such as the fair value of the political liberties and fair equality of opportunity, as well as to make it likely that economic and social inequalities contribute in an effective way to the general good or, more exactly, to the benefit of the least-advantaged members of society. Like the draft rule in professional sports, the arrangements required by the difference principle are part of, and not foreign to, the conception of fair social cooperation in justice as fairness. Even with these rules of background justice, distributive justice may still be understood as a case of pure procedural justice.

§15. The Basic Structure as Subject: First Kind of Reason

15.1. A characteristic feature of justice as fairness as a political conception is that it takes the basic structure as its primary subject. I note two broad kinds of reasons for this: the first notes how social institutions work and the nature of the principles required to regulate them over time to maintain background justice.

Consider an important criticism of Locke. Suppose we begin, as it seems he does, with the attractive idea that persons' social circumstances and their relations with one another should develop over time in accordance with fair agreements fairly arrived at. Much as with Locke's conception of ideal history, we might use certain principles to specify various rights and duties of persons, as well as their rights to acquire and transfer property. Now suppose we start with a just initial state in which everyone's possessions are justly held. We then say that when everyone respects persons' rights and

18. The remarks in this paragraph reply to the kind of objection Nozick raises to the difference principle in *Anarchy, State, and Utopia*. His description of the Wilt Chamberlin example, chap. 7, pp. 160-164, suggests that to apply that principle to government must involve continual interference with particular individual transactions.

duties, as well as the principles for acquiring and transferring property, the succeeding states are also just, no matter how distant in time. Call this an ideal historical process view.¹⁹

To work out this idea we need an account not only of the just initial state and of fair agreements, but also of just social conditions under which fair agreements are to be reached. Even though the initial state may have been just, and subsequent social conditions may also have been just for some time, the accumulated results of many separate and seemingly fair agreements entered into by individuals and associations are likely over an extended period to undermine the background conditions required for free and fair agreements. Very considerable wealth and property may accumulate in a few hands, and these concentrations are likely to undermine fair equality of opportunity, the fair value of the political liberties, and so on. The kind of limits and provisos that in Locke's view apply directly to the separate transactions of individuals and associations in the state of nature are not stringent enough to ensure that fair background conditions are maintained.²⁰

15.2. To preserve these conditions is the task of the rules of pure procedural background justice. Unless the basic structure is regulated over time, earlier just distributions of assets of all kinds do not ensure the justice of later distributions, however free and fair particular transactions between individuals and associations may look when viewed locally and apart from background institutions. For the outcome of these transactions taken together is affected by all kinds of contingencies and unforeseeable consequences. It is necessary to regulate, by laws governing inheritance and bequest, how people acquire property so as to make its distribution more equal, to provide fair equality of opportunity in education, and much else. That such rules of background justice are in force over time does not detract from but rather makes possible the important values expressed by free and fair agreements reached by individuals and associations within the basic structure. This is because principles applying to these agreements directly (for example, the law of contract) do not alone suffice to preserve background justice.

What is needed, then, is a division of labor between two kinds of princi-

19. Nozick's *Anarchy, State, and Utopia* is an example of this kind of view.

20. For example, in Locke's case they fail to guarantee the equal political liberties, as we can tell from *Second Treatise*, §158. See Joshua Cohen, "Structure, Choice, and Legitimacy: Locke's Theory of the State," *Philosophy and Public Affairs* 15 (Fall 1986): 301-324.