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## Property-Owning Democracy and the Priority of Liberty

*Abstract:* The distinction drawn by Rawls between the ideas of property-owning democracy and welfare state capitalism parallels his distinction between justice-based 'liberalisms of freedom' (including his own conception of justice as fairness) and utilitarian-based 'liberalisms of happiness'. In this paper I argue that Rawls's failure to attach the same level of significance to essential socio-economic rights and liberties as he attached to the traditional liberal civil and political rights and liberties gives justice as fairness a quasi-utilitarian character, which is incompatible with the fundamental objective of protecting the highest-order interests of citizens conceived as free and equal. I argue that in order fully to protect these interests, rights to access to non-human capital and productive resources should be assigned the same level of significance as that assigned to the civil and political rights and liberties, and prioritized over the lower-order rights and benefits regulated by Rawls's second principle of justice.

### 1. Introduction

Early commentators and critics of the work of John Rawls interpreted his theory of justice conservatively, as a defence of a suitably reformed set of welfare-state institutions of the kind that characterize the social and economic organization of post-war North American and Western European states (Clark/Gintis 1978; Sandel 1982; Wolff 1977). One of the most striking features of Rawls's later (2001) restatement of his theory of justice, however, was his emphasis of the importance of the distinction between the ideas of welfare state capitalism (WSC) and property-owning democracy (POD), and his insistence that the principles of justice are fully realizable in the institutional context of POD, but not in that of WSC. For Rawls, the distinction between these two forms of socio-economic organization is extremely significant, since in his view the institutions of POD express the ideas of reciprocity and fair cooperation between free and equal citizens, while those of WSC are grounded within a utilitarian theoretical framework which is incompatible, or at least less compatible, with the idea of society as a fair system of cooperation between free and equal citizens.

Although some scholars and commentators (Freeman 2007a, 219–35; Krouse/McPherson 1988) share with Rawls the view that there is a significant distinction to be drawn between the ideas of POD and WSC, and agree with him that the

principles of justice are not fully realizable in the institutional context of WSC, some (O'Neill 2009; Schemmel 2014) now take the view that the distinction between POD and WSC is somewhat overblown, since when presented in its most favourable light, WSC seems to be more compatible with the principles of justice than Rawls suggests.<sup>1</sup> In the *first section* of this paper I argue that although the distinction between the ideas of POD and WSC does seem to be less sharp than Rawls's account suggests, there is one significant point of difference concerning the distribution of non-human capital, which would be more widely distributed and easily accessible in a POD than in a WSC society.

Having argued that the distinction between the ideas of POD and WSC is in some sense significant, I then address in *section 2* the question of whether Rawls's principles of justice are in fact realizable in the institutional context of the POD but not in that of WSC. In addressing this question I focus on the feature of POD concerning the distribution of non-human capital identified in *section 1* as the feature which most sharply distinguishes the POD from WSC. I argue that because rights to access to economic resources are not included among the rights and liberties secured by the first principle of justice, justice as fairness as it stands does not provide strong, unambiguous support for this particular feature of POD, since neither of the two parts of Rawls's second principle of justice necessarily supports the implementation of the kinds of policies which would be needed to generate a wide enough dispersal of non-human capital.

Because Rawls fails to identify rights to access to basic economic resources as basic rights that should be protected by the priority of liberty, he is unable, so I argue, adequately to distinguish between citizens' 'highest-order' interests in developing and expressing their moral powers, and their 'lower-order' interests which are unrelated to their moral powers. Since this distinction is essential to Rawls's account of the priority of the first principle of justice over the second, I argue that his derivation of this priority fails, and must be revised in a way that will provide stronger grounds for the feature of POD identified in *section 1*. I then argue that in failing adequately to distinguish between higher- and lower-order interests, justice as fairness is left open to a quasi-utilitarian interpretation of its institutional implications which would provide support for consumerist pro-economic growth policies and institutions incompatible with the protection of the highest-order interests, and with which Rawls himself would have disapproved.

Finally, I argue that although the prioritization of a set of basic economic rights and liberties would not necessarily in itself guarantee the protection of the highest-order interests, the question of what such a set of rights and liberties might actually look like is nevertheless extremely important, and one that cannot be avoided. As the *final section* of the paper makes clear, the familiar association of the idea of 'individual economic rights and liberties' with classical liberal

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<sup>1</sup> In Rawls's view the two principles of justice are realizable not only in the institutional context of POD, but also in that of a liberal socialist society. What the basis of the distinction between the ideas of POD and liberal socialism is, and whether there is indeed any significant such distinction to be drawn, are questions which I cannot address in this paper. For a brief discussion of this issue see O'Neill 2009, n. 10 and O'Neill 2012a, 76.

endorsed ‘safety-net’ capitalist welfare state institutions makes the question of the proper specification of these rights and liberties all the more important.

## 2. POD, WSC, and the Distribution of Non-Human Capital

In the preface for the revised (1999a) edition of *A Theory of Justice* and in the later (2001) *Justice as Fairness: A Restatement* Rawls explicitly distinguishes between two models of socio-economic organization, which are both committed to free market institutions and a substantial degree of private property ownership, but which differ in the central aims that are pursued, the extent of social and economic inequalities that are permitted, and the means by which these inequalities are to be restricted. One of these models, property-owning democracy, aims “to carry out the idea of society as a fair scheme of cooperation over time among citizens as free and equal persons”, and must therefore be fully compatible with the principles of justice that in Rawls’s view should regulate the basic social and economic institutions of liberal democratic societies (Rawls 1999a, xv; Rawls 2001, 137–8). In order to be fully compatible with these principles of justice, the government of a POD must “disperse the ownership of wealth and capital”, and thus “prevent a small part of society from controlling the economy and indirectly political life itself” (1999a, xiv–xv).

The institutions of welfare state capitalism, by contrast, are in Rawls’s (1999a, xv; 2001, 137–8) view designed in order to achieve much more limited aims, such as guaranteeing a decent minimum standard of life, and protection against accident and misfortune, in the form of, for example, unemployment compensation and medical care. These institutions allow significant inequalities in the initial distribution of property and skill endowments, emphasizing rather the importance of the redistribution of the income generated from these endowments (Rawls 1999a, xv; 2001, 139). The more limited aims pursued by the governments of WSC societies mean that societies organized in accordance with this socio-economic model would “allow large and inheritable inequities of wealth”, and would therefore fail to secure key basic political liberties (protected by Rawls’s first principle of justice), fair equality of opportunity (covered by the first part of the second principle of justice), and a fully adequate social minimum (guaranteed by the second part of the second principle of justice) (Rawls 1999a, xv; 2001, 139). For this reason, WSC is not fully compatible with the principles of justice in accordance with which the basic social and economic institutions of liberal democratic societies should be regulated and organized.

For these principles to be fully realized, Rawls thought that it would be essential to disperse the ownership of wealth and capital “not by redistributing income to those with less at the end of each period, so to speak, but rather by ensuring the widespread ownership of productive assets and human capital [...] at the beginning of each period” (Rawls 1999a, xv). Thus, “basic institutions must from the outset put in the hands of citizens generally, and not only of a few, the productive means to be fully cooperating members of society” (Rawls

1999a, xv). What must be emphasized is the need for “the steady dispersal over time of the ownership of capital and resources by the laws of inheritance and bequest”, and “fair equality of opportunity secured by provisions for education and training” (Rawls 1999a, xv). The more equitable ‘pre-distribution’ of wealth and productive assets (including human capital), as opposed to the redistribution of the incomes generated from highly inequitable pre-distributive social and economic positions, would therefore seem to be the feature that most sharply distinguishes POD from WSC.

This distinction between the ideas of POD and WSC reflects a broader distinction made by Rawls in his (2000) *Lectures on the History of Moral Philosophy* between two kinds of liberalism, ‘liberalisms of happiness’ and ‘liberalisms of freedom’. Liberalisms of happiness are oriented primarily towards achieving the maximal welfare of citizens, and are associated with the classical utilitarians Jeremy Bentham, James Mill, and Henry Sidgwick (Rawls 2000, 366). The first principle of a liberalism of happiness “is that of the greatest happiness summed over all individuals”, and since its basic ideal “is that of maximizing happiness, it is a contingent matter whether doing this will secure the basic freedoms [. . .]. If it confirms the liberal freedoms, it is a liberalism of *happiness*; yet if it doesn’t confirm these freedoms, it is not a liberalism at all.” (Rawls 2000, 366, emphasis in original) Liberalisms of freedom by contrast are oriented primarily towards the freedom and independence of citizens, and are associated by Rawls with Kant, Hegel, J. S. Mill, and his own liberal political conception of justice as fairness (Rawls 2000, 362–3). While liberalisms of freedom provide citizens with the all-purpose means needed effectively to exercise their freedoms, they do not seek to guarantee citizens’ happiness, “for that is a matter for citizens themselves” (Rawls 2000, 366).

Samuel Freeman suggests that, for Rawls, “the capitalist welfare state is the contemporary institutional expression of the liberalism of happiness that is justified by utilitarianism”, the primary orientation of welfare state capitalism “towards continual economic growth and promoting maximal welfare” leading Rawls to associate it with utilitarianism and welfarism (Freeman 2007b, 108). POD, by contrast, with its orientation towards “realizing the freedom, independence, and active participation of equal citizens in economic and political life, is the institutional expression of the liberalism of freedom that is realized by Rawls’s justice as fairness” (Freeman 2007b, 108). In his contribution to this issue, Freeman argues that it is not an unreasonable assumption “to see capitalism as grounded in utilitarianism, or some form of welfarism extolling economic efficiency”, given that “arguments in support of capitalism predominantly assume that the best life for individuals is one of consumption, and that consumption is to be valued since it promotes individuals’ happiness or welfare” (Freeman 2013, 18–9). Since what is consumed “must first be produced, and production depends upon the incentives provided to individuals to expend their efforts and take risks with the wealth at their disposal”, it follows (according to proponents of capitalism like Milton Friedman and Friedrich Hayek) that nothing more than a social minimum constituting a kind of ‘social safety net’ consistent with economic efficiency

should be endorsed, and ‘social justice’ and economic egalitarianism rejected (Freeman 2013, 20).

It is plausible to suggest that this is the kind of reasoning that is commonly thought to justify the relatively un-ambitious and in-egalitarian welfare state systems of the USA and (perhaps to a lesser degree) the UK, which allow extreme inequalities in the distribution of income and wealth, with more progressive taxation and redistribution rejected on the basis that this will supposedly result in reduced economic output and efficiency. In these societies, any departures from this (less progressive) set of welfare state arrangements happen in spite of, rather than because of, the utilitarian-based obsession with material consumption and economic growth that dominates the public political discourse. By contrast, a public political attitude consistent with the liberalism of freedom as expressed in the principles of justice as fairness would support a clear and coherent programme for the reform of ‘safety net’ welfare state institutions. Therefore, although the distinction between POD and WSC is, as Martin O’Neill argues, in practice much fuzzier than Rawls seems to suggest, at the philosophical level the distinction would appear to be an important one.

However, it has been argued (O’Neill 2009; Schemmel 2014) that welfare state systems in other parts of the world, particularly the Scandinavian societies of Northern Europe, are far more ambitious and egalitarian in character than the safety net welfare state systems which form the focus of Rawls’s critique, and that the distinction drawn by Rawls between POD and WSC is not just fuzzy, but positively misleading, since many of Rawls’s criticisms of safety net welfare state societies simply do not apply to the more ambitious and egalitarian ‘social democratic’ welfare state societies. O’Neill, for example, argues that the account of WSC presented by Rawls is something of a straw-man, “a rather minimalist, unrepentant, and toothless version of a welfare state”, and points out that actually existing welfare state societies, such as Sweden and even the post-war United Kingdom, have pursued egalitarian education policies designed to achieve the broad distribution at least of human capital, in addition to the redistributive measures typical of welfare-state regimes (O’Neill 2009, 389–90). It seems, therefore, that it is important not only to distinguish POD from WSC, but also to distinguish classical or neo-liberal safety net welfare state systems from social democratic universalist welfare state systems<sup>2</sup>. It might then be argued that even if Rawls’s critique of WSC has little or no validity when applied to the social democratic universalist welfare state, his critique has some force when applied to the classical or neo-liberal safety net welfare state.

There is, however, perhaps one feature of POD which distinguishes it fairly sharply even from the social democratic universalist welfare state. This is Rawls’s emphasis on “the steady dispersal over time of the ownership of capital and resources by the laws of inheritance and bequest” noted above, which echoes the view expressed by James Meade (1964) that extreme inequalities in the ownership of property are “undesirable quite apart from any inequalities of

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<sup>2</sup> On this view, Rawls’s ‘WSC’ might be thought to correspond to what Gosta Esping-Anderson 1990 referred to as the ‘liberal’ welfare state, in contrast to the ‘conservative/corporatist’, and ‘social democratic’ welfare state.

income which they may imply”, since “a man with much property has great bargaining strength and a sense of security, independence, and freedom” (quoted in Ackerman/Alstott 1999, 25). This feature of POD as expressed above by Rawls and Meade would seem to fit closely with the idea of asset-based distributive policies promoted by the likes of Stuart White (2003), David Nissan and Julian Le Grand (2000), and Bruce Ackerman and Anne Alstott (1999) as essential for the promotion of material independence and personal autonomy. Stuart White, for example, proposes that “on maturity each citizen will be eligible for a sizeable capital grant” which may be used “to finance a range of activities broadly related to productive participation in the community, e.g. to finance courses of higher education or vocational training, to establish a new business, to finance the costs of moving to a new area in search of employment, or, perhaps, to subsidize time off from employment to care for dependants” (see also Paxton 2003; Paxton/White/Maxwell 2006).

The implementation of such asset-based distributive policies might be thought of as a ‘pre-distributive’ mechanism designed to broaden the distribution of economic power and thereby enhance personal independence and autonomy, in contrast to the redistributive progressive taxation and transfer mechanisms characteristic of the social democratic universal welfare state. The idea of progressive ‘pre-distribution’, recently promoted by commentators and politicians in the mainstream media (Eaton 2012; Hackett 2012; O’Neill 2012b; Miliband 2012) and by political and social theorists in academic journals (Hacker 2011; O’Neill/Williamson 2012a) draws attention to the need for policies and institutions which are designed to improve the position of the least advantaged members of society by generating a fairer distribution of opportunities and benefits from the operation of the free market system, with less reliance on redistributive tax-and-transfer mechanisms. Among the more radical proposals for progressive pre-distribution is that of a reformed version of inheritance tax designed to break up large concentrations of wealth by taxing the recipients of bequests and gifts above a certain value, and then using the revenue generated from this tax to fund the provision for disadvantaged citizens of some kind of capital stake designed to improve opportunities for setting up in business, undertaking additional education or training, or purchasing a house (O’Neill/Williamson 2012a).<sup>3</sup>

This emphasis on the need for a ‘pre-distributive’ asset-based approach to progressive reform would seem to be at least one significant point of difference between the POD and the social democratic universalist welfare state, which relies more heavily on conventional progressive taxation and redistribution. Given that this feature also sharply distinguishes POD from the neo-liberal safety net welfare state, it is on this policy-type that I will focus in addressing the question, to which I turn in the next section, of how effectively justice as fairness supports the idea of POD as opposed to that of WSC.

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<sup>3</sup> On the issue of inheritance tax reform see also O’Neill 2007.

### 3. POD and the Second Principle of Justice

Both Rawls and Freeman see the connection between justice as fairness and the idea of POD as deriving from the three ‘egalitarian’ features of justice as fairness: the guarantee of the fair value of the political liberties (included in the first principle of justice); the fair equality of opportunity (FEO) principle (the first part of the second principle); and the difference principle (the second part of the second principle). The fair value guarantee requires that socio-economic inequalities be restricted in order to prevent a minority of citizens from obtaining the means with which to exercise a disproportionate amount of influence and power in setting the political agenda and determining who will attain political offices and which policies will be adopted by the government. The FEO principle again requires that socio-economic inequalities be restricted, in this case in order to maintain a broad range of opportunities for disadvantaged citizens to achieve social positions of advantage. And the difference principle requires, not that the *income and wealth* of the least advantaged citizens be maximized, but that an index of primary goods including powers and prerogatives of offices and positions of authority and responsibility, and the social bases of self-respect, as well as income and wealth, be maximized. All of these features significantly limit the degree and kinds of socio-economic inequality that can be allowed to exist in a well-ordered society and in Rawls’s view cannot be fully realized in the institutional context of WSC.

Although there are considerations (Cohen 1989; Daniels 1975; Krouse/McPherson 1988) that support the view that the fair value guarantee included in the first principle of justice might require the restriction of socio-economic inequalities and the democratization of workplace decision-making processes, it seems unlikely that this feature of justice as fairness would support the implementation of the asset-based pre-distributive policies that might also be thought to be essential in improving access to and broadening the distribution of non-human capital and productive resources, and with which I am primarily concerned. The democratization of existing workplaces in itself would not secure the material independence and personal autonomy that asset-based pre-distributive policies might help to secure, and it is with these values and these kinds of policies that I am primarily concerned in this paper. Since considerations relating to the second principle of justice are more relevant to questions concerning these particular values and policies, it is on these considerations that I focus in this paper.

I begin with the second part of the second principle of justice, the difference principle, which requires that inequalities in income and wealth, ‘powers and prerogatives of office’, and ‘the social bases of self-respect’ result over time in a greater bundle of these primary social goods for the least advantaged members of society, which then maximizes the worth for these citizens of the basic rights and liberties protected by the first principle of justice (Rawls 2001, 65). It might be thought that since the difference principle regulates the distribution not only of income and wealth but also of powers and prerogatives of office and the social bases of self-respect, then this principle would be likely to require the restriction

of the inequalities in the distribution of income and wealth that would exist in a WSC society. Freeman, for example, argues that

“if we factor in powers and prerogatives of office and the bases of self-respect in the index of primary goods, there might be little or no net gain to the worst-off under the difference principle even with substantially increased income; for the prerogatives and powers that accompany their position (degree of worker control, etc.) have been substantially diminished, or in any case not increased.” (Freeman 2007a, 134)

Although the least advantaged members of society might have greater income and wealth under WSC,

“if the long-term effects of further economic gains to the worst-off concentrated wealth and economic power in the most advantaged so much that they unfairly reduced the quality of working conditions and bargaining power of unskilled workers or their opportunities for advancement within and outside the firm, then the difference principle itself could restrict those economic gains.” (Freeman 2007a, 134)

However, it does not follow from this argument that the difference principle necessarily supports the implementation of the kinds of policies with which I am concerned, since it is not clear that the disadvantages for the least advantaged members of society resulting from a highly unequal distribution of powers and prerogatives of office would not be outweighed by the advantages of higher incomes and standards of living which might depend upon inequalities in the distribution of powers and prerogatives of office. As Freeman again puts it,

“though workers in a POD have greater powers and prerogatives in the workplace, still the diminution of less-advantaged workers’ prerogatives and powers in the welfare state is offset by large increases to their income and wealth. (Suppose they earn \$30 an hour in the CWS [Capitalist Welfare State] versus \$15 in the POD.)” (Freeman, 2007a 135)

This more conservative interpretation of the meaning and institutional implications of the difference principle, which places greater emphasis on the distribution of income and wealth than on the other primary goods, would not seem to be much at odds with Rawls’s focus, when discussing the application of the difference principle, on the distribution of income in the form of a basic “social minimum” in terms of which the principle may be seen to be “roughly satisfied” (Rawls 2001, 161).

A similar problem weakens the argument presented by O’Neill (2009) emphasizing the importance of the social bases of self-respect. O’Neill suggests that the opportunity for citizens to participate in determining the direction of economic investment and production, and the variety of jobs and social roles within society, is arguably one of the social bases of self-respect, and therefore



subject to regulation by the difference principle (O'Neill 2009, 383–5). If “society is structured in such a way that all decisions about economic investment and production are made by a small, high-status group who constitute something like a ruling class or economic elite”, then although the implementation of the kind of redistributive measures characteristic of a welfare state might substantially reduce inequalities in income, such reforms will fail to bring about “a redistribution of *power*, or of *status*, within this society” (O'Neill 2009, 383). The difference principle therefore cannot be realized through the implementation of redistributive measures which address inequalities that result from the distribution of the social product but which fail to address inequalities that result from the way in which social production is organized. It must instead be realized through the implementation of mechanisms which challenge the control enjoyed by the dominant group by granting more control over productive capital to others.

In the absence of a plausible and persuasive account of the reasons why inequalities in powers and prerogatives of office or in access to capital and productive resources will generate or be likely to generate inequalities in the social bases of self-respect, a reformed welfare state society in which the distribution of non-human capital remains relatively narrow might plausibly be thought to satisfy the demands of the difference principle. In the absence of such an account the utilitarian promotion of economic growth and maximal welfare discussed in *section 1* might strengthen what seems to be the already dominant view in many liberal societies that the advantages gained from increased income and consumption levels outweigh the disadvantages generated by the inequalities that result from the way in which social production is organized. The difference principle therefore does not in itself provide strong and decisive support for the implementation of policies designed to broaden the distribution of non-human capital and productive resources, since the interests of the least advantaged members of society in greater access to these resources may be trumped by their supposed interest in the higher standards of living and levels of consumption made possible by higher incomes and economic growth. Nothing in the content or structure of justice as fairness as it stands seems to provide any defence against such an interpretation of the difference principle and its application.

I turn now to the first part of the second principle of justice, the fair equality of opportunity principle. Fair equality of opportunity (FEO), as opposed to formal equality of opportunity, requires “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” (Rawls 2001, 44). In order to accomplish the aims of the FEO principle, institutional measures must be implemented which would, for example, set a free market system “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”, and “establish, among other things, equal opportunities of education for all regardless of family income” (Rawls 2001, 44).

Although the FEO principle is subordinate to the guarantee of the fair value of the political liberties included in the first principle of justice, if we assume that this guarantee permits but does not require a relatively narrow distribution

of non-human capital, then the FEO principle (which has priority over the difference principle) might itself require the implementation of policies designed to improve access to and broaden the distribution of these resources. However, although FEO would seem clearly to require the implementation of policies designed to block the intergenerational transmission of advantage, such as gift and inheritance taxation, and the provision of an adequate system of public education for all, it does not follow that FEO as presented by Rawls will necessarily require the implementation of measures designed to disperse the ownership of productive capital. The implementation of gift and inheritance taxation which prevents the intra-familial transmission of wealth across generations might be compatible with the existence of significant inequalities in access to productive (non-human) capital within each generation. The revenue generated from such taxation might, for example, be used to fund better public services, such as health and education services, or better welfare schemes, such as unemployment and old age pension insurance, or might be added to an investment fund to be distributed to economically productive enterprises by the government or its associated investment agencies.

Whether the FEO principle would in fact require the implementation of policies designed to broaden the distribution of non-human capital and productive resources is difficult to determine, due to the lack of clarity and detail in Rawls's discussion of the meaning and institutional implications of this principle, which different commentators interpret in different ways. On the wider, more demanding interpretation of FEO, as supported by Freeman, FEO might be construed "in such a way that it puts a limit on the degree of inequalities not only in wealth and income but also in powers and prerogatives of office allowed by the difference principle", imposing on society "a positive duty beforehand to create for all citizens a *fair and adequate opportunity for control* over their means of production and working conditions" (Freeman 2007a, 135). The priority of the FEO principle over the difference principle would mean that the limits on inequalities in powers and prerogatives of control between the most and least advantaged imposed by FEO could not be exceeded, "no matter how large the income and wealth that might otherwise be that goes to the least advantaged in the capitalist welfare state" (Freeman 2007a, 135).

O'Neill, on the other hand, argues that the 'opportunities' covered by Rawls's FEO principle are "the opportunities of individuals with given social backgrounds to come to membership of any of the full range of socioeconomic positions or social classes", which is "a wholly different idea to that involved in Freeman's use of the term 'opportunities', which he uses to describe the powers and capacities possessed by individuals once they have already come to occupy a particular social position" (O'Neill 2009, 386). On O'Neill's interpretation of the meaning and institutional implications of the FEO principle, the opportunities the distribution of which is regulated by the FEO principle are understood narrowly to refer to the attainment of positions of employment and responsibility, rather than to the control of means of production and working conditions. On this view, the FEO principle is satisfied through the provision of high quality education and training for all citizens, irrespective of social background, and by the

implementation of policies designed to eliminate the most severe socio-economic inequalities, primarily through the imposition of an inheritance tax.

Considerations internal to Rawls's presentation of justice as fairness seem to fail to provide decisive support for either of these contrasting interpretations of the meaning and institutional implications of the FEO principle. Let us assume, despite this, that the wider more demanding interpretation of FEO and its institutional implications suggested by Freeman is more faithful to Rawls's account than the narrower less demanding interpretation suggested by O'Neill. In order to provide a convincing case for the implementation of policies designed to broaden the distribution of non-human capital and productive resources from considerations relating to the FEO principle we must still be able to provide a justification for the priority assigned to the FEO principle over the difference principle, since in the absence of such a priority rule there is the danger that any requirements for the implementation of such policies derived from considerations relating to the FEO principle might be balanced or 'traded-off' against possible requirements for the implementation of policies designed to maintain a narrow distribution of non-human capital derived from considerations relating to the difference principle.

In addressing this question a clearer account of the nature of the 'opportunity' the distribution of which is regulated by the FEO principle is essential. In the next section I argue that the idea of highest-order interests, upon which Rawls's derivation of the priority of liberty is based, provides such an account. However, I then argue that the use of the idea of highest-order interests to provide an explanation for the priority of the FEO principle over the difference principle casts doubt on the prioritization of the first principle of justice over the FEO principle. For this reason, so I argue, it would be more appropriate to incorporate the requirements of the FEO principle within an expanded first principle of justice, which would then be prioritized over the difference principle.

#### **4. Highest-Order Interests and the Priority of Liberty**

The priority of the first principle of justice over the second "rules out exchanges ('trade-offs', as economists say) between the basic rights and liberties covered by the first principle and the social and economic advantages regulated by the difference principle" (Rawls 2001, 47). The rights and liberties to be prioritized in this way are specified by the following list: freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law (Rawls 1996, 291). In order to justify the prioritization of this specific list of basic rights and liberties over the rights and benefits secured by the second principle of justice Rawls utilizes the idea of 'highest-order interests', which are said to over-ride any other interests that persons might be thought to have as citizens. The citizens of a 'well-ordered society' are conceived as "having the capacity to be normal and fully cooperating members of society over a complete life", and to conceive of persons in this way

is to attribute to them “two powers of moral personality”: “the capacity for a sense of right and justice (the capacity to honour fair terms of cooperation and thus be reasonable), and the capacity for a conception of the good (and thus to be rational).” (Rawls 1996, 301–2) Citizens’ interests in the full and informed development and exercise of these two moral powers are their ‘highest-order’ interests, which over-ride any other interests that persons might be thought to have as citizens.

Rawls’s argument is that the basic liberties specified in the above list are essential institutional conditions for the protection of these highest-order interests, and are for this reason assigned priority over the primary goods the distribution of which is regulated by the second principle of justice, which generate “a greater public good understood as a greater net sum of social and economic advantages for society as a whole” (Rawls 2001, 111). Thus, “the equal political liberties and freedom of thought enable citizens to develop and exercise these powers in judging the justice of the basic structure of society and its social policies”, while “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” (Rawls 2001, 45). The rights and liberties covered by the rule of law and the freedom and integrity of the person are “supporting basic liberties”, which are “necessary if the other basic liberties are to be properly guaranteed” (Rawls 2001, 113).

In his discussion of the highest-order interests and the derivation of the priority of liberty Rawls does not consider in any detail the possibility that there may be certain kinds of social and economic rights which are essential institutional conditions for the protection of these interests, assuming without much argument that the civil and political rights and liberties covered by the first principle of justice are the only such essential conditions. From this assumption it follows that citizens’ interests in developing and exercising their two moral powers are separate and sharply distinct from their interests in advancing the rational plan of life connected with their determinate conceptions of the good. The priority of the first principle over the second is then justified by the importance attached to the former set of interests compared with that attached to the latter (Rawls 1999b, 365–7; 1996, 74, 106). As Robert Taylor puts it, the priority of the basic liberties over the other primary goods “can be justified by a hierarchy of interests: our highest-order interest in choosing our ends in freedom takes lexical priority [...] over our interest in advancing those ends” (Taylor 2003, 255).

However, it seems clear that this rigid separation of the interest in forming and revising a conception of the good from the interest in advancing a rational plan of life cannot be defended, since the latter interest is practically inseparable from the former, and therefore cannot be identified as subordinate. In pursuing the determinate scheme of final ends and aims (rational plan of life) connected with our religious, moral, or philosophical values and commitments, we deepen our understanding of the practical implications and significance of these values and commitments. This may then lead us to revise and re-formulate the

determinate scheme of practical ends and aims, and eventually to revise the values and commitments in terms of which the more practical elements are understood. Thus, the interest in advancing a conception of the good is practically inseparable from the interest in forming and revising a conception of the good, because the process of forming and revising a conception of the good cannot take place in the absence of essential information obtained through practical attempts to realize the elements of the relevant conception of the good.<sup>4</sup>

It follows from this that any socio-economic rights which protect the interest in rationally pursuing a conception of the good are no less essential to the protection of the highest-order interest in the development and exercise of the capacity for a conception of the good than the civil and political rights and liberties covered by Rawls's first principle of justice. So while freedom of conscience, freedom of thought, and the freedoms of speech and association are essential to the interest in forming and revising a conception of the good and thus to the protection of the highest-order interest in the development and exercise of the capacity for a conception of the good, the socio-economic rights which generate the substantive freedom to pursue a set of practical ends and aims are also essential to the protection of this highest-order interest. Rawls's account of the priority of liberty would appear to be unjustifiable, at least in terms of the idea of highest-order interests which he utilized in order to try to defend and justify this feature of justice as fairness.

However, it does not follow from this that the idea of the priority of liberty should be abandoned. As I argue below, the priority of liberty should instead be reformulated to include the prioritization of essential socio-economic rights in addition to the traditional civil and political rights and liberties covered by Rawls's first principle of justice. Given that Rawls provides no convincing reason for the prioritization of the first principle of justice over the FEO principle, we can formulate the proposed expanded first principle thus: Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, *including fair opportunity to pursue a reasonable conception of the good*, which scheme is compatible with the same scheme of liberties for all. This first principle of justice is then prioritized over the difference principle, which regulates the distribution of rights and benefits that are not essential for the protection of the highest-order interests, such as the benefits of improved opportunities for material consumption.

To affirm the proposed prioritization of the expanded first principle of justice over the difference principle would be to express a commitment to the higher importance attached to citizens' interests in the development and exercise of their moral powers compared to that attached to other lower-order interests, such as the consumption interest in higher incomes and standards of living. A conception of justice that incorporated this structure would constitute a coherent and powerful expression of the 'liberalism of freedom', which as we saw above is oriented primarily towards the freedom and independence of citizens, rather than their happiness. By contrast, the conception of justice as fairness presented by

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<sup>4</sup> For a more detailed analysis of the idea of highest-order interests and its role in the derivation of the priority of liberty see Kerr 2012.

Rawls, which does not recognize the higher level of importance of access to productive resources relative to that of improved opportunities to consume, flirts with the ideal of the ‘liberalism of happiness’, the basic principle of which is that of maximizing the welfare of citizens. This elevation of the importance of the consumption interest relative to that of the higher-order interests associated with the pursuit of a rational plan of life makes justice as fairness more compatible with the institutions of WSC, with the narrow distribution of non-human and productive capital that this entails. Justice as fairness as presented by Rawls therefore assumes a kind of quasi-utilitarian character, and is not the clear alternative to the utilitarian welfare state that it is presented as and often considered to be.

Thus far I have argued that unless rights to access to the material resources necessary for the advancement of the rational plan of life associated with a conception of the good are prioritized over the rights and benefits associated with the consumption interest (and other lower-order interests) promoted by the difference principle, there is a serious risk that these rights will be traded-off for the supposed benefits of higher standards of living and income levels. Since the opportunity to pursue a specific set of practical ends and aims is an essential condition for the protection of the interest in the development and exercise of the capacity for a conception of the good, it seems reasonable to suppose that the implementation of the pre-distributive asset-based policies with which I am concerned would be required by the FEO principle (and therefore by the first principle of justice). In the absence of the improved access to non-human capital and productive resources that such policies would generate, the material independence and autonomy necessary for citizens effectively to pursue the specific set of practical ends and aims associated with the conceptions of the good that they hold would not be secure. The prioritization only of the traditional liberal civil and political rights and liberties is not enough to protect citizens’ highest-order interests in the development and exercise of the capacity for a conception of the good.

This distinction between the highest-order interests in the development and exercise of the moral powers and other lower-order interests, such as the interests in consumption and higher living standards, is crucial to the validity of the reformulation of the priority of liberty proposed in this paper. If no such distinction is made, then there would appear to be no basis for the priority of liberty in any form, since in the absence of some set of lower-order interests there is nothing over which the highest-order interests can be prioritized or thought to be of higher importance. I cannot in this paper provide a detailed account of the nature of the lower-order interests from which the higher-order ones are distinguished. But it seems plausible to suppose that there is a meaningful and significant distinction to be drawn between the rational, creative, and conscientious kinds of activities and attitudes involved in the development and exercise of the capacity to form, revise, and pursue a conception of the good, and the more thoughtless, compulsive, and narrowly self-interested activities and attitudes involved in the ‘conspicuous consumption’ of fashionable gadgets, clothing, and expensive toys. Such a distinction is one to which Rawls would presumably

have been sympathetic, given his view that beyond some point, great wealth would be likely “to be a positive hindrance, a meaningless distraction at best if not a temptation to indulgence and emptiness” (Rawls 1999a, 257–8), and that the long-term result of “trickle down”, and “economic growth, onwards and upwards, with no specific end in sight”, is “a civil society awash in a meaningless consumerism of some kind” (Rawls/Van Parijs 2003, 9).

What might be rather more controversial, however, is the significance of this distinction with regard to the compatibility of justice as fairness with the idea of the priority of the right over the good, and its characterisation as an anti-perfectionist conception of justice. This is another issue which I cannot discuss in this paper, except to point out that it cannot simply be assumed that the prioritization of highest-order over lower-order interests amounts to perfectionism of some kind and falls foul of the priority of right. One way in which this claim might be countered is by developing an argument to the effect that the prioritization of the interest in forming, revising, and pursuing a conception of the good does not itself amount to the prioritization of any particular conception of the good. On this approach, the subordinate lower-order interests would be identified as interests that are unconnected with the formation, revision, and pursuit of any conception of the good, of whatever kind. However, until such an argument is developed and examined, we can only postpone judgment on this important issue.

It is important to emphasize that my claim is not that the prioritization of a set of basic economic rights and liberties would necessarily in itself guarantee the protection of the highest-order interests, but rather that in recognizing that some sort of set of basic economic rights and liberties is an essential institutional condition for the protection of these interests, we are more likely to be motivated to give serious consideration to the question of what this set of rights and liberties might actually look like. In addressing this question, it is perhaps useful to begin by indicating what the set of basic economic rights and liberties would *not* look like. Accordingly, I consider in the next section the case for a conception of justice, called ‘free market fairness’, which emphasizes the importance of certain ‘private economic liberties’ which are identified as essential institutional conditions for the protection of citizens’ most fundamental interests. I argue that this feature of free market fairness is similar only in a very superficial sense to the account of the priority of liberty outlined above, and that the idea of ‘private economic liberties’ employed is inadequate and incomplete. I then argue that the inadequacy and incompleteness of the free market fairness idea of ‘private economic liberties’ makes the identification of the basic economic rights and liberties which are essential conditions for the protection of citizens’ highest order interests all the more important.

## 5. Basic Economic Rights and Liberties

In *Free Market Fairness* John Tomasi (2012a) presents a conception of justice which seeks to reconcile the values of democracy, fairness, and social justice,

on the one hand, with those of capitalism, free markets, and economic liberty, on the other. In seeking to reconcile these diverse values, Tomasi is led to a “market democratic” approach to social justice which “encourages democratic citizens to respect each other as holders of economic liberties as well as civil and political ones”, and requires that we “adopt institutions designed to *maximize* the bundle of wealth personally controlled by the lowest-paid workers (and not institutions designed to *reduce* inequalities between groups)” (Tomasi 2012b, 32–3, emphasis in original). While this may call for “a government safety net to assist those genuinely in need”, it is particularly important “not simply that the less fortunate *have* things, but that they have those things as a result of their own economic agency”, since “an opportunity for a life of freedom and independence is owed not just to the wealthy but to citizens of every economic class” (Tomasi 2012b, 33). This means that the social institutions most fit to pursue free market fairness are not social democratic ones, but rather those that protect a wide range of private economic liberty, limit the paternalistic reach of government, and create “an environment in which creative commercial capacities of individuals are unleashed to the benefit of all, without artificial limit or cap” (Tomasi 2012b, 33).

The institutional scheme promoted by Tomasi as appropriate for the realization of free market fairness seems to be strikingly similar to the neo-liberal version of WSC that forms the focus of Rawls’s critique, and in opposition to which he promotes the idea of POD. And yet, in its justification of the protection of private economic liberties on the basis of the importance of these liberties for citizens’ freedom, independence, and autonomy, is the free market fairness conception of justice not to be sharply distinguished from the kind of utilitarian conception of justice in terms of which safety net WSC is typically justified and defended? Is it not then the case that the prioritization of economic rights and liberties over the rights and benefits secured by the difference principle is just as likely to provide dubious justification for the institutions of neo-liberal safety net WSC as over-reliance on the difference principle?

In order to address this question, we must consider in more detail the account of ‘private economic liberty’ presented by Tomasi, and of the kinds of activities protected by such liberty. According to Tomasi, private economic liberties should be affirmed

“as a sign of the respect we owe our fellow citizens to make decisions about saving, working, and spending in light of their own values and ideals. How many hours to work each week, and on what terms? How much to spend on living now and how much to save for retirement and health insurance? How to balance the calls of work with the calls of family and other projects?” (Tomasi 2012b, 30)

For many citizens, Tomasi says, the making of these kinds of decisions is “the very stuff of life”, the particular balance that each of us strikes saying “a lot about what each of us values and about the kind of person each of us is” (Tomasi 2012b, 30). Citizens are respected, and the development of their moral powers is encouraged, when their liberty to make such decisions for themselves is protected.



At first glance this account of the economic liberties and the kinds of activities that they protect seems to be rather narrow and incomplete, applying to only a small range of the values and ideals that form the basis of the conceptions of the good of the citizens of modern and diverse liberal democratic societies. But on reflection it is clear that the kinds of decisions to which Tomasi alludes are indeed of crucial importance with regard to a wide range of practical ends and aims, and to the values and ideals that these express. For example, the making of decisions concerning the terms on which one works and the number of hours to be worked would be of fundamental importance to citizens for whom the opportunity to work in a democratically organized workplace and to participate in core decision-making procedures is essential to the values and ideals that in part constitute their conceptions of the good. And balancing “the calls of work with the calls of family and other projects” would be of fundamental importance to citizens holding a wide range of conceptions of the good.<sup>5</sup>

It is clear, then, that decision-making concerning these kinds of questions is essential to the pursuit of a wide range of conceptions of the good, and not only to a narrow range of ‘values and ideals’ which can guide us in deciding whether to do any overtime this evening, or how much to charge per hour for our services on this job, or how much (if any) we can afford to put into our savings account this week. However, Tomasi’s affirmation of the goal of maximizing “the bundle of wealth personally controlled by the lowest paid workers” indicates that the ‘control’ that citizens would be allowed to exercise over their bundles of wealth would in a free market fairness society be heavily restricted, covering an extremely narrow range of possibilities and choices. To see that this is the case, consider an objection to Tomasi’s claim that, since “a faster-growing economy would make more financial benefits available to the poor”, and given that we best respect the poor by maximizing their holdings of wealth, it therefore follows that we should endorse a capitalistic free market institutional arrangement which will provide the conditions for the faster economic growth that is needed (Tomasi 2012b, 31–3). One objection to this argument, suggested by Martin O’Neill and Thad Williamson in their (2012b) review of *Free Market Fairness*, is that even if everyone were benefitting from economic growth (which they point out is manifestly not the case),

“there would be reason to doubt that indefinite growth leads to indefinite improvement in human well-being. After achieving a baseline of economic security, most people don’t find themselves happier thanks to higher incomes. What they want instead is more time for friends, families, and activities that give their lives meaning [. . .] many people in the developed countries sacrifice their own happiness and friendships for greater income.” (O’Neill/Williamson 2012b)

O’Neill and Williamson then suggest that it is likely that, rather than freely choosing to overwork, “many workers can’t earn enough unless they’re overworked. Because firms don’t have much incentive to offer generous terms, work-

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<sup>5</sup> For another account of the economic liberties and their importance, see Nickel 2000.

ers are effectively not free to find a 30-hour workweek, adequate salary, and flexible scheduling.” (O’Neill/Williamson 2012b)

Whether or not these claims about the effectiveness of economic growth in improving the well-being of less advantaged citizens are entirely sound is not the relevant issue here. The important point is that a modern and diverse liberal democratic society must make room for people for whom the maximization of wealth and economic growth is incompatible with the conceptions of the good that they aim to pursue. As the quotation from O’Neill and Williamson makes clear, there are many reasons why the citizens of modern liberal democratic societies might oppose the affirmation of the goal of maximizing economic growth in order to maximize the bundle of wealth controlled by the least advantaged members of society. Finding the time to engage in activities such as interacting more with one’s family, perhaps by caring for elderly relatives or home-schooling one’s children, or undertaking important voluntary work in the local community, or playing music, or taking more exercise and doing more yoga, or practising one’s religion or otherwise developing oneself spiritually—all of these activities place limits on the amount of time that is available for engaging in the work that is necessary for the continuation of economic growth. If the continuation of economic growth is endorsed as one of the essential objectives of social justice, then it seems reasonable to suggest that a society the basic structure of which is regulated by this conception of social justice would be one within which space for these people would be very hard to find.

What this suggests is that, rather than affirming the objectives of promoting the indefinite continuation of economic growth and thereby maximizing the incomes and wealth available to the least advantaged members of society, a conception of justice fit for a modern liberal democratic society should affirm the objectives of maximizing the range of conceptions of the good that can be pursued, and securing fair opportunity for citizens to pursue them. The affirmation of the former rather than the latter set of objectives would restrict the ‘control’ that may be exercised over wealth by citizens in a free market democracy to the narrow range of decisions and choices that are compatible with these objectives.<sup>6</sup> To be sure of achieving the objectives of maximizing the range of conceptions of the good that can be pursued by the members of society, and securing fair opportunity to pursue them, a modern liberal democratic society must prioritize rights to access to and control over the basic economic resources required to secure this fair opportunity over the benefits of increased incomes and consumption secured by the difference principle. The protection of such ‘economic liberties’ would provide individual citizens with the opportunity to decide whether or not to engage in the kinds of activities that would be likely to generate continuous economic growth. Whether such growth occurred would therefore depend upon

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<sup>6</sup> Although Rawls expresses support for the idea of a no-growth economy (as Tomasi notes (2012b, 31)), the discussion of the previous section shows that justice as fairness may be interpreted in a quasi-utilitarian direction which provides support for the kinds of pro-growth objectives favoured by free market fairness. So Tomasi is mistaken in suggesting that justice as fairness necessarily favours institutions designed to maintain a steady state no-growth economy, rather than those designed to generate continuous economic growth.

the choices made and the conceptions of the good affirmed by the members of society.<sup>7</sup>

It is plausible to suggest that the control over wealth that free market fairness would allow covers such a narrow range that what Tomasi is endorsing is not the prioritization of ‘economic liberties’ understood as essential conditions for the protection of citizens’ interest in developing and exercising their moral powers (as Tomasi claims 2012b, 30), but rather the same quasi-utilitarian devaluation of the economic liberties to the level of the consumption interest protected by the difference principle. However, even if Tomasi’s claim to be endorsing the former is accepted, it is clear that his account of these basic economic liberties is radically inadequate and incomplete. If we accept the argument that the liberty to engage in free economic activity by, say, setting up a small business, is of fundamental moral importance, then, as O’Neill and Williamson again argue, what we should be calling for is not the deregulated capitalism of free market fairness, but rather the wide disbursement of capital characteristic of the POD, which would help to create a society in which “more people have enough to make their own way in the world without being dependent simply on labor income or constrained by the circumstances of birth” (O’Neill/Williamson 2012b). What this seems to suggest is that the prioritization of socio-economic rights and liberties over the lower-order rights and benefits regulated by the difference principle justifies, not the neo-liberal safety net WSC institutions of free market fairness, but rather the progressive ‘pre-distributive’ institutions of POD that are designed to disperse the ownership and control of non-human capital and productive resources.<sup>8</sup>

Another serious problem in Tomasi’s account of private economic liberty is the lack of any consideration of the question of the *distribution* of economic liberty. As Stuart White argues, even if we care about economic liberty “defined as the freedom to make our own decisions as individuals about work and saving, reflecting our own values, and living with the consequences of these choices”, it does not follow from this that we should endorse the free market fairness conception of justice (White 2012). This is because “different institutional schemes, of which the free market system is just one, offer different distributions of economic liberty” in the relevant sense, and what we have to decide is “what kind of distribution of economic liberty, in this sense, is just” (White 2012). Tomasi’s

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<sup>7</sup> This ‘agnostic’ attitude with regard to the objective of maintaining continuous economic growth would appear to be consistent with Rawls’s remarks on this issue in relation to the just savings problem (Rawls 1999a, 257–8), when he states that “Justice does not require that early generations save so that later ones are simply more wealthy. Saving is demanded as a condition of bringing about the full realization of just institutions and the equal liberties. If additional accumulation is to be undertaken, it is for other reasons. It is a mistake to believe that a just and good society must wait upon a high material standard of life.”

<sup>8</sup> It is important to emphasize that this focus on the ‘pre-distributive’ institutions of POD does not undermine or deny the importance of more traditional social democratic redistributive tax and welfare institutions. Once the implementation of pre-distributive asset-broadening policies has improved the position of the least advantaged members of society by generating a fairer distribution of opportunities and advantages from the operation of the free market system, the role to be played by the more conventional redistributive tax and transfer measures characteristic of the social democratic universal welfare state must then be determined.

remarks concerning the issue of ‘economic agency’ are relevant to this question. If it is vitally important from a moral point of view that we have the things that we have as a result of our own economic agency, rather than simply as a result of some state handout, then does this not justify, or even require, the pre-distributive taxation of unearned inheritances that would occur in a POD society? And if such taxation is justified by free market fairness, then would it not make sense (in terms of the promotion of economic agency) to use the revenue that this will generate to provide less advantaged citizens with the means with which to escape welfare dependency and make their own way in the world?

These are some of the questions which must be addressed by anyone whose aim is to present an account of the rights and liberties that constitute the ‘private economic liberties’ the protection of which is an essential condition for the promotion of citizens’ highest-order interests in the development and exercise of their conceptions of the good. Difficult and challenging though such questions undoubtedly are, we cannot avoid them by relegating the economic liberties to the level of mere lower-order consumption benefits over which the basic civil and political rights and liberties have priority. The inadequate and incomplete account of such rights and liberties upon which the free market fairness conception of justice rests must be challenged on its own terms by way of a deep and thorough analysis of the highest-order interests that must be protected, and of the institutional measures that would need to be implemented in order to protect them.

## **6. Conclusion**

I have argued that although it is as yet incomplete and under-developed, the revised account of liberty and its priority proposed in this paper, with the first principle of justice expanded to incorporate a more demanding fair opportunity principle and prioritized over the difference principle, can potentially provide a powerful expression of the character of citizens’ highest-order interests and the essential institutional conditions for their protection. For this reason the priority of liberty on this revised account is more favourable to the idea of POD, particularly the implementation of policies designed to improve access to and broaden the distribution of non-human capital, than the account presented by Rawls. It might be objected that although the economic liberties are indeed essential conditions for the protection of citizens’ highest-order interests, the civil and political rights and liberties covered by Rawls’s first principle of justice are still the most essential core basic liberties, which must therefore be guaranteed at the constitutional level of the application of the principles of justice. The objection here is that the questions which must be addressed concerning the economic liberties and their implementation are so complex and contentious that it is inappropriate to attempt to apply this aspect of the principles of justice at the constitutional level, and the risks involved in securing these rights and liberties at the level of the legislative assembly are not nearly as grave as

the risks inherent in the failure to provide strong constitutional protection for the basic civil and political rights and liberties.

In response to this objection it seems reasonable to suggest that in contemporary liberal democratic societies one of the most serious threats to freedom is the drive for economic growth and prosperity to which the governments of many liberal democratic societies, not just the US and the UK, are committed, and which is in these societies the overwhelming policy priority to which all, or certainly most other policy objectives are subordinate, and with which all must comply. If access to the fair and adequate opportunity to pursue a rational plan of life is an essential condition for the protection of citizens' highest-order interests, then it is important that this is something that is expressed clearly and unambiguously in the internal structure of justice as fairness, and the way in which this structure is justified and defended.

Whether the rights and liberties which must be protected in order to secure this fair opportunity are to be guaranteed at the constitutional level, rather than worked out and implemented at the legislative level, is an *entirely separate question*. The constitutional protection of first principle basic rights and liberties is one possible means by which *some* of these rights and liberties might be secured. Other aspects of the first principle of justice, such as the restriction of economic inequalities required by the guarantee of the fair value of the political liberties, might more appropriately be secured at the level of the formulation and implementation of legislation. The successful formulation and implementation of such legislation will depend upon the effectiveness of the arguments that are used to establish the importance of the rights and liberties in question, and it is on the further development of these arguments that those who oppose neo-liberal safety net WSC, and the free market fairness account of the economic liberties, should focus.

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