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ESTABLISHING DEMOCRATIC WELFARE STANDARDS

by

NACHUM TURETZKY

A dissertation submitted to the Graduate Faculty in Philosophy in partial fulfillment of the requirements for the degree of Doctor of Philosophy. The City University of New York

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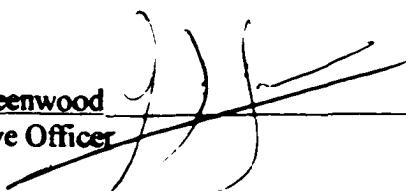
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Abstract

ESTABLISHING DEMOCRATIC WELFARE STANDARDS

by

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Adviser: Professor Stefan Baumrin

Many libertarian and egalitarian theorists accept that adequate welfare standards are some of the most basic conditions required for making the life of each citizen of contemporary Western democracies worth living. However, their philosophical differences prevent them from agreeing on particular standards. In this work I describe and analyze this disagreement. And I offer a theory and a model for democratically establishing adequate standards of welfare that can be acceptable to and trusted by libertarians and egalitarians alike.

In Chapter 1 I survey the essential elements of libertarian and egalitarian approaches to welfare and present my own tentative view of the meaning of welfare and the means by which it can be best institutionalized. In Chapter 2 I show that normatively prioritizing liberty or equality is counterproductive. I thus conclude that the institution of adequate welfare standards must be preceded by the elimination of such normative priority. I also present several reasons to motivate strict libertarians to join a democratic process of negotiation and compromise regarding unified standards.

Based on the results of the first two chapters, in Chapter 3 I examine three recent models of distributive justice. I conclude that the principles and model Rawls proposes are best suited for my purpose. However, I point out some

implementation problems, resulting from a certain discontinuity between ideal and practical levels in Rawls's theory. This discontinuity, I argue, prevents the actual development of adequate standards of welfare from Rawls's principles of justice. In Chapter 4 I utilize a Rawlsian framework to propose a theory and a model for determining welfare standards in current democratic regimes. The proposal aims at accommodating the plurality of approaches to welfare while utilizing democratic procedures in establishing such adequate welfare standards.

In this dissertation I do not aim at resolving all the controversies related to the determination of adequate welfare standards. Rather, I propose a procedure that is philosophically plausible, and one that can be useful for making such political decision in the here and now.

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INTRODUCTION

The current debate regarding globalization and the creation of 'free trade areas' illustrate the philosophical tension between, on the one hand, the value of liberty, especially the right to act in self-interest and the right to non-interference, and on the other hand, the value of equality, especially of equally benefiting all individuals who live under free market economic systems. Events in the past few years testify that this philosophical debate is not merely theoretical. It is, rather, an actual conflict that "... divides those who see free trade as a means to economic progress and greater democracy, and those who see it as distinctly undemocratic, providing increased freedom for corporations rather than people." ("Tearing Down the Wall", Leonora Todaro, *Village Voice*, New York, May 1, 2001, pp. 58-9)

For example, take the Summit of the Americas in Quebec City, at the end of April 2001, where the Free Trade Area of the Americas (FTAA) proposal was canvassed. During the summit, tensions rose so high that the convention area had to be fenced off and armed guards were used to secure the personal safety of the participating leaders. Those who support the FTAA argue that it promotes freedom of trade, economic progress and greater democracy. Whereas, those who object to the FTAA believe it promotes corporate domination and does not sufficiently benefit many of the individuals that may be subject to it.

President Bush, who campaigned for the FTAA inside and outside the USA, pledged "... to build freedom in the world, progress in our hemisphere and enduring prosperity in the United States." (As reported from Washington by David Stout, *New York Times Internet Service*, May 7, 2001) In reply to a group of 61 senators, who said that they "... would strongly oppose any new trade agreement that would restrict America's ability to use its laws to protect American companies against unfair trade practices of other nations." (Ibid.), President Bush

said that this 'new protectionism', "... talks of workers while it opposes a major source of new jobs. It talks of the environment while opposing the wealth-creating policies that will pay for clean air and water in developing nations. It talks of the disadvantaged even as it offers ideas that would keep many of the poor in poverty." (Ibid.) He added that "Trade creates jobs for the unemployed ... When we negotiate for open markets, we're providing new hope for the world's poor. And when we promote open trade, we are promoting political freedom." (Ibid.) Thus, President Bush concluded that "Open trade is not just an economic opportunity, it is a moral imperative." (Ibid.)

In Africa, the poorest continent, those who advocate free trade argue that it is the only way to eliminate poverty in this devastated part of the world.

Africans themselves will tell you that their problem with globalization is not that they are getting too much of it, but too little. ... That's not surprising, because if you actually look around Africa you see that the countries that are the most democratic, where the people have the most freedom to choose — South Africa, Nigeria, Ghana — are the most pro-trade, the most integrated in the world economy and the most globalized. The countries that are led by dictators are the least open and where the people have the least freedom to choose — Sudan, Zimbabwe, Liberia, Libya etc. — are those most hostile to globalization, openness and trade in goods and services. ("Foreign Affairs: Protesting for Whom?" as reported from Ghana by Thomas L. Friedman, New York Times Foreign Correspondent, April 24, 2001)

Friedman cites Jagdish Bhagwati, a Columbia University trade economist, who maintains that "The civil society groups who are concerned about the poor should actually be working to extend the benefits of globalization and freer trade to the truly poor in Africa, not denying them these opportunities." (Ibid.) Friedman also notes the view of the Harvard University development economist, Jeff Sachs, who says that poverty is the number one killer in Africa, and that economic progress is the only solution to the problems of this continent. Sachs adds that, "There is not a single example in modern history of a country successfully developing without trading and integrating with the global economy." (Ibid.) Thus, Mr. Friedman

concludes that. "By inhibiting global trade expansion they [those who oppose globalization] are choking the only route out of poverty for the world's poor." (Ibid.. my brackets)

However, as the editorial staff of the New York Times pointed out, President Bush's pledge for free trade may lead to results that are contrary to those he expects.

In his speech Saturday he rightly said that the trade proposal must be matched by "a strong commitment to protecting our environment and improving labor standards." But then later Mr. Bush said any agreement should focus on commerce and should include no codicils that destroy "the spirit of free trade." That made it sound as if environmental and labor protections could be jettisoned in the name of commerce after all. (New York Times Editorial, New York Times Internet Service, April 24, 2001)

Thus, although free trade seem to be the key to economic prosperity, the benefits it bestows on corporations may not necessarily filter down to all the people who make it possible.

Those who oppose the FTAA do so for at least two major reasons. First, they are concerned about the fair sharing of benefits of free trade. Second, they are concerned with whom to trust, and who should get the power to regulate free trade. John Boot, an Akwesasne Mohawk and retired factory worker, protests the FTAA "...because we haven't seen the benefits of free trade. Only the shareholders have." ("Tearing Down the Wall", L. Todaro, *Village Voice*, May 1, 2001). Ms. Todaro asserts that "Throughout the weekend in Quebec City, [when the Summit took place] indigenous peoples will be invoked as the first groups in the Western hemisphere to suffer the downside of trade, which wrought 'an ecocide and a genocide.'" (Ibid.. my brackets) Those who oppose the FTAA – indigenous peoples, the poor, individuals who do not own shares in corporations that may benefit from the FTAA, other organizations such as Public Citizen's Global Trade Watch and Global Exchange, Ya Basta, Mobilization for Global

Justice, Homes Not Jails, Reclaim the Streets, Situationists in Paris, and more—may not have a unified voice. But they have a common denominator. They worry that human rights, health care, the environment and general welfare, do not stand to improve by the proposed economic plane. And as it turns out, their willingness to work together gives these different groups some measure of unity.

Misgivings relating to future distribution of benefits resulting from the FTAA were expressed on the basis of economic and national concerns. Maria Louisa Mendonca, a documentary filmmaker and the director of Global Exchange's Brazil Project, said that "The U.S. represents 70 percent of the GDP [gross domestic product] for the Americas . . . We can't compete with this level of infrastructure and technology." (Ibid., author's brackets) If the USA is to harvest a proportional part of the benefits, then the rest of the Americas will share only 30% of the benefits. Since the rest of the Americas make well over 30% of the total population, the benefits these countries, and their citizens, will have to share is unproportionally small. For example, the Brazilian President, Cardoso, insisted that free trade benefits " . . . should be equally shared." (Ibid.), indicating that the terms of the FTAA do not satisfy such an equal distribution for his country. Indeed, the terms of the FTAA were not planned to be made public during the Summit. Nor were objections, and the countries making those objections, to be made public. "This matters because one strategy of those who oppose the agreement is to point out the very real economic and philosophical differences among nations." (Ibid.) says Todaro.

Possibly due to pressure from the media and protesters, one section of the proposal was leaked to the press. "The leaked section includes controversial 'chapter 11' language that would allow corporations to sue governments if their laws, say clean air standards, impede profits." (Ibid.), reports Todaro. As the above mentioned New York Times Editorial argues, such terms of free trade may eliminate environmental and labor protection concerns in favor of corporate gains.

And this brings us to the second objection to the FTAA regarding who should have the power to regulate such proposals. Todaro says,

Herein lies one of the complications about the meaning of 'democracy.' Should the public have access to the behind-the-scenes arguments in trade negotiations that are supposedly on its behalf? Whom should governments protect – multinational corporations, which they believe to be the engines of economic progress, or the people, who elected them?" (Ibid.)

Those who object to the FTAA, like Maria Louisa Mendonca, believe that giving power to corporations and keeping the public uninformed echoes " . . . the whole history of colonization." (Ibid.), where, in Todaro's words, ". . . the powerful are telling the powerless how to improve their lives." (Ibid.) Nevertheless, it is strikingly apparent that both sides aim at promoting democracy and freedom, and stimulating social, economic and political growth. Where those who support proposals such as the FTAA believe that freedom is the key to achieving these goals, those who object urge the need to find alternative and more egalitarian means to distribute these same goods.

I believe that the issues connected to the Quebec City Summit adequately represent the general public debate regarding the conflict between liberty and equality in the type of democracies that make up the industrial Western World. My intention is not to join the up-to-date debate. Neither do I intend to attempt to handle the complete range of issues involved. Rather, in what follows I would like to concentrate on a narrow slice of the general debate. I believe that the common aims of the two sides can serve as the basis for distributive justice principles that determine those adequate standards of welfare every person deserves in order to live a decent life. The common aims of both sides – freedom and equality, social, economic and political progress, and in general, the enhancement of the well-being of members of society – are some of the most basic conditions required for making the lives of members of democratic states worth living. But these conditions cannot be attained through the efforts of individuals or private organizations alone. In addition to private effort, the resources and institutions of

the state as a whole are required to attain and maintain citizens' well-being and welfare. Thus, democratic societies, through their institutions, carry part of the obligation to achieve those aims.

After making some preliminary remarks concerning the scope of this work, in Chapter 1 I will survey the essential elements of libertarian and egalitarian approaches to welfare. I will use Nicholas Rescher's (1972) account of welfare to explicate the maximal welfare position egalitarians advocate, and to provide a framework for my own tentative view of the meaning of adequate welfare and how it should be established. After a brief description of 'trust', in Chapter 2 I will show that a rigid, doctrinal allegiance to either liberty or equality, which gives rise to the normative priority problem, is counterproductive. Thus, I will advocate the elimination of such a normative priority as a necessary step in the direction of determining standards of welfare that can be acceptable to both libertarians and egalitarians. I will also present several reasons to motivate strict libertarians to join a democratic process of negotiation and compromise regarding unified and adequate standards of welfare.

Based on the conclusions of the first two chapters, in Chapter 3, I will examine three recent models of distributive justice. I will, then, suggest that the principles and model Rawls proposes are best suited for establishing adequate welfare standards. However, I will point out some implementation problems, resulting from a certain discontinuity between ideal and practical levels in Rawls's theory. Nevertheless, in Chapter 4 I will utilize the Rawlsian framework to propose a theory and a model for determining adequate welfare standards that can be developed and implemented in current democratic regimes. The proposal aims at accommodating the plurality of approaches to welfare while utilizing democratic procedures in establishing such adequate welfare standards.

CHAPTER 1: THE MEANING AND PLAUSIBILITY OF WELFARE

1.1: Introduction

1.1.a: Libertarians and egalitarians have good reasons for instituting welfare

I begin by demonstrating the validity of the following thesis: Libertarians and egalitarians have good reasons for instituting some levels of welfare in a just democracy. This thesis seems almost obvious or trivial. But, by surveying the development of libertarian and egalitarian doctrines, and by describing the different philosophical approaches to welfare, not only may the common ground become clearer, but also some of the disagreements may be exposed, explained and reduced. Though I do not attempt to handle the whole of this complex doctrinal development, the survey mentions many important issues involved. The review of the different doctrines will reveal the initial position of libertarians regarding adequate standards of welfare: the provision of security and stability. But it will not give us a comprehensive description of the egalitarian initial position. So, next I will present Nicholas Rescher's account of welfare, which I take to be more or less characteristic of the maximal level of welfare egalitarians advocate. Once I present these two initial positions, all intermediate positions between them represent space for negotiation and compromise. I will then demonstrate that the common denominator libertarians and welfarists share – their agreement on the plausibility and justification of instituting some levels of welfare – is wider than it seems and can be expanded to the extent that it may serve as a basis for negotiation and compromise. Following that, I will explicate my tentative view of welfare, which does not select any one intermediate position, but shifts the focus onto those primary goods the provision of which is the core of remaining disagreements. To begin with, I make some preliminary remarks that frame the rest of the discussion.

1.1.b: Liberal democracies

Liberal democracies, such as the USA, England, Canada, Italy and France, are the domain of this work. These democracies are based on two, often conflicting, principles: liberty and equality. The two principles are represented by two sets of doctrines, libertarianism and egalitarianism, which make up the two major political approaches prevalent in the kind of democracies discussed here. Libertarians believe that liberty is more fundamental to democracy, and egalitarians believe that equality is the essential principle of democracy.

1.1.c: Security and stability

Security and stability are the two fundamental operational principles for the maintenance of a state. At a minimum, the state must protect the life and property of its members. And it can only do so if it is stable enough that it can plan and act on long-range programs designed to ensure security. These operational principles, I will show, are widely accepted by libertarians and egalitarians.

Tibor Machan (1982b), for example, believes that libertarian governments are obligated to deliver to their members such services as “ . . . securing criminal justice and defending private homes and businesses or supervising such defense by private security agents so that due process of law is preserved.” (Ibid., p. 205) He adds that, “For government to be able to carry out these functions, however – to stand ready for the purposes of adjudicating disputes, defending persons and property, issuing warrants for arrest, seeking reparations, imposing penalties or imprisonment – it must be able to be stable and secure.” (Ibid., p. 205)

Gilbert Harman (1982), to take another example, maintains that libertarianism, even in its strictest form, holds that governments are morally obligated to protect the life and property of people. “Governments may prevent people from injuring each other, they may protect property rights, they may enforce contracts.” (Ibid., p. 226) If governments do not satisfy these obligations and ensure that widespread

moral behavior obtains. argues Harman, people stop trusting their governments, may try to find alternative means to protect themselves and their property, which, in turn, may lead to retaliatory actions, fighting, and even the dissolution of the state. "Therefore, some enforcement of morality is needed in order to preserve stability and this is where government comes in." (Ibid., p. 227)

In his essay "Facing Diversity: The Case of Epistemic Abstinence" (1994, pp. 45-81) Joseph Raz says "This essay examines the contemporary philosophical responses of John Rawls and Thomas Nagel to the diversity of opinions, customs, and ideologies prevalent in our societies." (Ibid., p 45) I take Thomas Nagel to represent egalitarianism, and Rawls to represent a centrist liberal view with egalitarian tendencies. Raz argues that both philosophers advocate 'epistemic abstinence'.

Governments, like everyone else, should of course act for good reasons. This would seem to require governments to ascertain which reasons for action are valid and which are not. But, says Rawls, governments should not be concerned with the truth or falsity of the doctrine of justice which guides them. Nagel, following a slightly different line of reasoning, suggests that the reason for certain views are so personal that a (true) doctrine of justice must disqualify such views, even if true, from serving as reasons for government action. (Ibid., p. 46)

This epistemic abstinence, argues Raz, is new to political theory. "For never before has it been suggested that governments should be unconcerned with the truth of the very views (the doctrine of justice) which inform their policies and actions, and never before has it been argued that certain truths should not be taken into account because, though true, they are of an epistemic class unsuited for public life." (Ibid., p. 46)

Raz attempts to challenge the epistemological abstinence presumed by Rawls and Nagel. Though Rawls and Nagel argue that their political theories are not based on theories of justice that are true, but on those selected by consensus, Raz argues

that the selection of any theory of justice is based on some fundamental, and true, principles. Raz argument unfolds as follows,

A theory of justice can deserve that name simply because it deals with these matters, i.e. matters that a true theory of justice deals with. In this sense there are many theories of justice, and they are all acceptable to the same degree as theories of justice. To recommend one as a theory of justice for our societies is to recommend it as a just theory of justice, i.e. as a true, or reasonable, or valid theory of justice. If it is argued that what makes it *the* theory of justice for us is that it is built on an overlapping consensus and therefore secures stability and unity, then consensus-based stability and unity are the values that a theory of justice, for our society, is assumed to depend on. Their achievement—the fact that endorsing the theory leads to their achievement—makes the theory true, sound, valid, and so forth. (Ibid., p. 55)

Setting Raz's epistemological concerns aside, what is implied by the above argument is that stability and unity are the two principles that Raz argues are presumed by Rawls's and Nagel's political theories. Rawls recommends his theory of justice because it would be unanimously selected in the original position. And Nagel recommends some Kantian theory of justice because it would be widely accepted by rational persons who understand the political implications of the interaction between the partial and impartial aspects of human life experience. Both, argues Raz, recommend their theories of justice because the degree of stability and unity they offer is most appealing to different people who may uphold different doctrines of justice. If so, concludes Raz, stability and unity are the foundational principles of Rawls's and Nagel's theories of justice.

I take the principle of unity Raz is talking about to mean the wide cooperation among members of a given society in establishing, accepting and adhering to the policies instituted by their government. Though this principle is not identical with the principle of security I have mentioned, I believe that such unity can only obtain when people feel that their bodies and properties are protected. If so, security must obtain before unity arises. Thus, security and unity are necessary for

the stability that is required for the long-range planning and execution of government policies.

Machan and Harman present the libertarian view that security and stability, for operational, practical and moral reasons, are necessary for the maintenance of the state. Raz, through his examination of the political theories of Rawls and Nagel, presents the egalitarian view that any consensus-based theory of justice, which provides the basis for political theories of state and government, presupposes the validity of the principles of stability and unity. (I argue that, by implication, unity presupposes security) Thus, I conclude that both libertarian and egalitarian doctrines accept that security and stability must obtain for the proper maintenance of any democratic state. I do not give a further explication of these two operational principles as this would take us too far from the topic of this work. Moreover, by using 'security' and 'stability' I do not refer to any exact ideals of human condition. Hereafter, when using these principles I will refer to following senses. By 'security' I refer to the provision of the kind of protection, of body and property, which makes citizens feel safe enough to cooperate with each other. In the absence of such security, as Harman suggested, society may dissolve. And by 'stability' I refer to the existence of a range of devices that enable the government to plan and act on long-term programs required for the maintenance of state and society. It is clear to me that this stability of state and society depends on the government's ability to provide security to its subjects.

1.2: The libertarian approach to welfare

1.2.a: The origins of contemporary libertarian doctrines– Hobbes, Locke, Bentham

The origin of contemporary libertarian doctrines can be traced back to such modern British philosophers as Hobbes, Locke and Bentham.

In the *Leviathan* (1651), Hobbes describes the 'state of nature', in which he characterizes the essence of human nature as being 'nasty, brutish and short'. In the state of nature, Hobbes locates the right of nature, which "... is the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature. . ." (Chap. XIV) This right is distinct but compatible with the law of nature, "... by which a man is forbidden to do, that, which is destructive for his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved." (Chap. XIV) However, in the state of nature there is no one to enforce and secure such rights and laws, and so their constant violation undercuts their theoretical value. Therefore, in the state of nature human beings live a miserable life of fear and war of each against each. To escape such existence, Hobbes argues, human beings contract with each other to relinquish their freedom to a sovereign whose duty is to establish a civil society where the life and property of its members are secure. Thus, in the Hobbesian republic, protection against other citizens and/or other states is the primary good the sovereign is obligated to supply.

Locke also maintained the principle of individual liberty, but added a distinct concern for the rights of others. In *Two Treatises of Government* (1690), Locke asserts, "Everyone as he is bound to preserve himself, and not quit his station willfully; so by the reason when his own Preservation comes not in competition, ought he, as much as he can, to preserve the rest of Mankind, and may not unless it do Justice on an Offender, take away or impair the life or what tends to the Preservation of the Life, Liberty, Health, Limb or Goods of another." (Book II, Chap. II, § 6) Furthermore, in his theory of just acquisition, Locke stipulates what has become known as the 'Lockean Proviso', where one may appropriate any unowned resource as long as there is "... enough and as good left in common for others." (Book II, Chap. V, § 27) It is thus the duty of government to secure one's 'willful station', and at the same time to maintain the availability of life-preserving resources to other members of society.

The utilitarian Bentham (1781) argued that the most fundamental fact about human nature is that people seek to increase personal pleasure and decrease personal pain. However, it seems that Bentham did not merely maintain a simple form of psychological egoism, but rather incorporated sympathy and consideration for the desires of others into his view of human nature (as those latter elements effect the degree of pleasure or pain one's action bring upon oneself). Bentham divides the laws governing individual action. 'Private Ethics' in Bentham's language, into three: (1) laws concerning one's 'duty to himself' or 'Prudence'; (2) laws concerning one's 'duty to his neighbor', governing acts which negatively affect one's neighbor, 'Probity'; and (3) laws concerning one's 'duty to his neighbor', governing acts which positively affect one's neighbor, 'Beneficence'. (Chap. XVII. §§. III and VI) According to Bentham, legitimate laws of society are just those that protect individuals against negative actions of others, i.e., laws governing probity. "It is plain, therefore, that in this branch [probity] the interference of the legislator cannot anywhere be dispensed with. We must first know what are the dictates of legislation, before we can know what are the dictates of private ethics." (Chap. XVII. §. XVIII, my brackets) These laws secure the life and property of individuals, and the state is obligated to legislate and enforce such laws. Bentham rejects the legitimacy of the other two types of laws, regarding matters of prudence and beneficence, not only because it is difficult to delimit and enforce them, but also because they may not result in an overall increase of pleasure over pain. That is, the difficulty in legislating such laws and the cost of enforcement may cause more pain than the pleasure they may bring about. However, Bentham suggests that duty to oneself and benefiting neighbors, which he recognizes as important values, can be enhanced by means such as education and peer pressure. (Chap. XVII. §§ V-XX) According to Bentham only those laws we nowadays call non-paternalistic laws maximize total pleasure and minimize total pain in society. The state, thus, is required to institute only non-paternalistic laws, and supply only those primary goods that protect

individuals against each other, in order to secure the freedom to pursue pleasure and avoid pain.

As a matter of historical fact, it is important to note that during the period Hobbes and Locke were working Western Society transformed from authoritarian, religious and monarchical social formations into societies of free people. Their theories focused on freedom of will and action, and one's right to own property, especially one's right over one's body. The two major principles emerging from this tradition are: (1) the principle of individual self-interest, and (2) the principle of non-interference. The first has to do with a certain view of human nature, and the second is a political principle that treats liberty as the most fundamental principle of society. On the basis of these principles was developed the view of state as the 'night watchman state' or, in the language of Robert Nozick (1974), the 'minimal state'. The state, under this view, has the obligation to provide only those goods that secure the exercise of self-interest and personal liberty.

It is also important to note that for contemporary strict libertarians the principles of self-interest and non-interference do not imply that any one person or institution has the duty to provide any other person with the means for decent living, or to compensate those who are deprived by luck or competition of the possession of some goods or opportunities. And unless there is a prior contract, which secures those means for living, there is no obligation, on the part of individuals or the state, to ensure that one has the means to live. However, concern for the well being of others is presented, for example, in the 'Lockean proviso'. And concern for those who are worse off is presented, for example, in Hobbes,

And whereas many men, by accident unenvitable, become unable to maintain themselves by their labour; they ought not to be left to the Charity of private persons; but to be provided for, (as farforth as the necessities of Nature require,) by the Laws of the Common-wealth. For as it is Uncharitableness in any man, to neglect the impotent:

so it is in the Sovereign of a Common-wealth, to expose them to the hazard of such uncertain Charity. (1651, Chap. XXX)

Nevertheless, regardless of interpretation, it is clear that in order to secure the principles of individual self-interest and non-interference the state must provide quite a bit; for instance, a legislative body, a police force to enforce the law, courts and penal institutions, roads and a monetary system, etc.

I conclude that under the traditional libertarian models of the nightwatchman state or the minimal state, the state is obligated to provide some level of primary goods, or, in other words, some level of welfare.

1.2.b: From the Nightwatchman State to the Welfare State– T. H. Green:

By the end of the 19th century, after long and difficult struggles, individual freedom became a wide spread reality for many members of the Western World. For most people, rights to their own bodies and to control their destiny became inalienable. However, given dire economic and social conditions, the meaning and value of this liberty became a subject of debate. Individual liberty, it turned out, did not improve the quality of life for many of those so emancipated. In England, in particular, a strong liberal movement demanded the improvement of work and life conditions for free laborers, especially young children and women. One of the main voices of this movement was the thinker and political activist T. H. Green. In his introduction to *The Political Theory of T. H. Green* (1964), the editor, John Rodman, states that “As a reformer of practical Liberal thinking, Green laid out one of the main lines of development from the upper-class ‘Nightwatchman State’ of the mid-19th century to the democratic ‘Welfare State’ of the 20th century.” (Ibid., p. 1)

In “Liberal Legislation and Freedom of Contract” (1881), Green says that freedom is a ‘blessing’ and the ‘true end of all our efforts as citizens’.

But when we thus speak of freedom, we should consider carefully what we mean by it. We do not mean merely freedom from restraint

or compulsion when we speak of freedom as something to be highly prized, we mean a positive power or capacity of doing or enjoying something worth doing or enjoying, and that, too, something that we do or enjoy in common with others. (In Rodman, 1964, p. 51-2)

The freedom of the 'wandering savage', who is alone and without constraint, is not strength but weakness. And, a state, where the freedom of the few is achieved through the suffering of others, ought not be called a free state. Moreover, Green points out, one's right to property is guaranteed only through society and state, "This guarantee is founded on a sense of common interest." (Ibid., p. 53) And this common interest of members of society gives rise to the common good.

That end is what I call freedom in the positive sense: in other words, the liberation of the powers of all men equally for contribution to a common good. . . . Every one has an interest in securing to every one else the free use and enjoyment and disposal of his possessions, so long as that freedom on the part of one does not interfere with a like freedom on the part of others, because such freedom contributes to the equal development of the faculties of all which is the highest good for all. (Ibid., pp. 53-4)

This kind of positive freedom, according to Green, entails, for example, the rejection of contractual slavery and imposing unfair preconditions on labor contracts. Moreover, Green argues, positive freedom implies the improvement of life conditions for all in terms of state provisions of education, housing and health.

Green maintains that it is the function of the state to promote moral goodness in the attempt to achieve the common good. The achievement of the common good should be guided by the principle of non-interference. However, strict adherence to this principle may leave many members of the state outside the realm of the common good.

Now, we shall probably all agree that a society in which public health was duly protected, and necessary education provided, by the spontaneous action of individuals, was in a higher condition than one in which the compulsion of law was needed to secure these ends. But we must take men as we find them. Until such a condition

of society is reached, it is the business of the state to take the best security it can for the young citizens' growing up in such health and with so much knowledge as is necessary for their real freedom. In so doing it need not at all interfere with the independence and self reliance of those whom it requires to do what they would otherwise do for themselves. (Ibid., pp. 57-8)

It is the population of those who are overworked, uneducated, poorly housed, in poor health and with no access to adequate health services, which is not able to enjoy real freedom. Indeed, Green asserts, "Left to itself, or to the operation of the casual benevolence, a degraded population perpetuates and increases itself." (Ibid., pp. 58-9) The promotion of moral goodness by the state, until it becomes 'spontaneous', is necessary for the free contribution of all members to the common good. Thus, Green advocates 'positive' liberalism that is more robust than the strict adherence to the principles of self-interest and non-interference. Under Green's view, the state is required to provide its membership with goods such as education, health, housing and protection from labor exploitation.

1.2.c: Some extreme contemporary libertarian views– Murray N. Rothbard and Tibor R. Machan

I begin reviewing contemporary libertarian approaches to welfare by discussing two 'extreme' libertarian positions. I will explain, below, why I call them 'extreme'. In "Society without a State", Rothbard (1982) takes the principles of self-interest and noninterference to the limit. He advocates an anarchist society without a state that is based on the comprehensive " . . . prohibition of aggression against person and property." (Ibid. p. 62) He argues that current governments are in violation of these two principles since they use taxation and coercion to maintain the state. Thus, he concludes that current democratic regimes are unjustified. Then, he goes on to describe how the free market can provide all the

goods and services currently provided by governments. From Rothbard's point of view, there are no primary goods the state is obligated to provide.¹

As opposed to the anarchist solution to governmental coercive measures, Machan, in "Dissolving the Problem of Public Goods: Financing Government without Coercive Measures" (1982b), maintains "... that government is precisely that institution that should be established so as to protect and preserve the liberty at issue in this context, namely, the liberty accorded to human beings when their fellows refrain from initiating force in human encounters." (Ibid., p. 201) Machan acknowledges that,

National defense and other political values, ... are demonstrably essential for the very survival and functioning of a free society, at least in terms the nonanarchist libertarian conceives of human community life. This is why the public goods problem must be solved before the libertarian who considers government vital can rest assured that his conception of political life is possible, let alone preferable, to all others. (Ibid. p. 202)

In order to establish a government that is not financed through coercion, (i.e., through taxation) Machan makes a distinction between, on the one hand, public goods the government may provide to all at no charge (e.g., national defense and a criminal justice system) and on the other hand, nonpublic goods the government may provide for a fee (e.g., contract protection.) "The key to this idea is that a libertarian government would provide crucial yet unique private goods as well as public goods, and this would make it possible to secure the financing of government voluntarily." (Ibid., p. 203) Under Machan's proposal, governments would provide a set of primary goods similar to the set provided by current liberal democracies. However, the total set of primary goods (public and nonpublic) would be financed by the provision-for-fee of nonpublic goods. The surplus from

¹ It is interesting to note how Rothbard's version of libertarian anarchism, based on a strong commitment to the principle of non-coercion, is similar to egalitarian anarchism, e.g., J. P. Proudhon, based on federalism and mutualism. But I shall not pursue this here.

the provision of nonpublic goods, by the government to interested individuals, will be allocated to finance those public goods the government provides to all at no cost. In this way, argues Machan, a libertarian government supplies the total set of primary goods necessary for the security of individual members and the stability of government. Machan concludes that a government that is financed in this way interferes less with the liberty of its citizens, at least to the extent that they are no longer coerced to finance government through paying taxes.

While acknowledging their merit, I sidestep such proposals, not because of problems with their theoretical validity, but because of the enormous practical problems involved in any attempt to act on such proposals. It would take extreme measures (probably some sort of a revolution) to convert current liberal democracies into the type of anarchist formation recommended by Rothbard. And it would take a complete restructuring of government to enact Machan's proposal. (Even if such restructuring is possible, I am not convinced that revenue raised from, for example, legal services, can finance such goods as national defense, unless the fees are very high, in which case legal services may be out of reach for most people.) That is why I earlier called these positions 'extreme'.

As a methodological directive in this work, I will take such extreme, or utopian, proposals to be irrelevant for my purposes. Rather, I am interested only in proposals that can be more or less immediately phased into current democratic forms.

1.2.d: Strict libertarianism– Robert Nozick

One of the most influential strict libertarian treatises of the last few decades is Nozick's *Anarchy, State, and Utopia* (1974). Nozick's conception of the unpattered state, or the minimal state, relies on the ideal of liberty understood as the principle of noninterference. Emerging from some Lockean 'state of nature', where individuals have 'perfect freedom' to lead their lives according to

their wants and to dispose of their possessions as they will, the Nozickean minimal state is described as a civil association that aims only at safeguarding the rights to life, liberty and property.²

In particular, Nozick designs his 'entitlement theory' (of just property acquisition and transfer) in a way that shows how the right to property is integrated into his political libertarian theory.

If the world were wholly just, the following inductive definition would exhaustively cover the subject of justice in holdings.

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2. (Ibid., p. 151)

Nozick does not define but only describe justice in acquisition and justice in transfer. (Ibid., pp. 150-1) But he does say that "A distribution is just if it arises from another just distribution by legitimate means." (Ibid., p. 151) Thus, I believe it is correct to say that under the entitlement theory, once the original just distribution of property has been uncovered, and all following just transfers have been traced and amended if need be, the state is merely obligated to secure citizens' property and their freedom to dispose of their property freely. The state is indeed banned from any further interference in the dynamics of the free market economy.

² Nozick renounced his strict libertarian view, presented in *Anarchy, State, and Utopia* (1974), in *The Examined Life* (1989) and in *The Nature of Rationality* (1993). This renouncement is based on 'the symbolic importance of joined actions and commitments', which he never sufficiently clarified. Indeed, recently L. Lomasky (2002) and G. Gaus (2002) presented ways of integrating such unclear notions into workable libertarian theories. Nevertheless, I will use Nozick's 1974 view of libertarianism as representative of strict libertarianism because I think it represents it best.

Nozick's unpatterned state is obligated to provide the stability of government needed for securing the life and property of its members. But, matters of basic needs and survival are left to the individual's entrepreneurial actions within the free market. Nozick's unpatterned state is a contemporary version of the nightwatchman state mentioned in section 1.2.a above. Yet, even such a minimal state must provide some set of primary goods in order to ensure individual security and government stability.

I take Nozick's libertarian position to represent 'strict' libertarianism, a point from which to compare and evaluate other, less strict, libertarian positions. In the next three sections I present three ways in which libertarians, who do not subscribe to Nozick's strict libertarianism, argue for the justification of some level of welfare in the state.

1.2.e: Welfare as a compromise based on morality and stability—Gilbert Harman

In "Libertarianism and Morality". Harman (1982) argues, based on a conventional conception of morality, that the same justification the strict libertarian uses for enforcing some aspects of morality indeed justifies imposing additional aspects of morality the strict libertarian is not too keen on enforcing. He begins with the following explication of the strict libertarian thesis:

Libertarianism is in part a thesis about the limits of governmental action. In its strictest form, it holds that governments may legitimately protect people from each other but may not legitimately impose taxes and other restrictions for the sake of projects aimed at advancing general welfare Governments, may, in other words, enforce only certain aspects of morality. Morally, one should not only keep one's contracts and avoid injury to others and their property but also develop one's own talents, refrain from injuring oneself, and help others who need help. Libertarianism allows governments to enforce some of those duties but not others. (Ibid., p. 226)

According to Harman, strict libertarians argue that governments may enforce only those 'unstable' moral obligations whose violation may bring the state to the point

of break down. If people do not keep their contracts, if they injure each other, or damage the property of others, the resulting feuds and retaliatory actions may bring on the dissolution of the state. In such cases government enforcement of moral obligations is necessary for the maintenance of a stable libertarian state. However, other kinds of moral obligations do not require such governmental involvement. Strict libertarians, who see themselves as moral agents, maintain that one cannot, and should not, be forced to develop one's talents; that preventing one from injuring oneself is a violation of one's right over one's body; and that in the case of the needy, if one well-off person does not help, then there is always another person who helps. These latter kinds of moral obligations should not be enforced by governments, say libertarians, since they are 'stable' and their violation does not normally lead to the dissolution of the state.³ However, Harman notes.

This line of thought presupposes that in a libertarian society there would be a shared morality which, among other things, would motivate people to help those who need help. It collapses if (as I suspect) the establishment of a strict libertarian society would lead members of the society to attach less importance to those aspects of morality not enforced by government so that, in particular, they would cease to care very much about those less fortunate than themselves and would come to attach little importance to the duty to help those who need help. This would undermine the suggested justification of the strict libertarian thesis since it would mean that those aspects of morality the libertarian does not wish to enforce are as unstable as those aspects of morality the libertarian does wish to enforce. (Ibid. p. 227)

And with this instability comes the danger of the break down of the state.

³ Harman offers three justifications for strict libertarianism: "(1) the argument that we can make do with morality alone without government except where government enforcement of morality is needed for the sake of stability, to protect people against violence, fraud, and theft; (2) the argument that ordinary common sense morality [the rights to life and property] supports strict libertarianism; (3) the argument that the consequences of adhering to libertarian principles are much better than the consequences of not doing so." (p. 230) However, as Harman states, "I suspect that the three arguments stand or fall together, . . ." (p. 231, my brackets). And so I only concentrate on Harman's treatment of the first justification of strict libertarianism.

Harman's solution to this problem is based on the conception that "... morality arises from something like convention. People accept moral principles and values because it is in their interest to do so given that others do so." (Ibid., p. 231) The conventional character of morality entails that it is widely accepted by all members of society, libertarians and otherwise. This, in turn, implies that libertarians need to acknowledge and consider other, non-libertarian, moral doctrines. And this, concludes Harman, implies that the moral aspects the state needs to satisfy are subject to negotiations, bargaining and compromise. Only a conception of morality that is based on consensus, argues Harman, is widely shared by all members of society, and is stable enough to provide a background from which the moral duties of the state can be derived. Moreover, Harman notes that,

The stronger and richer members [of a society] would prefer strong prohibitions against harm, theft, and fraud and no duty to help those who need help. The poorer and weaker members would prefer a strong duty to help as well as a strong prohibition against harm, theft, and fraud. One would expect the continual implicit bargaining between these groups to yield as a compromise a strong prohibition against harm, which everyone wants, plus a somewhat weaker duty to help, since not everyone favors such a duty. This, of course, is just what we have in our society. (Ibid. p., 231, my brackets)

Harman argues that libertarians cannot appeal to an a priori moral doctrine, from which strict libertarianism can be derived, since morality is conventional. However, they can promote libertarianism by pointing out the importance of the principle of self-interest. They can campaign, among those who are well-off, to support libertarianism in the bargaining process which yields the state's moral obligations. In doing so, libertarians can also point out the tremendous cost of government and requisite taxation which are necessary for instituting comprehensive welfare programs. "Finally, libertarians can try to create as large a coalition as possible of those who would support modifying the overall moral (and political) consensus in that direction and then bargain hard with those that are left so as to accept the minimum compromise away from libertarianism that is at the same time relatively stable." (Ibid., p. 234)

Thus Harman offers a libertarian argument, based on conventional morality, that preserves the ideals of libertarianism yet allows for non-libertarian primary goods, such as help for the poor and the need to enable people to develop their own talents, to be justly incorporated into libertarian politics.

1.2.f: Welfare (or, secondary freedom) as the proper goal of the free state–

Douglas D. Uyl

In “Freedom and Virtue” (1982), Uyl presents the following view,

A free society could not promote freedom, because that society would already *be* free. That is to say, that freedom would not be something a society or its members could aspire to. Freedom would instead characterize their condition or state of existence. The promotion of freedom only makes sense in societies that are unfree. Virtue, on the other hand, is something that can always serve as an object of one’s aspirations. A man may be born free, but he is never born virtuous. Free societies can seek to maintain their freedom, but freedom will not serve as a further goal for the members of that society. (Ibid., pp. 211-12)

After presenting this view, Uyl considers some objections. First, Uyl notes, “It might be objected that people always desire to purge themselves of such social burdens as poverty, disease, and ignorance.” (Ibid., p. 212) However, Uyl replies, this relief-of-burdens sense of freedom cannot be the same as the primary sense of freedom, i.e., self-interest and non-interference. “ . . . the relief-of-burdens view of freedom must be derivative from or dependent upon a more fundamental conception of freedom, since the aspiration to relieve burdens begs one to search for the proper context for that relief.” (Ibid., p. 212) The relief-of-burdens sense of freedom must be supplemented by context that describes what are the burdens, the conditions under which those burdens occur, and the capability and possibility of relief. This context varies greatly in different societies. However, the fundamental sense of freedom, the principles of self-interest and non-interference, must obtain in all free societies regardless of particular contexts. Thus, according to Uyl, this sense of freedom is derivative or secondary.

Next, Uyl considers the objection that, “ . . . given a primary conception of freedom, is it not still possible to pursue freedom in a free society by relieving burdens which are admittedly secondary freedoms?” (Ibid., p. 212) To this objection Uyl replies by saying that “To relieve burdens requires action, and the mere desire to obtain such relief does not specify the nature of the actions to be taken.” (Ibid., p. 212) Once the context of the burdens to be relieved has been identified, there is still the matter of how to go about relieving those burdens. Uyl argues that what is required here are principles of conduct and not principles of freedom. “In some sense, therefore, the relief of burdens presupposes the promotion of virtue – that is, right action.” (Ibid., pp. 212-13) What is required for the relief of burdens, therefore, is not only the specification of the burdens, but also an additional set of moral principles which regulate and give meaning and value to such desired relief.

Furthermore, Uyl considers the objection that “ . . . a society could promote freedom by insuring the freedom to *do* certain things, such as obtaining a better job, receiving an education, or having the leisure to travel.” (Ibid., p. 213) Yet, counters Uyl, “The freedom to engage in certain activities, however, is also a second-order view of freedom and suffers the same defects as noted above.” (Ibid., p. 213)

Thus, Uyl argues that the relief-of-burden sense of freedom is not fundamental but secondary or derivative because it is neither identical nor essential to the fundamental sense of freedom. Rather, it depends on the context and the moral principles obtaining in particular societies. This secondary sense of freedom is suitable as a goal of a free society only if this society also wishes to be moral or virtuous. In the second part of his essay (Ibid., pp. 214-223) Uyl begins his discussion of morality and virtue by noting that personal responsibility is a central concept. Blame and praise can only be attributed to an acting agent if that person is rational and is not coerced to act. “A person is not held responsible for an act if

he was forced to do that act or if he is mentally defective or incompetent . . . if a person did not do an act or was forced to do it, moral worthiness or unworthiness cannot be attributed to that person.” (Ibid., p 215) He continues by asserting that society as a relationship among people can be virtuous only if its members are not coerced to act morally. “ . . . coercive act make it impossible for the term ‘good’ to be applied to all parties to the relationship; and if a positive moral term, such as ‘good,’ cannot be applied to *all* aspects of a relationship, then the relationship itself is suspect” (Ibid., p. 219) He concludes that “ . . . the more coercion there is, the less virtuous a society becomes.” (Ibid., p. 222) Thus, assuming that the relief of burdens is a virtue, as Uyl explicitly does, we may conclude that the degree to which a society can be considered virtuous in this sense depends on the degree of coercion involved in relieving burdens in that society.

Uyl distinguishes between fundamental freedom and secondary freedom in order to show that freedom cannot be the goal of a libertarian state, and in order to show that virtue, in particular the relief of certain social burdens, can and ought to be taken as the proper moral obligation of a libertarian state. “Mutual non-interference serves as a necessary condition for both a free and moral or virtuous society. If this is so, our task becomes one of seeking voluntary means to secure those secondary freedoms spoken of earlier.” (Ibid., 223) Therefore, a free society that wishes to be morally worthy or virtuous must find non-coercive means to supply some primary goods which relieve social burdens such as poverty, disease and ignorance, and enable members to have the opportunity to get, for instance, better jobs, education and leisure.

1.2.g: Welfare as paternalistic laws in cases of involuntary action–John Hospers

In “Libertarianism and Legal Paternalism” (1980), Hospers objects to Bentham’s view that only non-paternalistic laws– laws that protect one from harm caused by another– are legitimate. Hospers advances the view that paternalistic laws– laws that protect one from inflicting harm on oneself and laws that require one to assist

others– are sometimes legitimate. “*Legal paternalism* is the view that the law should, at least sometimes, require people to act (a) against their will (b) for their own good, in that way protecting them from the undesirable consequences of their own actions.” (Ibid., p. 135) Such legal paternalism, argues Hospers, is often appropriate in libertarian societies. “Even libertarians are not . . . opposed as a rule to *all* paternalism. There are several groups of people in behalf of whom some degree of paternalistic action would be considered proper.” (Ibid., p. 136) For example, notes Hospers, legal paternalism seems proper, even to strict libertarians, in the case of infants and children, the senile as well as the mentally incompetent. Thus, concludes Hospers, it is not the case that all paternalistic laws are illegitimate.

According to Hospers, paternalistic laws are illegitimate only if the act in question is a voluntary act. And paternalistic laws are legitimate when the acts in question are not voluntary. “I want to say that the greater the degree to which an act (or a proposed act, or a thought-of act) is *voluntary*, the less justified other persons (or institutions, especially the law) are in behaving paternalistically toward that person.” (Ibid., p. 140) Of course, this formulation shifts the focus onto the conception of voluntariness. “The popular conception, embedded also in most libertarian literature, is that voluntariness means *non-coercion*. But in my view much more than this is required.” (Ibid., p. 140) Accordingly, in order for an action to be considered fully voluntary a few conditions have to be satisfied.

Hospers argues that an act (‘or a proposed act, or a thought-of act’) is not fully voluntary, and thus may be regulated by paternalistic laws, in case the following conditions obtain: (1) “Any influence, whether pressure or outright coercion, which keeps it from ‘filtering through your mind’, triggering the decision-making faculties, tends to inhibit the full voluntariness of the decision” (Ibid., p. 141) Thus, for example, the decision to help others because your congregation members pressured you to do so is not voluntary, while the same decision would

be a voluntary act if it is the product of your own deliberations. (2) "The decision must be [fully] *informed*, based on the facts relevant to the case, and purged of false information." (Ibid., p. 141. my brackets) For example, the decision to help those you were told need help, but indeed do not need help, is not voluntary, since you would not have made such a decision if you had known the people you decided to help do not need help. However, if you decided to help others who indeed need help, your decision is voluntary. (3) "A person may not be under coercion or outside pressure, and he may be fully informed of the relevant facts of the case, and yet he may make his decision on what I can only describe as an unsatisfactory— or irrational, depending on what the term is taken to mean— *psychological state*." (Ibid., p. 142) For example, a decision to help others when you are in grave grief is most likely strongly affected by your mental state rather than be wholly voluntary. Under these three conditions, argues Hospers, the decisions made are not fully voluntary and therefore may be regulated by the state through some paternalistic laws.

Any kind of paternalism which consists of our acting against his will to achieve *our* goals for him, rather than our acting against his (present) will to achieve *his own goals* (assuming, of course, that he is sufficiently mature to have them), is the kind of paternalism which I believe libertarians should condemn. Libertarians have condemned all paternalism without realizing that paternalism may assume both of these distinct forms, one of which may sometimes be acceptable and the other not. (Ibid., p. 144)

Thus, according to Hospers, people do not always act voluntarily. At these times, enforcing paternalistic laws may not violate their freedom, or their self-interest. In this way Hospers leaves an opening for the justification of instituting some level of welfare that the strict libertarian may condemn, yet the libertarian who is aware of the distinction made by Hospers, should embrace. The state, according to Hospers, is justified, sometimes, in enforcing those paternalistic laws that prevent people from harming themselves. Thus the requirement to help others does not necessarily violate the proper sense of freedom.

1.2.h: Conclusion– libertarians have good reasons for instituting some levels of welfare in a just democracy

I believe I have presented sufficient evidence to support my claim that libertarians have good reasons for instituting some levels of welfare in a just libertarian democracy. With the exception of anarchists like Rothbard, who reject the need for the state altogether, all libertarian doctrines, including strict libertarianism, maintain that in order to satisfy the principles of individual self-interest and non-interference, and in order to provide individual security and social stability, the state is required to provide some set of primary goods. Strict libertarianism requires the provision of only those goods that are necessary for satisfying individual self-interest and non-interference. However, as we get away from strict libertarianism, we have seen a variety of doctrines that advocate a libertarianism that goes well beyond the mere satisfaction of these two principles. The plurality of libertarian arguments expresses different levels of doctrinal concern for the less fortunate, the general welfare of society, morality, libertarian interests, virtue and legitimacy of legislation. For different reasons, Hobbes, Locke, Green, Harman, Uyl and Hospers advocate instituting additional primary goods, such as education, health, housing, and enforcement of contracts, which define different levels of welfare. So far, I have established that libertarians have good reasons to institute welfare as a basic requirement for a just democracy. Next, I will attempt to show that egalitarians also have good reasons to support instituting some level of welfare in just democracies.

1.3: The egalitarian approach to welfare

1.3.a: The origins of contemporary egalitarian doctrines

The ideas that different persons are equal in some specific senses, or that all persons are equal in some essential sense, are deeply rooted in Western culture. Plato advocated the political equality of all citizens, regardless of gender. In Book

III of the *Ethics*, Aristotle presented the view that all men, who are equal in all respects relevant to a given matter, ought to be treated similarly, even though they may be unequal in respects that are not relevant to the given case. And, in matters in which they are unequal in relevant respects, says Aristotle, they are to be treated in proportion to their relevant inequalities. The Stoics universalized the principle of equality and maintained that, regardless of social, political and economic station, each person is a rational being with an equal capacity for virtue.

The New Testament presented the doctrine that all souls are equal in the eyes of God. This doctrine was modified during the fourth and fifth centuries by St. Augustine's doctrine of election. According to St. Augustine, all persons are equally unworthy in the sense that all are sinners. (426, Book I §§ 25, 27; Book XI. § 17; Book XIV, § 3) Only some may be elected to be saved by the mercy of God. Thereafter, until the seventeen-century, most social theorists strongly opposed egalitarianism, believing inequality and hierarchy to be natural to universal order and society.

The shift in social theory is due in part to Calvinism. Calvin (*Institutes* 1536, 1539-41) contended that the saved, whether clerical or lay, are all naturally equal. This view, when applied not only to church government, but also to secular government, affirmed the derivation of legitimate authority from the voluntary agreement of natural equals to choose and accept the authority of some of their own. This doctrine became central during the debates of the English civil war. From the seventeenth century on, the natural equality of all persons became a central political proposition of Western democratic thought.

Hobbes argued that in the state of nature, where each wars against each, all persons are roughly equal.

Nature hath made men so equall, in the faculties of body, and mind; as that though there bee found one man sometimes manifestly stronger in body, or of quicker mind then another; yet when all is

reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend, as well as he.
(*Leviathan*. 1651. Chap. XIII)

In the Commonwealth, all are equal in relinquishing their natural freedom and in their contractual acceptance of the authority of the sovereign. The sovereign, in turn, is obligated equally to provide each member of the Commonwealth with the security of person and property. Similarly, Locke argued that in the state of nature all persons are subject only to the natural law and have the same natural rights. In forming a civil society, persons give up a measure of their natural freedom in order equally to gain security for their body and property. Accordingly, regardless of individual differences, the state has the duty equally to provide security and stability to its members. Believing that most individual differences are due to environment and experience, philosophers such as Rousseau (1762) and Kant (1785) maintained that equality of treatment, and the establishment of favorable conditions, lead persons to realize their potential. These beliefs are fundamental principles of contemporary egalitarianism. Moreover, as we have seen before, T. H. Green argued that the potential to enjoy one's life and possessions requires more than security and stability. In order to actualize the potential to enjoy life, argues Green, any member of the state, especially the disadvantaged, must be provided, by the state, with some primary goods such as education, housing and health.

The major egalitarian principles emerging from this tradition are: (1) that all persons are equal in some fundamental sense and should be treated equally; (2) that one's current station in life is not deserved, but is an outcome of luck, environment and life experience; and, (3) that undeserved inequalities, especially in the case of the worse-off members of society, need to be ameliorated.

Like the libertarians, egalitarians argue for welfarism from different standpoints. There are some extreme egalitarian positions, such as J. P. Proudhon's version of

anarchism⁴ and Marxism, which attempt to level social and economic inequalities. However, as I stated in the case of extreme libertarian proposals, I sidestep such proposals, not because of problems with their theoretical validity, but because of the enormous practical problems, including direct expropriation and the attendant violence involved in any attempt to act on such proposals. Rather, I focus on at least two ways egalitarian doctrines may arrive at the plausibility of instituting welfare: those who interpret equality on the basis of individuality, and those who understand equality on the basis of community or some ideal of the common good.

1.3.b: Individualistic egalitarians

Egalitarians, who interpret the ideal of liberty on the basis of individualism, argue that the capacity to be free is first realized by each person when acting according to personal interests. Moreover, when one comes to act on one's wants and abilities, one does so within some social, political and economic context. Within this context one also interacts with others. The second stage of moral thinking occurs with the realization that all others have the same right to act on their wants and abilities. Egalitarians view this interpersonal realization as the foundation of social justice. Of course, how to balance personal interests with the interest of others, and hence to what extent egalitarianism needs to be taken, are problems to which egalitarian doctrines have varying responses. In general, individualistic egalitarians see the necessity of some institutional provision of welfare to be a logical development of other notions of equality, such as legal and political, prevalent in our society. Although those kinds of equalities are quite recent, and are the results of tremendous struggles in the past, it seems that there is a sense in which these equalities are indisputable. Egalitarians argue that if equality before the law and political equality are justified, then so is some level of social and economic equality.

⁴ Or federalism, as Proudhon calls it, since he views the state as a collective of communities and associations formed for particular purposes.

Thomas Nagel, specifically in his book *Equality and Partiality* (1991), presents an example of such individualistic egalitarianism. He begins with making a distinction between the personal and impersonal aspects of our life experience. Regarding the personal standpoint, Nagel says, "Most of our experience of the world, and most of our desires, belong to our individual points of view: We see things *from here*, so to speak." (Ibid., p. 10) As we experience and attempt to fulfill our wants, we also recognize that the same life experience is true of others. "We can then remove ourselves in thought from our particular position in the world and think simply of all those people, without singling out as / the one we happen to be." (Ibid., p. 10) The relationship between the personal and impersonal standpoints, Nagel believes, serves as that basis for constructing political theory.

According to Nagel, the first stage of constructing political theory evolves from the impersonal recognition that everyone counts the same. But it is also clear that everyone is different, at least in the sense that they may differ in their wants and their values. So the second stage is the generation of ethics from the multiplicity of personal values on the basis of the impersonal standpoint. " . . . my [Nagel's] belief is that the right form of impersonal regard for everyone is an impartiality among individuals that is egalitarian not merely in the sense that it counts them all the same as inputs to some combinatorial function, but in the sense that the function itself gives preferential weight to improvements in the lives of those who are worse off as against adding to the advantages of those better off— though all improvements will count positively to some degree." (Ibid., p. 12, my brackets) Nagel recommends that in order to universalize this ethics of impartiality, in the third stage of constructing political theory, ethics must assume a Kantian form. When applying this ethics to politics, in the last stage, Nagel argues that the political institutions of society need to reflect the Kantian ethics made possible by egalitarian impartiality. "The ideal, then, is a set of institutions within which persons can live a collective life that meets the impartial requirements of the impersonal standpoint while at the same time having to conduct themselves only

in ways that it is reasonable to require of individuals with strong personal motives.” (Ibid., p. 18)

Based on this political theory, Nagel eventually considers two alternative types of distributive models that can fit his ideal: a social minimum vs. strong egalitarianism.

My conclusion, as before, is that a strong egalitarian society populated by reasonable normal people is difficult to imagine and in any case psychologically and politically out of reach, and that a more real possibility lies in the first alternative. Intolerance of severe poverty at least receives lip service in most liberal societies, and it ought to be possible to develop it into insistence on a higher and higher social minimum, until it becomes intolerable in a rich society if anyone does not have a decent standard of living and of fair opportunity to go as far as his natural talents will take him above that. (Ibid., p. 128)

I will not pursue his choice between the two alternatives, nor will I present his complete reasoning. Rather, as I have done before, I will assume the validity of his argument. For our purposes, there are two important things to notice. First, Nagel justifies instituting welfare on the basis of a theory of impartial equality: social and economic equality are the next logical step in the same line of reasoning that made legal and political equality a reality. And, second, regardless of the choice between strong egalitarianism and a social minimum as the correct model for distributive justice, both models imply the plausibility of some level of welfare to be instituted in a just society.

1.3.c: Common good egalitarians

Apart from libertarians and individualistic egalitarians, there are egalitarians that argue for the plausibility of welfarism not on the basis of either liberty or individuality, but on the basis of community or a conception of the good. To begin with, let us note that I am here lumping together a number of distinct doctrines. I do so because explicating these distinct positions individually would take us too far from our goal: to illustrate the plausibility of actually instituting

welfare. Rather, I would suggest that reviewing the common denominator of these doctrines would provide us with enough grounds for this goal. Therefore, hereafter I will refer to this cluster of positions as common good egalitarianism.

Common good egalitarians, like M. Walzer (1983), M. J. Sandel (1984) and A. MacIntyre (1991), are united in their rejection of libertarianism in at least in two senses. First, they reject the libertarian approach to political philosophy on the grounds that its understanding of the ideals of liberty and individuality is too abstract, too far removed from the reality of our life experience. Second, given their skepticism regarding the ideals of liberty and individuality, they reject any conception of justice as an ideal of individual rights. That is, if libertarian conceptions of liberty and individuality are flawed, then so is their conception of abstract individual rights. Conversely, they argue, liberty can only be realized within a community, and individuality cannot be separated from the cultural and historical context of the individual. Thus, conceiving these ideals in isolation, in the abstract, is a fatally flawed approach to political philosophy.

Common good egalitarians argue for what they take to be a fuller view of moral life. Individuals, they say, can only be understood within the context of their history and culture. And the common good, properly understood, emerges as the result of the historical evolution of the concept of human happiness or fulfillment in the minds of members of a particular community. It is possible, they add, based on these considerations of individuals and their good, to try and generate a universal common good, but this is not a necessary move. To develop a fuller view of a morally good life, for a given society, it is sufficient to understand its history and the way its members conceive of what is good for them. Let me suggest here that if the common good is understood as a function of members' happiness or sense of fulfillment, it is primarily dependent on the satisfaction, if not of all then some, of their basic needs. In other words, without the satisfaction of their basic needs, it is hardly conceivable that members of community can go

on to achieve their ideals of happiness and fulfillment. Indeed, Walzer (1983), who I take as representative of the view of the common good egalitarians, asserts that. “ . . . every political community must attend to the needs of its members as they collectively understand those needs; that the goods that are distributed must be distributed in proportion to need; and that the distribution must recognize and uphold the underlying equality of membership.” (Ibid.. p. 84) Now, Walzer’s move from ‘as they collectively understand those needs’ to just ‘needs’ can be objected to on the ground that it is a slippery move; that is, that there may be a significant difference between the two terms. However, given the common good egalitarians’ insistence that individuals and moral and political philosophy can only be properly understood together within historical and cultural contexts, the move seems defensible. Needs, according to the Common good egalitarian approach, like any other concept, cannot be anything else but what the members collectively understand them to be.

Again, the intricacies of the argument are less important for our purposes. Assuming the validity of the common good egalitarian position, what is important for us is to note that a view of justice based on a conception of the common good implies the provision, by the community, of some basic goods for the satisfaction of some basic needs of the membership. This claim, I suggest, is tantamount to the plausibility of instituting some level of welfare.

1.3.d: Conclusion– egalitarians have good reasons for instituting some levels of welfare in a just democracy

Hence, sufficient evidence supports the claim that egalitarians have good reasons for instituting some levels of welfare in a just democracy. As mentioned in section 1.3.a above, the major egalitarian principles are: (1) that all persons are equal in some fundamental sense and should be treated equally; (2) that one’s current station in life is not deserved, but is an outcome of luck, environment and life experience; and, (3) that undeserved inequalities, especially in the case of the

worse-off members of society, need to be ameliorated. Based either on individualism or on a conception of the common good, egalitarians maintain that in order to satisfy the three egalitarian principles, and in order to provide individual security and social stability, the state is required to provide some set of primary goods. Thus, I conclude that egalitarians have good reasons to institute welfare in a just democracy.

While the general soundness of the doctrines I have reviewed can be disputed, it seems to me that their inclination toward giving instituting welfare policies high plausibility is valid. However, the biting contrast lies between those who opt for a minimal state and those who opt for comprehensive welfare policies; and this is the conflict I would like to focus on. Therefore, for simplicity of argumentation and in order to sharpen the contrast between libertarianism and egalitarianism on the issue of welfare, I would like to reduce the logical space into only two approaches: strict libertarianism and welfarism. In doing so I will lump together all egalitarian approaches into the welfarist approach. Although egalitarians argue for instituting welfare from different starting points, they all converge in their strong commitment to the provision of a wide range of basic goods. I will also move all non-strict libertarians to the side of welfarists, since they also approve of the provision of a wide set of primary goods, much wider than the set of primary goods strict libertarians would choose. Of course, the different libertarian welfarist positions entail different levels of welfare. It is my intention to develop, in Chapter 4, a theory of, and a model for, distributive justice that gives these different positions expression and a role in determining standards of welfare for a given society. Hence, for clarity of argumentation I will operate within this reduced logical space. Hereafter, unless indicated otherwise, when I mention libertarianism I refer to strict libertarianism. And when I mention welfarism I refer to all those positions that recommend instituting higher standards of welfare than those considered legitimate by the strict libertarian. (Nevertheless, as I have indicated when reviewing Nozick's view, even strict libertarians are obligated to

approve of the provision of those primary goods that ensure the security of members of the state and the stability of government.)

1.4: Welfare, basic requisites and primary goods

1.4.a: Rescher's comprehensive view of welfare and the libertarian and welfarist initial positions

Before we consider the possibility of a political process of negotiation and compromise that may lead to establishing adequate standards of welfare in just democracies, one that both libertarians and welfarists can accept, we need to get clear on the initial positions of the two sides. Libertarians such as Nozick advocate minimal standards of welfare limited to the institutionalized provision of security and stability. (Sec. 1.2.d) I describe at this point a view of comprehensive welfare that can serve as the welfarists' initial negotiating position. Welfarists advocate varying standards of welfare depending on their various moral, philosophical and religious doctrines of justice. By presenting a comprehensive view of standards of welfare I intend to suggest an upper limit to welfare, to be contrasted with the minimal libertarian view. Between these minimal and maximal limits is a range of possible intermediate standards of welfare that can serve as the logical space for negotiation and compromise.

To describe a maximal comprehensive position of adequate standards of welfare I employ Nicholas Rescher's view of welfare because of the wide scope of his discussion and the data he provides to support his view. Indeed, Rescher's view and the evidence he presents are somehow outdated, since they are based on statistical data gathered from World War II until the late 1960's. But I believe that his lists of essential requisites are still relevant and, more or less, are representative of a maximal welfarists' initial position. Moreover, Rescher's book, *Welfare: The Social Issues in Philosophical Perspective*, was published in

1972, a year after Rawls's *A Theory of Justice* (1971) was published, and two years before Nozick's *Anarchy, State, and Utopia* (1974) was published. These two major works have dominated discussions regarding justice, social policy and welfare, including related theories such as social choice theory, for the past thirty years. However, even if Rescher was aware of, at least, Rawls's book, he did not present his view of welfare in either Rawls's nor Nozick's terms. Although my work is well within the contemporary debate, I find it beneficial to present the comprehensive welfarist view in the more neutral language Rescher uses. I believe that the fact that Rescher's discussion is unaffected by the Rawlsian/Nozickian debate contributes to the clarity of his discussion. As such, I find Rescher's presentation to be particularly suitable for the purpose of presenting a full-blown welfarist position.

In *Welfare: The Social Issues in Philosophical Perspective* (1972), Nicholas Rescher presents the view that

Welfare has close connections with the conception of a *standard of living*, provided that what is at issue in such a standard is conceived broadly; not simply in terms of consumption levels alone, but in terms of access to essential services and the creation of an adequate – or at least viable – human and natural environment. Since welfare relates to the availability of the basic requisites for human well-being, it points toward the idea of a certain minimum level in the standard of living: any failure to achieve this level is thereby to be viewed as creating a corresponding deficiency in point of welfare. (p. 4)

Since human beings are complex, argues Rescher, the welfare of an individual is made up of many components such as physical health, material situation and mental or spiritual health.

With respect to its components, welfare has the character of a *profile* rather than of an *average*. Just as the health of a person is not an average of the state of health of the various organs and subsystems composing his physical frame, so a person's overall welfare is not an average of his welfare condition in point of the various applicable dimensions: physical, material, psychological, and so on. And just as the lowest point of a health profile, so to

speaks, represents the focal point around which a man's overall health pivots, so the weakest spot in a person's welfare profile is the critical factor in the on-balance condition of his welfare at large. (Ibid., p. 5)

Rescher further notes that securing welfare, as a matter of securing a 'minimum level in the standard of living' to each member of society, is necessary but not sufficient for achieving the 'good life' or individual 'happiness'. "This is the reason why the components of the good life must extend far beyond the province of welfare. It is essential to keep these considerations in mind from the very first, lest one exaggerate the role of welfare and take it to cover more than the distinctly minimal range with which it is concerned." (Ibid., p. 8) Welfare, according to Rescher, is the set of basic requisites required for the achievement of minimal standards of decent living in just democracies. It only defines the first tier of what is required for a good life. "Thus while the components of welfare represent great, indeed essentially indispensable, assets to 'the good life', they yet furnish no more than the beginnings of such a life." (Ibid., p. 8) Moreover, asserts Rescher, the basic requisites a person needs for well being are of two kinds, personal and social. Personal basic needs are those one requires to initiate the creation of one's own 'happiness' and the 'happiness' of one's intimates. And social basic needs are those required to begin promoting the common interests of society as a whole, or the common good. (Ibid., pp. 6-7)

Based on these considerations, Rescher presents the 'main yardstick for personal welfare':

The principal criteria for assessing the degree of realization of a man's welfare can be outlined as follows:

- I. Physical health
 - A. Life expectancy
 - B. Physical condition (vigor, adequacy of functioning)
 - C. Physical feeling tone (absence of pain or physical distress)
 - D. External normality (absence of disfigurement and overt physical impairment or disability)

II. Mental health

- A. Capacity to act effectively along chosen lines in chosen directions (outside controlled, limited, or institutional contexts)
- B. Mental tone (absence of abnormal fears, animosities, mental distress and connected symptomology, etc.)
- C. Satisfaction with himself and his circumstances (self-respect and contentment)
- D. Capacity to function normally in interpersonal transactions

III. Material prosperity

- A. Income
- B. Possession of negotiable assets (money, land, negotiable securities)
- C. Access to the services of others
- D. Security in tenure of material possession

IV. Personal assets

- A. Intellectual resources (cf. II.A)
- B. Social resources (cf. II.D)
- V. Environmental resources
 - A. Availability of goods for personal use
 - B. Availability of personal services
 - C. Quality of the environment (artificial and natural, social, public health, etc.)

(Ibid. pp. 12-13)

Rescher qualifies these criteria for the realization of personal welfare in several ways. I will mention only a few qualifications which seem relevant for the purposes of this work. First, Rescher notes, "... in assessing a person's overall welfare standing, all these factors must be taken into account within the total welfare profile." (Ibid., p. 9) Second, "These factors do not define the meaning of 'welfare,' but rather serve as standards, as mere *tests* for assessing the degree of a person's welfare." (Ibid., p. 9) Third, "In assessing a man's welfare we would not just take into account his present state, but his foreseeable future prospects as well." (Ibid., p. 9) Fourth, since welfare pertains to the basic needs one requires for a 'happy' or satisfactory life, argues Rescher, it is a matter of degree relative, on the one hand, to the individual's welfare profile, and, on the other hand, to the conditions (historical, cultural, economic, political, etc.) obtaining in the society in which that individual lives. Finally, Rescher acknowledges that the statistical

data which inform and support his suggested yardstick represent only part of the 'overall drama of people's well being'. As such the statistical data may be interpreted different ways. Thus, Rescher concludes, this main yardstick for personal happiness, or adequate standard of living, represents only a relative and incomplete part of the larger scope of the individual's existence within the structure and duties of the modern state. (Ibid., pp. 11-15, also in Chapter 3)

Rescher's main discussion of social requisites necessary to promote the common interests of society as a whole occurs in Chapter Four, *Quality of Life and Social Indicators* (Ibid., pp. 60-78) The following representation is a simplification of Rescher's already simplified discussion. This double simplification is done for the purpose of clarity and manageability of the subject matter. Rescher argues that consensus happiness requisites represent the set of conditions the satisfaction of which members of society believe is necessary for the promotion of the 'common good' or 'social happiness'. When the common good is adequately served, a satisfactory quality of life obtains. According to Rescher, an adequate quality of life is the aim of social welfare policies, and can be achieved when consensus happiness requisites are satisfied. Rescher argues that matters of social policy regarding general welfare, or the achievement of adequate quality of life, ultimately hinge on "*Consensus happiness requisites*. What people in general regard as the essential requisites for a happy life (be it simply for human life as such or life as a member of their own societal environment)." (Ibid., p. 62) Naturally, quality of life is closely related to, and probably influenced by, two subjective aspects. One is "*Idiosyncratic happiness factors*. A person's own perception of 'what *he* needs' for happiness, and his appraisal of the extent to which he possesses these resources." (Ibid., p. 62) The other is "*Hedonic mood*. The psychological feeling tone (of a potentially ephemeral character) of 'being happy'." (Ibid., p. 63) Nevertheless, Rescher asserts,

When the concept of quality of life is invoked as a yardstick for the evaluation of social policies and programs, one is certainly not concerned with the vagaries of idiosyncratic 'needs' and, possibly,

very unrealistic individual expectations Rather, the door through which considerations of happiness enter into the 'quality of life' as a social issue is provided by . . . the generally recognized requisites for happiness. (Ibid., p. 65)

Indeed, one's view of one's own basic requisites provides the starting point for the determination of consensus happiness requisites. And it is also the ultimate judge of the degree to which the provisions of welfare satisfy those requisites. However, argues Rescher, when it comes to social policy. "Our attention is directed not at the atomistic or microscopic level of the characteristics of this or that individual life but at the molar or macroscopic level of the *climate of life* in general" (Ibid., p. 66) After presenting some statistical data regarding consensus happiness requisites, Rescher concludes,

Thus an abbreviation of the preceding tabulation to those consensus happiness requisites that are socially actionable would result in something like the following greatly diminished list:

1. Health
2. Prosperity and economic well-being
3. Leisure
4. Personal status, security
5. Personal development, education and training
6. Personal freedom and individual opportunity
7. Political freedom and good government
8. Equality
9. Legal rights, justice, and due process
10. Privacy
11. Pleasing or aesthetic surroundings
12. Satisfactory physical environment

(Ibid. pp. 71-72)

According to Rescher, when the above consensus happiness requisites are satisfied, the possibility of establishing a quality of life obtains in a democratic society.

Although the origin of the set of consensus happiness requisites can be traced back to personal wants, personal happiness only indirectly affects this set. "It comes on the scene through the existence of a domain of consensus happiness requisites falling within the sphere of legitimized action on the part of society

acting through the agency of the state.” (Ibid., p. 72) At least two factors convert what initially starts out as an aggregation of personal wants into the sphere of legitimate and possible state action. First, the set of consensus happiness requisites is not merely the total sum of all wants of all members of society. Rather, it is limited to just those elements everyone agrees are necessary, for themselves and others, in order to enhance the common good or achieve adequate quality of life. In this manner, the consensus regarding basic requisites and quality of life, arrived at through political processes, gains it political legitimacy. Second, the set of consensus happiness requisites is restricted by the amount of resources available to the state. In the ideal, all the elements of consensus happiness requisites are satisfied. But in most cases the limited resources available to society result in severe restrictions on the number, levels and quality of supply of requisites. This implies that society is obligated to supply only those requisites that it can, relative to the limited amount of resources the state is capable of allocating toward welfare policies. The satisfaction of consensus happiness requisites is not a matter of satisfying what each member of society want, but a matter of satisfying those requisites the state can actually afford. Thus, Rescher concludes that in order to establish an adequate quality of life and satisfy the set of consensus happiness requisites, only those social policies that are ‘actionable’ – i.e., legitimate and possible in a particular society – should be implemented. In this way the set of consensus happiness requisites surpasses the sphere of individual desires and is properly placed within the sphere of actionable state policy.

I suggest that Rescher’s sets of personal happiness requisites and consensus happiness requisites approximately describe the maximal level of welfare welfarists could advocate. I say approximately because even those who argue for comprehensive welfare advocate slightly different sets of requisites, depending on the conceptions of justice they presuppose. Indeed, it is case that some of Rescher’s requisites do not appear on the lists of primary goods of some

welfarists: for example, some welfarists may not take ‘pleasing and aesthetic surroundings’ (Rescher’s consensus happiness requirement #11 – see list above) to be an essential primary good. My point is that Rescher’s sets are characteristic of the welfarists’ comprehensive welfare view, and that Rescher’s sets of requisites, or some near versions of them, properly describe the maximal initial welfare position maintained by those who promote instituting comprehensive welfare policies in just democracies. For example, Rawls’s list of primary goods, or the ‘things that every rational man is presumed to want’, things such as “. . . rights and liberties, powers and opportunities, income and wealth. . . (self respect) . . . health and vigor, intelligence and imagination . . .”(TJ, 1971, p. 62) and many more (TJ, pp. 90-95), amply resemble the sets of essential requisites Rescher presents. Such descriptions of comprehensive welfare requisites, or primary goods, approximately define the meaning and content of the maximal limit of welfare.⁵ Thus, we now have a clear view of the initial negotiating positions of libertarians and egalitarians, between which is a range of possibilities for compromise.

Now, that we are clear on the initial welfare positions of libertarians and welfarists, I further suggest that the difference between the two is not as large as it may appear. Inasmuch as the welfarist’s initial position regarding welfare is not fixed, so is, to some degree, the libertarian’s initial position. That is, the minimum welfare doctrine, held by libertarians, is not as severely restricted as it first appears. Indeed, the limits libertarians impose on justifiable provisions of primary goods are quite vague. Libertarians advocate state provision of only those things

⁵ Rawls constructs his list of primary goods as those things each person would choose in the ‘original position’ thought experiment, under the ‘veil of ignorance’. Rescher constructs his list of consensus happiness requisites based on actual preferences revealed through statistical data. I believe that Rescher’s ‘essential requisites’ and Rawls’s ‘primary goods’ are pragmatically equivalent terms, in the sense that both aim at defining the set of enablements each member of society requires for achieving a

that are necessary for the security of life and property of each member of society and for the stability of state. However, even securing this much, in fact, implies the provision of a wide range of things. For example, it seems clear that providing some health related benefits is essential for securing the life of many individual members. For this purpose, institutions such as public hospitals and emergency administrative agencies are deemed essential in western industrialized democracies. By the same token, it seems reasonable to expect that some further preventive measures (aimed, for instance, at the prevention of contagious lethal diseases such as Smallpox, TB and plague) need to be taken for the sake of public health and security. Another example has to do with securing the property of each member of society. Some of the aims of the criminal justice system are to ensure the security of private property, to enforce property laws and punish violations of these laws. An additional way of securing property is cultivating, among the members of society, through education, a high degree of morality and respect for others and their property. However, is the mere ability to read the law sufficient for these purposes? Would not understanding the law and its implications (to individuals and the economy) enhance securing property rights? These two levels of education and morality imply the need of at least two different levels of public education. Libertarians may reject the provision of higher levels of education, but at least for the purpose of cultivating a good citizenship, they support the provision of some level of public education. And to take a last, and less controversial example, consider roads and traffic laws. The construction and maintenance of an effective road system (as well as other kinds of transportation routes) is necessary for securing the life of citizens, at least to the extent that they can be reached when their lives and property are in danger. Even though some libertarians may object to traffic laws and regulations as a matter of principle, in practice they accept and obey these laws. Indeed, the construction and maintenance of an effective road system requires the extra expense the state bears

minimal and adequate standard of living, and probably more. Thus, I take the liberty of using them interchangeably here.

in creating and maintaining traffic laws and their enforcement. Thus, the justification for constructing and maintaining roads extends further to the institution and enforcement of traffic laws.

The purpose of presenting these examples is to show that, even if not in principle, at least in practice, the minimal libertarian position is not as minimal as it appears since it entails the provision of additional goods not considered by the libertarian justified at first sight. The examples illustrate that effectively ensuring individual rights to life and property as well as the stability of the state require more than a limited criminal justice system and the minimal state. It requires the provision of a much wider range of institutions and primary goods such as health, education, an extended legal system. This shows that it is possible to justify the institutionalized provisions of a wide set of primary goods on the basis of libertarian conceptions of justice, founded on the principles of acting self-interestedly and non-interference, rather than justifying such comprehensive provisions solely on the basis of welfarist notions of equality. Indeed, in many industrialized western democracies, such as the USA, where libertarian conceptions of justice, (exemplified by the general support of values such as freedom of trade, speech, association and in the private sphere of action,) are well entrenched within the public domain and in government. Nevertheless, even libertarian citizens of such democracies show a willingness to forgo their minimal initial position in favor of political compromises that yield the institutionalized provision of primary goods that extend beyond the limited provision of security and stability.

At this point I am not yet arguing that the libertarian has to accept these considerations. All I here attempt is to illustrate that the limits libertarians impose on justified provisions of primary goods are not clear or simple to delimit. I argue (1) that when the implications of the state's obligation to provide security and stability to its citizens are given serious consideration, the line that separates justified libertarian provisions from those that are not justified becomes blurred.

and (2) that how far up this minimal and vague line can be jostled depends on the trade off between considerations of principles and circumstances. These considerations show that the distance between the minimal and maximal initial welfare positions is not as great as we started out with.

So far, as a step towards reaching a compromise between libertarians and welfarists regarding adequate standards of welfare in democracies, I presented the minimal libertarian initial position and the approximate maximal initial position of welfarists. I further argued that inasmuch as the welfarist initial position is approximate, due to differences in conceptions of justice, so is the initial libertarian position, due to different interpretations of libertarian principles and political as well as other factual circumstances. Between those two initial positions is a range of intermediate positions that can serve as a framework for compromise. Such a compromise, I suggest, is achievable through political means. Next, I present my view of welfare, which is consistent with both sides. It is a view that does not select any one of the possible intermediate positions regarding welfare, but shifts the focus of compromise onto those primary goods the provision of which is the core of disagreement. In doing so I attempt to even further reduce the range of intermediate positions, thus making the prospect of a compromise that much better.

1.4.b: My tentative view of adequate welfare standards as the set of primary goods and the levels and quality of their supply

I begin explicating my tentative view of welfare by pointing out some differences between my view and Rescher's. Rescher is concerned with a general account of human well-being, where welfare issues are only a part of this greater picture. I, on the other hand, focus on the narrower domain of welfare as a set of primary goods society is obligated to provide to its members, in line with Rawls's view (as presented in *Justice as Fairness: A Restatement*, 2001). I am mostly interested in democratic principles and procedures to facilitate a compromise regarding

adequate standards of welfare based on the idea of the largest overlapping agreement. I discuss other social and political values only to the extent that they are relevant for my immediate goal. Moreover, Rescher's set of consensus happiness requisites is quite comprehensive, even if not exhaustive. This set represent what I personally have in mind when I think of primary goods. However, I am working toward presenting a system that is not fixed but dynamic. Therefore, I will avoid presenting my preferred set, or the most popular set, in order to leave this determination for the actual implementation of such a system. In other words, for the purpose of this work, it seems to me counterproductive to advocate a self-generating system and at the same time to predict or fix its results. Finally, Rescher distinguishes between basic requisites for personal happiness required for establishing adequate standards of living for each citizen and consensus happiness requisites required for establishing an adequate quality of life. I, however, will offer a different division among basic needs. I do not distinguish between 'the life of the citizen' and the 'life of the community' because I do not believe it is possible, or theoretically necessary, to separate these two aspects of human life experience in this way. Thus, I will not adopt Rescher's distinction between standards of living and quality of life, and use the two phrases interchangeably to refer to the totality of human experience as citizens of certain societies. Below, I will offer a distinction between infrastructure primary goods and a more inclusive sense of the set of primary goods as a part of my view of welfare.

I here give a tentative and sketchy account of my view of welfare in order to make some distinctions, provide some definitions of terms I will use throughout, and point out the general direction of this work. I will present a full account of my view of welfare in Chapter 4, after a few important discussions have been completed. My account of welfare is similar to Rawls's account of primary goods. Welfare, in my view, is the proper set of primary goods, determined through the establishment of the largest overlapping agreement obtaining among the citizens

of liberal democracies. It is the set of goods required to enable each citizen to (a) live at or above the social minimum of decent living conditions, and (b) realize a reasonable life plan. A range of reasonable life plans is also delineated through the establishing the largest overlapping agreement.

For the rest of this work I will often use the terms: 'the largest overlapping agreement', 'adequate standards of living' and 'adequate welfare standards' as defined below.

Largest overlapping agreement: By the 'largest overlapping agreement' I refer to an intersect of the set of preferences for any given subset of members of a society that a majority of society agree on. Once the member subset represented is a majority of the members of society it is reasonable to claim that this overlapping agreement, indicated by the intersect, represents the society's legitimate preferences. The more members of society are included, the smaller the set may get. But it is highly unlikely to ever be an empty set. And the larger the set is, the wider and stronger the agreement obtaining among the members of society.

Adequate standards of living: By 'adequate standards of living' I refer to a political conception of a certain minimal social and economic environment, determined by the largest overlapping agreement obtaining among the members of a society, of what would be sufficient to achieve one's legitimate expectations of a decent life.

Adequate welfare standards: By 'adequate welfare standards' I refer to the set of primary goods, the state should ensure is available to each citizen, as determined by the largest overlapping agreement obtaining among the citizens of the state, through legitimate political processes, regarding those goods which are necessary for enabling each member of society to achieve

reasonable life plans above the social minimum defined by adequate standard of living.

By definition, adequate standards of welfare obtain above an already fixed social minimum of adequate standards of living. Hereafter, unless otherwise indicated, when I mention adequate standards of welfare I want to be understood as also referring to such adequate living standards. I will distinguish between the two kinds of standards only when needed. Moreover, welfare standards are adequate if they delineate a reasonable and legitimate range of life plans, or conceptions of the good, the majority of citizens prefer. When talking about reasonable life plans, we customarily refer to those plans that are supported by good reasons, or are well argued for. However, in the context of distributive justice, such life plans must also be realizable within the limited amount of resources available to society. Once such reasonable life plans are selected by the largest overlapping agreement obtaining among the members of society, they also become legitimate. Hereafter, when speaking of life plans I refer to reasonable and legitimate life plans.

In general, primary goods satisfy the basic needs members of society require for planning and attaining life plans. The set of primary goods also includes those things members of society believe are required for enhancing the common good. In democracies, such a political agreement justifies, indeed, mandates, the state provision of the set of primary goods because it represents what the majority of citizens prefer. In this political sense, the set of primary goods defines the content of adequate standards of welfare in a given society. Each member of society, who lives below these standards of welfare, or has no sufficient access to such enablements, has a justified claim against the state. Or to reiterate Rescher's words, "... any failure to achieve this level is thereby to be viewed as creating a corresponding deficiency in point of welfare." (1972, p. 4) Of course, limited resources can prevent the provision of a large set of goods or high levels of quantity and quality of supply. Or, it may be the case that the state has no

apparatus to establish standards of welfare in this political way. But as long as a democracy moves in the direction of maximally using its available resources to meet citizens' legitimate expectations, and as long as it moves in the direction of instituting welfare policies according to a general agreement, it retains legitimacy. Some version of this view, I believe, is implied to different degrees by most of the non-strict libertarian and egalitarian theories I have mentioned before, from Hobbes to Rawls and Nagel. Indeed, the libertarian may reject such a sweeping notion of welfare. Instead, the libertarian can insist on minimal welfare, necessary to guarantee just security and stability. But I intend to show that once certain elements of the political process are exposed, and some particular arguments are presented to the libertarian, this view may no longer seem defensible to the libertarian.

At this point, I would like to clear out some possible confusion regarding the distinction between needs and desires. In Rescher's language, the provision of personal happiness requisites and consensus happiness requisites aims at satisfying personal and common requirements of members of society, such that those members are enabled to create a 'happy' life for themselves. Rescher explicitly says that institutionalized and legitimate welfare is not a matter of trying to satisfy what each member of society desires. According to Rescher,

... the basic reason why people are justified in looking to the state for support of their welfare, and why this expectation is something other than highly unreasonable, is surely not that welfare is desirable and generally desired. A great many things are desirable and generally desired! Rather, such justification is to be sought in the fact that the state *has been duly charged* by the public mandate with the proper execution of this task, as determined by the political process. (1972.. p. 115)

With Rescher, I maintain that welfare is not a matter of trying to satisfy what each citizen wants because, first, doing just so is impossible in principle and in practice, and second, welfare is not the outcome of general desires or the simple sum of all individual desires but it is the outcome of legitimate political processes.

Consider the outcome of an election for a certain public office, or the outcome of a political process by which a parliament approves of, say, a government's annual budget. Such outcomes are considered 'objective' and legitimate if they are the results of legitimate political processes. As a general rule, if legitimate political processes are legitimacy-preserving, then their outcomes are legitimate. Thus, the elected person is justified in holding the position for which she is elected, and the government is justified in spending its annual budget, not because those who participate in the political process express their 'subjective' preferences, but because of the presumed legitimacy of the process by which persons are elected and budgets are determined. Similarly, welfare policies are not justified because those who participated in the political process express their unreasonable 'subjective' preferences. Welfare policies are justified because they are outcomes of legitimacy-preserving democratic political processes. Finally, the consensus regarding welfare need not be universal or ideal. It is relative to the current welfare profiles of members of a particular society, and is restricted by the amount of resources available to the state.

Nevertheless, it can be argued that this account is insufficient because welfare expectations are, ultimately, about people's desires and not about what they need. Or it can be argued that what people require amounts not to what they need but what they demand. Therefore, it follows that welfare expectations do not, in fact, transform from the 'subjective' desires into legitimate needs. Even though I believe that Rescher's account, and my explication of the justification of outcomes of legitimate political processes, are sufficient to meet these charges, I would like, for the purpose of this work, to offer technical and inter-theoretical definitions of desires and needs, in order to keep them clearly distinguished:

Desires refer to what people want.

Needs refer to what is necessary in order to enable each member of society to achieve an acceptable standard of living (see def. above) where each is enabled to construct a reasonable and legitimate life plan and act on that plan.

But I want to be understood in this essay to be using 'needs' also to refer to outcomes established by the largest overlapping agreement, which implies determinations through democratic political processes in the public domain. The class of needs is specifically designated to meet the objections mounted above, with the intention to show that the public characterization of needs secures their 'objective' constitution. Of course, it is most likely that not all needs can actually be satisfied because of the scarcity of resources available to the state (especially in impoverished countries.) Thus, society should balance the provision of primary goods with the amount of its available resources. Moreover, these definitions do not entail that all needs must be desired. Rather, needs are determined according to the largest overlapping agreement obtaining among members of a particular society, expressed through participation in legitimate political processes. This way of distinguishing needs from desires is accepted by other thinkers. For example, it is also a part of Rawls's revised view of primary goods.

Primary goods are now characterized as what persons need in their status as free and equal citizens, and as normal and fully cooperating members of society over a complete life. Interpersonal comparisons for purposes of political justice are to be made in terms of citizens' index of primary goods and these goods are seen as answering their needs as citizens as opposed to their preferences and desires. (1999, p. xiii)

Moreover, the definitions do not attempt to belittle the importance of fulfilling personal desires and wants. They, however, imply that desires that are not also needs do not fall within the domain of reasonable and legitimate welfare policies. For example, one's desire to have a fancy house with a swimming pool and a tennis court as well as a fleet of luxury cars, is not the kind of desire society is obligated to enable one to fulfill. However, one's need for an adequate dwelling

for one's family, whatever society collectively decides is adequate for such a family, is the sort of need society should enable one to satisfy, if one is unable to satisfy it with what one has and through one's own earnest efforts. These definitions are not to be taken as logical or universal truths. I employ them in order to eliminate any future confusion with regard to my use of needs.

I distinguish the way I am using primary goods from the way it is generally used. For example, in economic theory (as well as other disciplines,) 'primary goods' refer to a set of goods, including such goods as roads, sanitation, sewer, water supply, monetary system, national defense, etc., and administrative agencies such as the FCC, FAA, FTC, etc. I call these goods 'infrastructure goods', and distinguish them from the more inclusive sense in which I use primary goods. In this inclusive sense I use 'primary goods' to refer to a set that also includes goods such as education, medical care, child care, housing, minimum wage, self-esteem, self-respect, etc. Although I do not advocate a particular set of primary goods, I argue for the additional provision of the kind of non-infrastructure primary goods that satisfy those needs that if left unfulfilled bring about unjustified social and economic inequalities. Members of society who, due to lack of access to primary goods, live below the established social minimum of decent life, or are unable to plan and act on their reasonable and legitimate life plans, suffer from social and economic inequalities. These members have justifiable complaints against the state.

All social and economic inequalities, obtaining among those who live at or above the social minimum and the reasonable and legitimate range of life plans, are rendered justifiable, as they are not caused by inadequate access to primary goods and are a part of effective free market economic systems. They are the results of the kind of differences in luck, effort and talents that do not call for amelioration. But social and economic inequalities are unjustified, and constitute legitimate complaints that call for amelioration, if they are the result of the set of living

conditions into which one is thrown, where one has little access to primary goods, rather than the result of lack of individual efforts in using available primary goods. Even in an impoverished democracy it is possible to determine, through legitimate political procedures, adequate standards of welfare, relative to current conditions and available resources, such that the state is obligated to provide those primary goods that enable members of society to achieve an agreed upon social minimum, and more. In short, this inclusive sense of welfare picks up those primary goods that are needed to establish security of body and property, stability of state, as well as locally achieving a certain range of life plans, at or above the social minimum, for each member of society.

To illustrate this inclusive view of welfare consider the following cases. In general, we assume that the provision of a road system is vital for the livelihood of the whole population. But it may not make a large enough contribution to those who are situated below the social minimum such that they are enabled, by utilizing this road system, to rise to or surpass the social minimum. Or it may not make a large enough contribution to those situated just above the social minimum to enable them to realize their preferred reasonable and legitimate life plans. Thus, although the provision of such an infrastructure good is necessary, it might not be sufficient for ameliorating unjustified inequalities. The provision of a state sponsored adequate education system, to take a different example, may not affect those who already enjoy adequate education. But it is a key element in enabling those who are situated below the social minimum to improve their station. And it is important to all those who live above the social minimum but are unable to realize their reasonable and legitimate life plans due to low levels of supply or poor quality of this primary good.

Indeed, the provision of all primary goods, infrastructure as well and non-infrastructure, variably contributes to the adequacy of standards of welfare as well as the promotion of the common good. However, I believe that infrastructure

primary goods, though necessary, might not make a large enough contribution to lives of members of society who live at, or just above, the social minimum, as suggested by the two examples above. On the other hand, non-infrastructure primary goods are required to enhance the lives of such members such that they are enabled to achieve a decent life and more. I do not aim at the leveling off of all social and economic inequalities, but only at eliminating those inequalities society determines to be unjustified through establishing the relevant largest overlapping agreement. It is the business of this work to describe a system for determining the kinds of primary goods, and the levels and quality of their supply, required to enable all members of society to achieve life plans at or above a social minimum. The distinction I am making between infrastructure and non-infrastructure primary goods is not absolute or rigid, and it seems unlikely that a clear line separating the two kinds of goods can, or needs to, be drawn. As we go along my use of the inclusive sense of primary goods will get clearer. Hereafter, when using 'primary goods' I will refer to this technical and inclusive sense.

Furthermore, welfare, as the set of primary goods and the levels and quality of their supply, may be defined differently relative to time, location and resources of a particular society in question. In this work I will speak of welfare in contemporary liberal democracies such as the USA, England and other industrial democratic societies. When I speak of welfare levels I refer to the levels of supply of primary goods. For example, let education be a primary good. By distributing education to all members of the society we may mean elementary or elementary through high-school education. We may also mean nursery through college education. These options represent different levels of supply of the same good. When I speak of quality of welfare I refer to the quality of primary goods supplied by the state. Let us again take education as an example of a primary good. An adequate explication of the means to measure the quality of education is too complex to be fully given here. Rather, I will employ some intuitive notions for measuring the adequacy of education. Roughly, the criteria for determining the

quality of education measure the degree to which education provides those who receive it with the tools to process information, make reasonable decisions, get jobs, form plans for the future, and assess what is required to act on such plans. In short, adequate education provides individuals with the skills required to create for themselves satisfactory lives as individuals and as active and cooperative citizens in their society. These criteria provide us with the ability to judge the quality of education. Even though in this work I do not explicate the complete means of evaluating the quality of primary goods, the model I present in Chapter 4 offers an account of the role such criteria play in determining the proper levels and quality of supply of primary goods. Therefore, when I speak of standards of welfare, I refer to the set of primary goods and the levels and quality of supply of those goods.

In sum, I view welfare as the set of state provided primary goods (in my inclusive sense of primary goods). This set also serves to measure the level of welfare obtaining in a particular society. At the same time, the set of state provided primary goods represents what society takes to be the basic enablements required by its citizens to achieve their preferred life plans, at or above the a social minimum level of decent living. Such fixed social minima and ranges of reasonable and legitimate life plans are to be continuously determined by establishing the largest overlapping agreement at certain points in time in the life of the society. Any citizen who does not have access, or has too little access to such primary goods suffers from unjustified social and economic inequality. The responsibility for such cases of failure to provide access falls on the state. Hence, the institution of welfare aims at establishing a social minimum level of decent life that should be met even when the amount of resources available to a society is scarce. The remaining resources, if any, are allocated toward enabling each citizen to realize reasonable and legitimate life plans. In this way the institution of adequate welfare standards also aims at rectifying unjust social and economic inequalities relative to the amount of resources available to society.

1.5: Conclusion

The conjunction of the conclusions of sections 1.2 and 1.3 support the thesis that libertarians and welfarists have good reasons for instituting some levels of welfare in a just democracy. Despite the plurality of the often-divergent doctrines reviewed, they all converge – in a possible largest overlapping agreement – in justifying and accepting the institutional supply of some level of primary goods that are necessary for a meaningful realization of liberty and equality. These goods are required for the establishment of social, economic and political conditions that are advantageous for social cooperation and unity without which no democracy is secure and stable. In this chapter I have presented the initial minimum welfare position advocated by (strict) libertarians and the comprehensive welfare position welfarists endorse. The intermediate positions, I suggested, define a range of possibilities for negotiation and compromise regarding the establishment of adequate standards of welfare both sides can agree on and live by. I argued that in practice the two extreme positions are closer than they seem. I, then, presented a tentative and different view of welfare. It is different in being inclusive and in the sense that it does not pre-select a particular set of primary goods, but advocates utilizing a political procedure to fill in the proper content of welfare. Ultimately, In Chapter 4, I develop a dynamic and self-generating procedure that enables each citizen to participate in establishing adequate welfare standards.

My view of welfare thus shifts the focus from the justification and legitimacy of any particular set of primary goods onto the justification and legitimacy of the political process itself. Accordingly, what justifies and mandates the provision of a certain set of primary goods, or a certain standard of welfare, is not any one doctrine, but the largest overlapping agreement by which it is arrived. I believe that democratic regimes are obligated to create the kind of environment and the kind of citizenship that can use democratic political procedures to determine

adequate welfare standards. If so, the next natural question to ask is: What prevents both sides from coming to agree on a particular set of primary goods and the levels of their supply? This question is the topic of the next chapter.

CHAPTER 2: THE NORMATIVE PRIORITY PROBLEM AND WHY SHOULD LIBERTARIANS PARTICIPATE IN NEGOTIATION AND COMPROMISE

2.1: Introduction

2.1.a: The two moves

Given that libertarians and (egalitarian and non-strict libertarian) welfarists agree on the desirability of instituting some level of welfare in democracies, why is it that this agreement does not yield specific standards of welfare acceptable by both sides? The simple answer is that this overlapping agreement is too weak to serve as the basis for establishing non-controversial standards of welfare. The common denominator shared by libertarians and welfarists is too narrow to serve as a basis for instituting levels of welfare that extend beyond the institutionalized provision of security and stability. For libertarians see the provision of security and stability as the maximum level of welfare that can be justified in a democracy. Whereas, welfarists maintain that the provision of security and stability is indeed necessary for the preservation and maintenance of a democracy, but not sufficient. They argue that the provision of security and stability is a minimum that should be supplemented by the provision of additional primary goods in order to enable each member of a society to form and act on her preferred life plans. Indeed, the welfarists' account of welfare begins where the libertarian account ends. My intention is to pave the way for a theory and a model for establishing adequate standards of welfare in democracies based on a compromise achievable through procedural justice and the direct involvement of the body politic. In order to do so, in this chapter I make two moves. First, I argue that the normative priority problem should be eliminated. Second, I present reasons to motivate libertarians to participate in establishing the largest overlapping agreement regarding adequate welfare standards.

I begin with showing that in current democratic politics there is an obstacle that hinders both sides from reaching a compromise, and indeed, pulls them apart. I argue that the desirability of instituting welfare policies is tainted when it comes to specifying a set of primary goods for a society because of the normative priority problem. Libertarians advocate the normative priority of liberty over equality. In contrast, egalitarians promote the normative priority of equality over liberty. I argue that each normative priority is motivated by the mistrust of concentrated power. Yet, giving either liberty or equality a normative priority, I show, does not eliminate the mistrust of concentrated power. Thus, I conclude, giving either liberty or equality a normative priority cannot be successful in a democracy. And, if we can eliminate the normative priority problem, we eliminate a major cause of disagreement and polarization.

But, even if both sides accept that the normative priority they advocate does not yield the results it is designed for, that does not necessarily mean that each side has any reason to compromise its initial position regarding welfare. Even if the libertarian concedes that her concerns cannot be guaranteed priority regardless of who is in power to determine welfare policies, she can still argue that based on her libertarian conception of justice and statehood, the only justifiable standards of welfare are the provisions of security and stability. On the other hand, the welfarist position represents multiple approaches to welfare as well as a willingness to refrain from achieving some ideal (maximal) levels of welfare, given the limited resources available to the state. It is safe to assume, then, that welfarists are inclined to participate in political negotiations in order to reach a compromise regarding welfare. Thus, in the second part of this chapter, I will present philosophical and practical arguments to convince libertarians that participation in such a political process is a suitable way to promote their ideals and interests. Ultimately, the theory and model I will put forward in Chapter 4 may not yield welfare standards that fully satisfy all the concerns each side has,

but it can still serve as a basis for establishing adequate standards of welfare both sides can accept and live with.

However, before we consider these two moves, we need to understand the meaning of 'trust' used in this work, for it is an essential element of the mistrust of concentrated power. Moreover, trust is required for the acceptance of welfare standards mandated by the largest overlapping agreement obtaining between citizens of a democratic state.

2.1.b: Trust

The normative priority problem, I argue below, is motivated by the mutual mistrust of concentrated power. In current industrialized western democracies, those who are in a position to institute welfare standards in their societies have the power to decide which primary goods and what levels of quality and supply each citizen gets. Their decisions are accepted if the membership trusts them. If they are elected officials, there is a presumption that they are trusted and that their decisions will be largely accepted. However, given that democracy is based on two, sometimes conflicting, principles, officials are most likely to be prone to favor either liberty or equality. Indeed, the doctrinal allegiance of officials (their propensity toward liberty or equality) may determine the content of welfare standards they try to institute in their own society. Thus, those who do not trust that their own doctrinal inclinations and social and economic interests would be sufficiently served by the elected officials may object to the welfare standards these officials select. Giving a normative priority to liberty or equality thus plays an important role in deciding and accepting any given model of welfare.

In ethics, where questions of how to act are dealt with, trust plays an important role. Trust is a complex concept. I will not attempt a complete account of trust but be content with the following intuitive explication. The dictum, 'No one will take care of me better than I', represents the basic intuition behind the conception of

trust I relate to the problem of establishing adequate welfare standards. That is, assuming that a person is reasonable and well informed, this person trusts her own decisions the most when deliberating on how to act in light of her first-hand knowledge of her circumstances, her interests, and the best way to achieve her preferred life plans. This personal aspect represents the core of the domain of trust. Normally, one voluntarily accepts decisions made by those one trusts. Moreover, one tends to trust and accept decisions regarding issues that are familiar to one and are relevant to one's life. Otherwise, one is most likely nonchalant. When one has to decide how to act, especially when one is not sure of how to balance one's interests with one's circumstances and the demands of justice, one generally opts to rely on opinions and arguments one believes to be not only true but also in one's best interest.

Within the domain of trust, let us say that free and rational persons, in charge of their faculties, trust themselves the most, and trust other people, interests and values to different degrees. Those different degrees of trust largely determine the degree to which one is willing to accept decisions made by oneself and others. As we get away from the core, up to the outer boundary of this domain, there is a multiplicity of tiers where trust is marginally diminished. For example, consider the following trust schema. The core is the first tier of trust. Close friends and family may make up a second tier of trust. Those friends and family who are not so close, and, say, the views of some religious leaders, philosophers and politicians, may compose a third level. A fourth tier of trust may be formed by those one does not know, those whose opinions and interests are not familiar to one, and, say, the views of some politicians whose agenda is not to one's liking. And a fifth tier, representative of those one trusts the least, may be composed of people whose interests are incompatible with one's own and persons one believes are not concerned with truth or justice but purely with their malevolent motivations.

Some qualifications of this intuitive picture are in order for the sake of clarity and some degree of completeness. First, levels of trust are not determined by geographical distance from the core but by something like emotional, psychological and doctrinal distance from the core. For example, one may trust a friend who is far away, with whom one speaks only once a year, more than one trusts a relative with whom one maintains daily contact. Second, the position of interests, people and opinions may shift from one level to another level of trust. This may happen as one changes one's beliefs and interests or as the result of additional new information. Thus, the composition of one's tiers of trust, and the corresponding degrees of trust and acceptance, are most likely to change over time. Finally, knowing we are prone to make mistakes, one trusts and accepts decisions for which recourse is available, if not immediately, then within a certain acceptable period of time. In short, the more one trusts a person, a deliberation process or a doctrine, the more one is willing to accept decisions made by such persons, through such processes or under such doctrines.

Applying this intuitive view of trust to the subject matter at hand, namely, decisions with respect to welfare, let us say the following. In making decisions regarding standards of welfare in one's society, one trusts oneself the most in determining what goods are primary and what levels and quality of supply are satisfactory. Again, we assume that one is well informed, can provide good reasons for choices made, and has the ability to revise decisions at a later date. One trusts and, thus, accepts the decisions of others relative to their positions on one's trust scale.

This intuitive view may suffice for the purposes of this work, but an immediate objection must be met if this view is to be preserved. One may say that the subjective dictum behind this intuitive view of trust, i.e., 'No one will take care of me better than I', does not fit the objective issues involved in determining adequate standards of welfare. For example, Rescher (1972) notes that,

A deep-rooted feeling is unquestionably present in most well-meaning people that no one can have a better understanding of the issues relating to person's own affairs – and, above all, those regarding his own welfare and well-being – than the man himself . . . But a thoughtful scrutiny of the facts will not bear out this importation of welfare into the sphere of those subjective items – such as his own likings and preferences – regarding which a person is obviously better qualified to judge than any of his fellows. (Ibid., pp. 15-16)

To answer this objection I reiterate that one trusts decisions (one's own or others') that are well informed and well reasoned. By opting to trust and accept well informed and well reasoned decisions one does not only exhibit subjective concerns for one's own welfare, but also due consideration to objective conditions and factors.

By being well informed I mean that one is well aware of one's environment, the basic goods one is already provided with, those that are not provided but ought to be, the economic conditions obtaining in one's society and the limits of the resources one's society can allocate toward welfare provisions. These circumstances are presented to the individual through the individual's own observations and through observations made by other persons or institutions one considers credible. Part of the information, in the form of opinions or analyses, may be supplied by experts, or even qualified persons outside one's own society, for these people may have valuable insights regarding welfare standards because of their detachment. This information defines the limits to one's welfare expectations. Moreover, one has to make decisions regarding welfare with concern for the future, and not only in connection with one's current position. Nevertheless, it is clear that to be well informed does not imply that one is required to have all the information possibly related to deciding matters of welfare. Such a requirement would overwhelm the person and would be outside of her or his processing capabilities. Thus, imposing such a requirement would become an obstacle in the decision making process. What is important is that a person obtains relevant information, and is able sufficiently to understand and use

this information in the decision making process. After all, to take an example from another area, one does not need to know fully and understand the theory of relativity or be a nuclear physicist in order to be justified in supporting the ban of nuclear weapons.

Providing good reasons for one's decision may not require knowledge of high-level principles, nor fluency in logic. It does require, however, that one can consistently and coherently explain, based on relevant information, one's evaluation of current welfare conditions and one's reasons to propose different future conditions. Being the referent of one's own welfare profile, or being the origin of a personal evaluation of welfare conditions in one's own society, does not automatically make one best qualified to judge the adequacy of present or future standards of welfare. Yet, being well informed, and being able to give good reasons for decisions regarding welfare, justify the high degree of trust and acceptance one attaches to such decisions. However, the most important thing one has to keep in mind when one decides about welfare levels is that the provision of primary goods is meant to satisfy needs and not personal or general desires. Once the person deciding recognizes and applies this constraint to the decision making process, and once this person is well informed and reasons well, her decisions will express objective judgments about welfare rather than unrealistic expectations or desires. Of course one may make mistakes. That is why having recourse and being able to revise decisions in the future increase the degree of trust and acceptance one attaches to decisions so conceived. Imposing these conditions on the decision making process makes participation in the political process, by which the largest overlapping agreement is established, not about mere subjective desires, but about impartial and adequate standards of living and welfare suitable for the person deciding as well as for all other members of this society. With this I believe the objection has been fully met.

In making well informed and well reasoned decisions regarding personal welfare and standards of welfare in one's society, one trusts oneself the most, and accepts the opinions or decisions of others relative to the degree to which one trusts them. In the type of democracies in which we are interested, however, personal decisions do not usually determine welfare policies. The power to make such decisions is normally vested in elected officials. Individuals must trust these representatives first, in order to accept the decisions made by them. Members of society, who trust certain representatives, are willing to grant responsibility and power to make such decisions to these trusted representatives. Those members of society who do not trust the representatives who end up with the power to make decisions regarding welfare feel justified in not liking these decisions, even though they may end up living under policies patterned by such decisions. They will probably be bitter about being governed by such decisions, and look for the first opportunity to replace representatives they do not trust with those they trust. Thus, trust is directly linked to who should be empowered with the responsibility to make decisions regarding welfare, as well as to the degree of acceptance attached to such decisions.

In sum, let us say that one would grant the responsibility to determine the standards of welfare in one's society to those one trusts. But, normally, the officials who are responsible for determining welfare standards are not on many citizens' most trusted list either because of lack of familiarity, or because of personal factors, or because of doctrinal differences. Thus, when it comes to determining the set of primary goods and the levels and quality of their supply, one may not be too keen on trusting and accepting the decisions of those who are actually making the required decisions. The general division between libertarians and welfarists may be useful in explaining the grounds for their mistrust. If we divide the population in the way we divided our theoretical space, then libertarians would not trust welfarists' decisions regarding standards of welfare, and welfarists' would not trust libertarians' decisions regarding welfare standards. The

problems of whom to trust with the responsibility to determine standards of welfare, and whose decisions to accept, are thus closely related to the normative priority problem in the way I discuss next. Though the above account of trust is minimal and vague, it seems to me sufficient for our discussion of welfare.

2.2: The normative priority problem

2.2.a: Introduction to the normative priority problem

By 'the normative priority problem' I mean that when, in a democracy, issues of justice involve a conflict between liberty and equality, the effects of the principle that gets the normative priority standardly override the effects of the secondary principle. The normative priority problem in liberal democracies is not exclusive to the sphere of distributive justice. However, I will argue, it has a blocking influence on the feasibility of devising principles and models for distributive justice needed to supplement the initial plausibility of instituting widely accepted welfare standards.

For clarity and simplicity of argumentation, I will step back from my previous lumping together of egalitarians and non-strict libertarians under the welfarist banner. (Chapter 1, Sec. 1.3.d) Libertarians (strict libertarians, to be precise) believe that liberty overrides equality under all circumstances. Egalitarians believe that equality is the overriding principle. Non-strict libertarians believe in the superiority of liberty, but in matters of welfare they are willing to yield to the principle of equality. This puts non-strict libertarians in an intermediate position where they are more willing than (strict) libertarians to negotiate and compromise. However, integrating this position into my explication of the normative priority problem will make the exposition unnecessarily complex. In order to simplify my exposition of the normative priority problem, I set the non-strict libertarian position aside for the time being. I will bring it in later, when it can comfortably

be integrated into the discussion regarding the institution of welfare standards. So, for the time being, and for heuristic purposes, I explicate the normative priority problem as a conflict between (strict) libertarians and egalitarians.

Libertarians and egalitarians are divided on how to prioritize the two fundamental democratic principles, liberty and equality. Where libertarians accord absolute priority to liberty, egalitarians argue for the necessary priority of equality. My thesis here is that the normative ranking of the two principles is based on a common doubt, the mistrust of concentrated power. This discord affects the way libertarians and egalitarians approach the establishment of adequate welfare standards. In connection to welfare, the mistrust of concentrated power includes a mistrust of having the power to institute welfare policies concentrated at the hands of a few (people or organizations) who may not be sensitive enough to the wider range of interests of the general membership. Where libertarians see the priority of liberty as a bulwark against the excesses of government power, egalitarians view the priority of equality as a defense against uncontrolled economic power. I have mentioned an example of this mistrust of concentrated power when discussing the events at Quebec City in April of 2001. (Introduction)

When working out the problem of distributive justice in democracies three options present themselves. In the first liberty gets a normative priority over equality. Libertarians such as Hayek and Nozick have advocated this position. The second option gives a normative priority to equality over liberty. Egalitarian thinkers from Marx to Nagel have maintained this view. I argue that both views fail to eliminate the mistrust of concentrated power. When libertarians, by giving priority to liberty, aim to prevent the possibility of government oppression, they do not remove the likelihood of economic domination and may therewith encourage it. Egalitarians aim at neutralizing the worry of economic domination by giving priority to equality. But, they are unable to block the likelihood of excess government encumbrance. Thus, while both sides aim at eliminating their own

version of the mistrust of concentrated power, neither is able to eradicate it completely for everyone. In this sense, each side gives priority to the principle that reduces its greatest skepticism, and at the same time may create a situation that the other side doubts the most. I would like to argue against these two options and show that the normative priorities they advocate are erroneous. I believe that these erroneous priorities make up a major obstacle to establishing an overlapping agreement regarding adequate welfare standards. Their elimination, I argue, is an important precondition for a feasible political procedure of negotiations and compromise by which such an agreement can be reached. Therefore, I devote much attention to the explication and elimination of the normative priority problem. I shall begin with discussing some libertarian and egalitarian approaches to this problem. Then, I will present the general problem. Next, I will discuss the normative priority problem within distributive justice, as it relates to determining adequate standards of welfare. I shall argue against giving either principle a normative priority over the other and present some conditions on the determination of welfare standards that follow from the elimination of the normative priority problem.

2.2.b: The libertarian approach to the problem

F. A. Hayek

F. A. Hayek, in *The Road to Serfdom* (1944) argues that liberty is a stockade against economic planning. He advocates a free economy based on individualism over a 'planned' economy based on 'collectivism'. Hayek objects to economic planning because "Economic control is not merely control of a sector of human life which can be separated from the rest; it is the control of the means for all our ends." (1997 edition, p. 101) Hayek warns that egalitarian economic planning methods such as central planning and state coercion are the same as those used by authoritarian or totalitarian regimes. While economic planning aims at

establishing a higher degree of equality within a state, it carries the risk of stepping back into social formations that we took long to overcome.

Competition, asserts Hayek (Ibid., pp. 41-48, 54, 102, 105, 108-11), is the fundamental principle of a free market economy. Within a free economy, the price of commodities and levels of production adequately register circumstances – such as demand and supply and availability of resources – obtaining in a particular society at a specific time. Changes in those circumstances are reflected in the fluctuation of prices and production. Moreover, Hayek says, competition allows individual expression of talents and wants. Individuals use their talents to produce what they can and what they believe they and others want and are willing to buy within their given situations. Hence, competition is an effective way to coordinate individual efforts. In this sense a free economy also provides a reliable guide for individuals when they plan for the future and act on such plans. Furthermore, argues Hayek, since freedom implies responsibility for voluntary action, it means that producers, sellers and buyers are responsible for the benefits as well as the costs of the goods manufactured, sold and bought in a free economy. This sort of responsibility also implies that participants in a free economy are at least partially accountable for the effects manufacturing and products have on common assets such as the environment. In this way a free and competitive economy can accommodate some of the interests common to all members of society (I will return to this feature of a free market economy in my discussion of the second part of Hayek's view below). Those, like Hayek, who believe in the free market regard "... competition as superior not only because it is in most circumstances the most efficient method [of coordinating human efforts] known but even more because it is the only method by which our activities can be adjusted to each other without coercive or arbitrary intervention of authority." (Ibid., p. 41, my brackets)

On the other hand, argues Hayek, those who advocate a planned economy usually do so for the sake of some sense of the common good or general welfare.

However says Hayek.

The welfare and the happiness of millions cannot be measured on a single scale of less and more. The welfare of people, like the happiness of a man, depends on a great many things that can be provided in an infinite variety of combinations. . . . To direct all our activities according to a single plan presupposes that every one of our needs is given its rank in an order of values which must be complete enough to make it possible to decide among all the different courses which the planner has to choose. It presupposes, in short, the existence of a complete ethical code in which all the different human values are allotted their due place. (Ibid., p. 64)

In the absence of such a scale and ethical code, economic planning cannot succeed. Moreover, we cannot rely on a general agreement among people regarding such a comprehensive scale, argues Hayek, because most people have not had the occasion to analyze and form opinions about all the elements that compose a scale like this. That is why Hayek says that on most issues involved in economic planning most people either have no opinion or they have conflicting opinions. Ideals such as the 'common good' or 'general welfare' are insufficient as bases for planning because they are as problematic as the idea of a comprehensive ethical code. (Ibid., p. 65) Even if the economic planner tries to import some criteria external to economics, such as a particular moral code, in order to commensurate needs and economic factors, things do not get any better. For no amount of learning and available information has yet resulted in a single moral doctrine which may sustain a definite ordering of social relations and, by implication, of economic activity. "The essential point for us is that no such complete ethical code exists." (Ibid., p. 65) concludes Hayek.

The lack of such an exhaustive ethical code or a comprehensive scale of values makes, according to Hayek, the economic planner's selection of a particular moral theory, or a scale of values, arbitrary. This is so because the selected criteria are representative of the views of just those who at a certain point in time have the

power to plan. Yet, at the same time, such an arbitrary code may not be representative of the interests of some other members of society. Indeed, government action is usually based on its officials' selected moral code and the interests they believe are more important. Nevertheless, once such a code or scale is selected, it determines the whole structure of the economy and society. This means that the liberty of some to pursue their interests may get a low priority in the economic plan, or may even be pushed outside of the plan, which amounts to a violation of their liberty.

This infringement on liberty, argues Hayek, has further unwanted consequences, because "Once government has embarked upon planning for the sake of justice, it cannot refuse responsibility for anybody's fate or position." (Ibid., p. 118) Assuming, (1) that the government which engages in central planning does not aim at eliminating but only at reducing social and economic inequalities, and (2) that planning can not be applied only to the economic sector, Hayek asserts that "... once the free working of the market is impeded beyond a certain degree, the planner will be forced to extend his controls until they become all comprehensive." (Ibid., p. 117) For the moment, let us bracket the meaning of 'beyond a certain degree', to which I will return below when discussing Hayek's conditions for justified limited planning. Hayek points out that central economic planning, when it inevitably becomes all comprehensive, determines not only the workings of the market, but also the social and economic positions of individuals. In planning an economy, those who have the power to plan decide what goods are to be produced and what resources are to be used. This, in turn, makes some producers of goods and some owners of the means of production well-off and others worse-off. In this sense, the responsibility for planning is also the responsibility for social and economic inequalities.

Inequality is undoubtedly more readily borne, and affects the dignity of the person much less, if it is determined by impersonal forces than when it is due to design. In a competitive society it is no slight to a person, no offense to his dignity, to be told by any

particular firm that it has no need for his services or that it cannot offer him a better job. (Ibid., 117)

But in a planned society, where the economy is not free and not competitive, being let go may be equivalent to being excluded from society. In such a society, being unable to pursue a better or more desirable employment, because such an alternative employment is not within the economic plan, may lead to frustration and alienation. Moreover, in a planned economy the responsibility to get a job, or to pursue an alternative job if one's current job is not satisfactory, may not fall within the individual's domain. Indeed, from the point of view of excluded or frustrated individuals, the blame for their condition lies squarely with those who are responsible for economic planning. Given that the economic planner may choose, for the sake of efficiency (at least in the initial stage of establishing a planned economy,) to restrict the types of production and employment opportunities, the number of excluded or frustrated individuals may be quite large. As the number of such individuals grows, and as their alienation and frustration increase, the stability of the 'planned state' is increasingly at risk.

So far, I presented Hayek's arguments in support of the (strict) libertarian advocacy of giving liberty a normative priority over equality. At this point, however, I would like to introduce a second part of Hayek's thought that is representative of the libertarian welfarists' position. This so-called second part represents Hayek's view of the possibility of justifying institutionalized welfare under some specific conditions. I would like to emphasize the need to keep these two parts of my representation of Hayek's thought separate since I use them for two different purposes. I use the former, first, part to explicate the reasons libertarians characteristically give for the normative priority of liberty. And I use the following, second, part as a way of presenting the creed of the libertarian welfarists' view. In this way I am using Hayek's work for two different purposes. In using the words 'first' and 'second' I do not intend to imply that the two parts

are of equal weight and scope in Hayek's work. Indeed, this so-called second part is quite limited in space and scope.

Despite the criticism of planned economy and planned society, in what I have called the first part of Hayek's view, in other parts of his work Hayek allows for some partial and justifiable planning of the economy. He acknowledges that in a free market economy some but not all the burdens can be the sole responsibility of individual marketeers. The environment, infrastructure, the legal system, etc., according to Hayek, require the active involvement of the state. "Nor is the preservation of competition incompatible with the *extensive* system of social services – so long as the organization of these services is not designed in such a way as to make competition ineffective over wide fields." (Ibid., p. 43, my emphasis) And when it comes to specifying the list of services Hayek believes liberal democracies should provide to its citizens, he presents a set of goods and services similar to the one suggested by Rescher (sec. 1.4.a above). Hayek argues that "There is no reason why in a society which has reached the general level of wealth which ours has attained the first kind of security [*'security against severe physical privation' and 'the certainty of a given minimum of sustenance for all'*] should not be guaranteed to all without endangering general freedom." (Ibid., p. 133, my brackets) Moreover, Hayek asserts that " . . . there can be no doubt that some minimum of food, shelter, and clothing, sufficient to preserve health and the capacity to work, can be assured to everybody." (Ibid., p. 133) In addition, Hayek supports state assistance and social insurance in cases of natural disasters such as sickness, accidents, earthquakes, and economic emergencies such as large-scale unemployment. (Ibid., pp. 132-4) These aspects of economy, Hayek asserts, may be justly planned, so long as planning does not go *'beyond a certain degree'*. Such a partially planned economy, if designed and implemented under appropriate constraints, argues Hayek, is not only justified and useful, but is also compatible with liberty and competition.

Hayek specifies at least three constraints that when imposed demarcate that certain degree up to which justified partial economic planning can be legislated and implemented in liberal democracies. The first constraint has to do with the nature of the laws and rules that govern such partial planning.

An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other. Even the most essential prerequisite of its proper functioning, the prevention of fraud and deception (including exploitation of ignorance), provides a great and by no means yet fully accomplished object of legislative activity. (Ibid., p. 45)

Hayek advocates what he calls the 'Rule of Law'. This legal system is constructed of formal laws that prescribe, in general and in advance, how the government will react in certain types of situations, without reference to particular instances. As an example of such laws, Hayek mentions traffic laws that control the flow of traffic yet do not tell people which road to take. " . . . that they are merely given the form most likely on the whole to benefit all the people affected by them, is the most important criterion of formal rules in the sense in which we here use them." (Ibid., p. 83) Because they are formal, and do not aim at specific persons, such laws do not involve giving preference to certain needs or wants of particular individuals. In applying formal rules to matters of welfare, " . . . the government confines itself to fixing rules determining the conditions under which the available resources may be used, leaving to the individuals the decisions for what ends they are to be used." (Ibid., p. 81) Thus, formal rules are instrumental in helping people achieve their goals without favoring any particular goal. The rules of planning are designed to enable rather than coerce individuals to achieve the goals of their choice.

The Rule of Law thus implies limits to the scope of legislation: it restricts it to the kind of general rules known as formal law and excludes legislation either directly aimed at particular people or at enabling anybody to use the coercive power of the state for the purpose of such discrimination. It means, not that everything is regulated by law, but, on the contrary, that the coercive power of the state can be used only in cases defined in advance by the law in such a way that it can be foreseen how it will be used. (Ibid., p. 93)

The second restriction Hayek imposes on justified partial planning limits the extent of government involvement in pursuing, in Hayek's language, 'common ends'. The problem is how to limit the power of the state and its officials from unnecessarily infringing on individual liberty while designing and acting on justified partial planning. As we have seen above, Hayek argues that the common good or some similar notions can not be adequately defined since there is no one ethical code and no one comprehensive scale of values available for the planner. However, Hayek asserts, in the case of partial planning, (which aims at those social goods and services which he believes a liberal democracy should provide.) general agreement may serve to define the limits of government activities, i.e., the extent to which it can infringe on individual liberty.

Common action is thus limited to the fields where people agree on common ends. Very frequently these common ends will not be ultimate ends to the individuals but means which different persons can use for different purposes. In fact, people are most likely to agree on common action where the common end is not an ultimate end to them but a means capable of serving a great variety of purposes. (Ibid., p. 67)

There is a twofold restriction here. For clarity, I will treat the two restrictions in reverse order. The second part of the quotation above says that people are likely to agree not on ends but on enablements necessary to achieve ends. And the first part of the quotation says that government can only plan and act on those enablements 'people' agree are necessary. In other words, Hayek maintains that government social policies, or welfare policies, should be restricted to just these goods and services considered necessary enablements for pursuing various ends. Social policies that are restricted in this way, concludes Hayek, do not constitute an unjust infringement on individual liberty.

But even if such an overlapping agreement on a range of enablements can be arrived at, it may be the case that the set of actionable goods and services exceed what available resources can satisfy. In this case, how can people as well as planners decide which primary goods are to be provided and which are not?

It is the essence of the economic problem that the making of an economic plan involves the choice between conflicting or competing ends – different needs of different people. But which ends do so conflict, which will have to be sacrificed if we want to achieve certain others, in short, which are the alternatives between we must choose, can only be known to those who know all the facts; and only they, the experts, are in a position to decide which of the different ends are to be given preference. It is inevitable that they should impose their scale of preferences on the community for which they plan. (Ibid., p. 72-3)

Most people are not aware of all the relevant information involved in planning the economy. Some may not be interested in acquiring such information. Others may not have the ability to process such information. There are those who may not trust themselves with such decisions, or do not want to take the responsibility for such decisions. And there are those who would like their elected officials, or their spiritual leaders, or other persons they consider competent, to make those decisions. Moreover, some people may not want to participate in the democratic process of reaching consensus altogether. “We must not deceive ourselves into believing that all good people must be democrats. Many, no doubt, would rather entrust it to someone whom they think more competent.” (Ibid., p. 148) Only experts, according to Hayek’s third restriction, have access to the information and the processing skills required for a just discrimination between common ends. And even if they may be wrong at times, or influenced by their own opinions and beliefs, they are best equipped for such determinations. Thus, argues Hayek, even those people who have the power to make decisions regarding welfare in their society must adhere to the advice of experts.⁶

To sum up, in the so-called first part of Hayek’s view, Hayek argues for the preservation and supremacy of liberty for two major reasons. First, he believes that the free market and the principle of free competition register the true social and economic conditions of society, most effectively coordinate human interests.

⁶ For more about these issues, see also Hayek “The Use of Knowledge in Society” (1945); in T. Machan, ed., *The Libertarian Reader*, 1982, pp. 67-75.

needs and interaction, adequately distribute some degree of responsibility, and require the least amount of government infringement on liberty. Second, any planned economy, which implies a planned society, must rely on a comprehensive moral code or scale of needs for the sake of establishing a greater degree of equality or fairness. But no such code or scale is available. This makes the selection of any scale of needs or moral code arbitrary. Such a selection inevitably leads to unjustified inequalities for which the government is responsible, and which may lead to the instability of society. These two reasons are the main arguments libertarians utilize for giving a normative priority to liberty over equality under normal conditions. Indeed, in the so called second part of Hayek's view, Hayek, unlike strict libertarians, allows for some degree of economic and social planning. But such planning can only be justified under the three conditions specified, or else planning may put us back on 'the road to serfdom'. Thus, according to the so-called first part of Hayek's view, the normative priority of liberty and its political and economic implications need to be recognized and acted on.

Robert Nozick

In a vein, similar to the so-called first part of Hayek's view,⁷ Nozick (1974) argues that liberty overturns equality in principle and practice. Nozick maintains that individuals in general, and members of just democracies in particular, have the right to act from self-interest and the right not to be prevented from acting on their interests, so long as they do not violate similar rights of others. The state, according to Nozick, is an association whose sole aim is to provide the security and stability required for the preservation of those individual rights.

Our main conclusions about the state are that a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified; and that the minimal state is

⁷ Indeed, Nozick objects to the so-called second part of Hayek's view regarding welfare. (1974, pp. 158-9)

inspiring as well as right. Two noteworthy implications are that the state may not use its coercive apparatus for the purpose of getting some citizens to aid others, or in order to prohibit activities to people for their *own* good or protection.(Ibid., p. IX)

Moreover, argues Nozick, any state that is more extensive than the minimal state must use some pattern of distribution which is not only hard to find, as indicated by Hayek, but also violates the rights of some portions of society. Nozick acknowledges that members of society obviously want their society to look and be just. "But must the look of justice reside in a resulting pattern rather than in the underlying generating principles?"(Ibid., pp. 158-9) Therefore, Nozick supplements this view of the minimal state with a distributive justice theory called the entitlement theory. (Sect. 1.2.d above)

Nozick objects to *end-states* or *patterned states* (similar to Hayek's *planned* societies) because they violate individual liberty, and because patterned states are inherently unstable. One of the ways Nozick illustrates how patterned states violate liberty is presented in the Wilt Chamberlain story. (Ibid. pp. 160-4)

Roughly, the story goes as follows. Assume that a pattern of justice is selected and a just distribution is established. In particular, under such conditions Chamberlain is entitled to a certain income. Next, through voluntary means on the part of Chamberlain and those who are willing to pay more to see him play basketball, Chamberlain earns an income larger than the one he was to receive under the established pattern. No violation on liberty is involved since both Chamberlain and his spectators are engaged in a voluntary exchange. Of course, Chamberlain does satisfy all the obligations implied by the original pattern. Now, if no one objects to the new pattern of distribution, in which Chamberlain holds more and the spectators who enabled him to hold more hold less, then, Nozick argues, the new pattern is just and entitlement theory is right. But if some, say the planners and some parts of the population, argue that the new distribution is unfair and conflicts with the selected pattern, then, Nozick argues, any attempt to reject the new pattern and re-establish the original pattern constitutes a violation of the

liberty of Chamberlain and his spectators as well as a rejection of the entitlement theory. The Chamberlain story illustrates, says Nozick, that

. . . no end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives. Any favored pattern would be transformed into one unfavored by the principle, by people choosing to act in various ways: for example, by people exchanging goods and services with other people, or giving things to other people, things the transferrers are entitled to under the favored distributional pattern. (Ibid., p. 163)

The continuous coercive interferences, required for the preservation of a pattern, constitute the kinds of violation of liberty and use of government power that Nozick believes are unjustified. A minimal state, on the other hand, does not have the power or the need to interfere in such ways.

Moreover, not only do patterned states violate liberty, argues Nozick, they are also inherently unstable. For,

It might be objected that all persons voluntarily will choose to refrain from actions which would upset the pattern. This presupposes unrealistically (1) that all will most want to maintain the pattern . . . (2) that each can gather enough information about his own actions and the ongoing activities of others to discover which of his actions will upset the pattern, and (3) that diverse and far-flung persons can coordinate their actions to dovetail into the patterns. (Ibid., p. 163)

Assuming that all three conditions are continuously satisfied in a patterned state, according to Nozick, is assuming too much. Realistically, some people may not believe the selected pattern is just and may choose to act in ways that upset the pattern. Others may not be in an informational position from which they can coordinate their actions with the actions of others in a way that preserves the pattern. Yet others may not be satisfied with a pattern that expresses a compromise between their favorite doctrines of justice and other doctrines that are radically different than their own. In turn, these sorts of people may take actions that violate the pattern, causing it to be unstable. The state, in such cases, must use

its coercive apparatus to force violators into behavior that conforms to the pattern. But such use of state power, repeats Nozick, is a violation of the liberty of these dissidents. Nozick does acknowledge the possibility of a very weak pattern the maintenance of which may not result in a violation of the three presuppositions. But, he argues, that in any case where the pattern aims at offsetting inequalities or aims at increasing equality, such a pattern will inevitably be overturned by the free actions of those who do not accept the pattern or do not know how to preserve it. In Nozick's words, "Any distributional pattern with any egalitarian component is overturnable by the voluntary actions of individual persons over time . . ." (Ibid., p. 164) Thus, concludes Nozick, for theoretical and practical reasons – the inevitable violation of liberty, the impossibility of finding and preserving a pattern acceptable to all, and the danger of instability entailed by patterned states – should move us to give liberty a normative priority over equality.

In conclusion, libertarians such as Hayek⁸ and Nozick interpret liberty as the principles of self-interest and non-interference. Hayek argues that a planned economy and a planned state infringe on free competition that is the fundamental principle of free economy and state. He also argues that there is no comprehensive scale of needs or a complete ethical code necessary for planning. Central planning, which unfairly determines socio-economic positions, and the state coercion required for the maintenance of such planning carry the risk of converting liberal democracies into totalitarian regimes. Thus, he concludes that liberty should be given a normative priority over equality. Nozick argues that the establishment and maintenance of patterns of distributions are unrealistic and in principle overturnable by individual actions. And whenever the state uses coercion to re-establish patterns that are upset by individual free actions, the use of coercion furthers the violation of individual liberty. Thus, Nozick clearly advocates the supremacy of liberty over equality. As I have mentioned before, I take Nozick's

⁸ Again, I take the liberty of calling Hayek a libertarian here for heuristic reasons, even though I should properly call him a non-strict libertarian.

1974 position to be representative of strict libertarianism. The reasons advanced by both thinkers represent the central arguments put forward by libertarians for giving liberty a normative priority over equality in just democracies.

2.2.c: The egalitarian approach to the problem

Egalitarians argue that giving liberty a normative priority not only undermines the value of the equality presupposed by libertarians, but also the justification and general conditions of democratic societies. Egalitarians, who give equality a normative priority over liberty, do so from a variety of standpoints. To begin with, analytically, it seems that liberty presupposes equality since by definition individual liberty, as a political value, must be distributed *equally* among members of any democratic society. G. A. Cohen (1989), for example, when presenting the 'leftist' reply to libertarianism asserts that "... freedom should give way to equality, since justice demands equality, and justice comes before all other political values." (Ibid., p. 113)

Karl Marx

Karl Marx, in his essay "On the Jewish Question" (1843) argues that human beings may live authentic lives, according to their own nature, only as social beings, as equal members of a community united by cultural and historical bonds. Otherwise, in the absence of such a community of equally socialized beings, liberty and other political rights bring about no more than the life of egoistic individuals who must be coerced into adhering to the laws of the state. According to Marx, the French Revolution missed its proper mark. "The *political revolution* dissolves civil society into its elements without *revolutionizing* these elements themselves or subjecting them to criticism." (*The Marx-Engels Reader*, 1978, p. 46) Disappointed with the results of the French Revolution and its ripples around the world, Marx argues that the revolution overthrew the feudal state but preserved its functions. "Let us notice first of all that the so-called *rights of man*, as distinct from the *rights of the citizen*, are simply the rights of a *member of a*

civil society, that is, of egotistic man, of man separated from other men and from the community.” (Ibid., p. 42)

Marx's disappointment arises from the contrast between his own vision of the equal, free and cooperative citizen, and the limited sense of citizenship characteristic of civil societies. In this latter sense, says Marx, *liberty* is the right to be an isolated monad, an egoistic individual. *Equality* is merely the extension of this sense of liberty to all and is no more than equality before the law, of protection and of punishment. *Security* enhances isolation by preserving the life, rights and property of the individual only. And the right to *property* is nothing but the right to own property and dispose of it as the owner wishes. (Ibid., pp. 42-3)

These rights, Marx argues, fall short of the real aims of human emancipation. Yet,

The matter becomes still more incomprehensible when we observe that the political liberators reduce citizenship, the *political community*, to a mere *means* for preserving the so-called rights of man; and consequently, that the citizen is declared to be the servant of egoistic “man”, that the sphere in which man functions as a species-being is degraded to a level below the sphere where he functions as a partial being, and finally that it is man as a bourgeois and not as a citizen who is considered the *true* and *authentic* man. (Ibid., p. 43)

In other words, Marx roughly says that basing political theory and the basic structure of society on the principles of self-interest and non-interference does not actualize the full potential of individuals to become full members of the human kind and of society. Under such principles, Marx argues, the only authentic life available to individuals is egoism, and the true nature of humans is reduced to the life of ‘abstract citizens’, deprived of adequate relations with others and with the state.

Nevertheless, says Marx, we have the option to change our lives and bring about the life of a ‘species-being’. In such a life human beings are not only aware of themselves as individuals, but also aware of themselves as members of the human species. This ‘species-consciousness’, according to Marx, is definitive of human

nature. Thus, human beings may only live and act authentically, according to their essential nature, when they deliberately live and act as social beings.

Human emancipation will only be complete when the real, individual man has absorbed into himself the abstract citizen; when as an individual man, in his everyday life, in his work, and in his relationships, he has become a *species-being*; and when he has recognized and organized his own powers (*forces propres*) as social powers so that he no longer separates his social power from himself as *political* power. (Ibid., p. 46)

Only in a community based on justice, equality, historical awareness and cooperation, the 'rights of man' and the 'rights of citizens' merge and become a bond shared by all members. Marx believes that being a moral person— an equal citizen of a community that has recovered from all the illnesses of feudal and civil societies— is a precondition to any new and meaningful sense of liberty and the so-called 'rights of man'.

To sum up, Marx argues that liberty understood as self-interest and non-interference produces individual alienation and egoism, which are not only contrary to the true nature of human beings as social beings, but also serve as the wrong basis for society. Hence, Marx concludes, only on the basis of a community and his ideal of conscious equal citizenship may individuals realize the full meaning of their rights. And only within such social and political context, may liberty, in turn, gain its full meaning.

Thomas Nagel

In contrast to Marx, Nagel (1991), as we have seen in Chapter 1, section 1.3.b, presents an egalitarian political doctrine and a sense of distributive justice that is individualistically based. He argues for the priority of equality not on the basis of the chronological order of things but on ontological grounds. I will not repeat Nagel's argument since it was already presented in Chapter 1. Rather, let us briefly reckon that Nagel argues that impartiality is generated by the individual's recognition that her partial life experience is similar to the partial life experience

of any other person. By generalizing this recognition, one may put oneself in an impartial position from which one conceives of everyone else as equal to oneself. Nagel asserts that only on the basis of such impartiality can political theory be developed. Thus, he argues that equality is ontologically prior to political theory, to other human rights, and any meaningful sense of liberty.

Other current egalitarian thinkers, such as Raz (1994), Barry (1986) and Sandel (1984), have shifted the focus from individuality and rights-based ethics to the common good and the community. They indirectly argue for the priority of equality by maintaining that individual liberty cannot be properly understood outside the context of the community and human cooperation.

Joseph Raz

In his essay "Rights and Individual Well-Being" (1994, pp. 29-44) Joseph Raz asserts that individual interests and rights are fashioned and justified by society, and indeed, reflect the culture in which they evolve. He argues that "... the image of right as a bulwark of the right-holder's interest against the claim of others distorts the nature of the concept and its role in our thought." (Ibid., p. 43) Raz puts forward the following puzzle, "How can rights both be based on the right-holder's interests and fail to match the weight and importance of these interests?" (Ibid., p. 36) To illustrate this puzzle Raz offers a few examples, only two of which will be mentioned here. For instance, in some countries, the execution of a convicted pregnant woman is postponed until she gives birth because of her right not to be executed before delivery. "The right protects an interest of the woman, but the respect with which it is treated in some of the countries which maintain capital punishment is due to concern not for the woman but for her child." (Ibid., p. 35) Another example presented by Raz is "I, as a parent, have, in English law, a right to a periodic payment known as child benefit, which I receive because I am a parent and because benefiting me is a good way of benefiting my child." (Ibid., p. 35) In all the examples presented, argues Raz, the

weight of the right, its value or the rigor with which it is observed, does not correspond to the mere satisfaction of interests of any single right-holder. Rights are justified not only on basis of how they benefit the interests of one individual, but primarily on the basis of how they serve the interests of other people. As such, the weight or value of a right is measured by the degree to which it serves the right-holder interests as well as the interests of others.

. . . the right-holder's interests are only part of the justifying reason for many rights. The interests of others matter too. They matter, however, only when they are served by serving the right-holder's interests, only when helping the right-holder is the proper way to help others. (Ibid., p. 36)

In this sense, one benefits from rights (1) because they satisfy one's interests, (2) because they benefit others, and (3) because one benefits from the benefits of others, especially when those others are one's intimates. Nevertheless, Raz points out, "Though he gains from the benefit the right secures to others, the weight and importance of the right depends on its value to those others, and not on the benefit that this in turn secures to the right-holder." (Ibid., pp. 36-7) That is, a right cannot be valuable because it satisfies the interests of one individual. Rights are justified, and get their actual value, only when they expand from individual contexts into the public domain.

To explicate the public aspect of rights, upon which their weight depends, Raz invokes the notion of the common good. "I shall refer variably to the 'general, or common good or interest' in its traditional sense, in which it refers not to the sum of the good of individuals but to those goods which, in a certain community, serve the interest of people generally in a conflict-free, non-exclusive, and non-excludable way." (Ibid., p. 37) This sense of the common good, thus, is rooted in a particular community. It is 'conflict-free', which means it is based on a consensus, if not unanimity. And it is based on equality since the goods that serve the common good are not distributed discriminately among people, and are reflective of the interests of all people, as suggested by Raz's use of the terms 'non-

exclusive' and 'non-excludable'. "The protection of many of the most cherished civil and political rights in liberal democracies is justified by the fact that they serve the common or general good." (Ibid., p. 37) Based on this conception of the common good, Raz argues that the value of such rights primarily depends on the common good.

The argument has two stages. The first establishes that the protection of individual civil and political rights serves the common good. The second shows that the common good served by those rights is, in the majority of cases, more important to individuals than the enjoyment of their own civil and political rights, and therefore that the status the rights enjoy in the liberal democracies is due to their contribution to the common good. (Ibid., p. 38)

Assuming the validity of Raz's argument, with the understanding that the establishment of the common good, though it involves controversy, is the result of a general agreement, the path to answer the original puzzle is paved.

Here, then, we have arrived at the core of the explanation of our initial puzzle: in the case of the central civil and political rights of liberal societies, the main reason for the mismatch between the importance of the right and its contribution to the right-holder's well-being is the fact that part of the justifying reason for the right is its contribution to the common good. (Ibid., p. 40)

Raz's view indirectly favors equality over liberty in that he takes the justification of rights out of the individual's domain and places it within the domain of the common good. The satisfaction of individual interests is a necessary but not sufficient condition for the value of rights. Indeed, rights cannot be justified merely because they satisfy the interests of any one individual. For rights to satisfy the necessary and sufficient conditions for their justification, they must fulfill the interests of a certain individual and the interest of others, at the same time. Otherwise, they can never reach the public domain of the common good. Thus, according to Raz, the very liberty to pursue one's interests cannot be considered a right unless it is part of the common good which serves all members of the community. In this sense, then, Raz's position can be said to give priority to equality over liberty.

Brian Barry

While examining social choice theory, in particular, the social welfare function, Brian Barry (1986) voices a strong rejection of libertarianism and anti-paternalism in favor of distinct egalitarian concerns. I offer here only a shallow glimpse into the highly sophisticated and technical arguments Barry puts forward. For clarity and compactness of discussion I will neglect the expansive economic and mathematical aspects of Barry's paper, and concentrate on what is relevant for our purposes. Barry presents the social welfare function as follows. "Suppose that we take three conditions that we would like a social welfare function to satisfy: unrestricted domain (U), Pareto optimality (P), and liberalism (L)." (Ibid., p. 12) Barry goes on to explain these conditions:

'Unrestricted domain' means that we do not place any restrictions on the range of individual preferences entering into the social welfare function. Pareto optimality is the requirement that if everybody prefers one state of affairs to a second, then the first state of affairs is 'socially preferred': that is to say, ranked higher on the social welfare function. . . . What the liberal condition means here is that each individual should be 'socially decisive' over some pairs of alternative social outcomes. (Ibid., p. 12)

According to Barry, the liberal condition does not only entail the individual's right to have control over some events in the sense that the individual may choose between pairs of alternative social outcomes: but also entails that the individual may trade control over some events (she has a right to control by the initial assignment of rights) for the control of other events (over which she has no initial control.) in cases where the individual is more interested in controlling those other events. If all goes well, and the social welfare function is given an interpretation and cranked, it is described by Barry to work as follows. ". . . if I prefer to lie on my belly rather than on my back, the social welfare function should produce the conclusion that, of the two states of the world differing only in respect of the way up I lie, the state of the world in which I lie on my belly is socially preferred." (Ibid., p. 12)

Barry goes on to discuss he calls the 'liberal paradox'⁹, which involves the incompatibility of conditions P and L of the social welfare function. I shall not completely explicate this central theme of Barry's paper, but only focus on a few issues involved. To begin with, Barry says,

The essential point about Pareto optimality, then, is that it simply calls for mutually advantageous deals to be made, but to pick one Pareto-optimal outcome out of the infinite number of Pareto-optimal outcomes we have to have an initial assignment of rights. The liberal principle is a criterion for the assignment of these rights which tells us who should start with the power to control what events. (Ibid., p. 17)

Given an initial, non-arbitrary, assignments of rights to control events, a Pareto-optimal outcome can be realized when, within a free economic system, all opportunities for beneficial exchanges between free agents have been made in such a way that that total utility or usefulness of these exchanges is maximized. That is, a Pareto-optimal situation is one where there is no possibility to make another exchange that will increase the total utility that has already been reached. If we knew, says Barry, what the original assignment of rights (satisfying condition L) would be, and the structure of the domain of interests (the structure of U), and would have some strong mathematical theory with sophisticated tools to calculate all transactions that lead to Pareto optimality (satisfying condition P), then, in principle, we could use the social welfare function to reach a unique Pareto-optimal outcome, which would define what is 'socially preferred'. This outcome could then be used to design social policy. However, says Barry, we are far from being able to satisfy these conditions in this way, especially when we are interested in real people and actual states of affairs, and not just theoretical or simplified constructs. "In the absence of such a strong theory . . . the assumption that mutually advantageous exchanges of control over events would be made until no opportunities remained would not generate a unique outcome." (Ibid., p. 18)

⁹ The 'liberal paradox' Barry refers to is a paradox generated by A. K. Sen (1970). It was subjected to much discussion thereafter.

But even if a social welfare function would yield such a unique Pareto-optimal outcome, says Barry, there would not be a conflict between this result and the principle of free choice regarding the domain of individual private action. The social welfare function applies to the domain of social or public actions or events, which should not affect the 'protected sphere', the domain of action where people are legally free to act as they will. "The only way in which we can create a conflict between a social welfare function and a genuinely liberal principle of this kind is by supposing that what is socially better should be enforced." (Ibid., p. 19) That is, whatever the calculated Pareto-optimal outcome may be, if it is to be enforced, it will violate the liberty of some in the way the strict libertarian understands liberty, which is the same sense of liberty required to maximize the total utility of free trades.

For, in the contemporary jargon, a libertarian is precisely somebody who believes that no limits should be set on the drive towards Pareto optimality. That state should not, for example, step in between a willing seller of labour (willing, that is, compared to the alternatives) and a willing buyer by prescribing minimum wage rates. Nor should it prevent people from entering into onerous contracts (e.g. at usurious rates of interest) if they regard that as advantageous to themselves. Thus, it is clear that libertarianism, so conceived, is in no sense incompatible with Pareto optimality. Rather, Pareto optimality is a natural part of the kind of social philosophy (in effect an ideology constructed out of outdated introductory economic textbooks) known as libertarianism. (Ibid., p. 20)

In other words, the drive for actual and unique Pareto-optimal state of affairs would necessitate the enforcement of all utility maximizing exchanges this outcome implies, regardless of the freedom of some not to make some of the deals, or even make deals that are less than utility maximizing. The drive for Pareto optimality, thus, may violate the principle of liberty it assumes, if it prescribes the enforcement of some such 'socially preferred' situation.

In presenting such a strong rejection of what I have called strict libertarianism and its sense of liberty, Barry leads the way to a discussion of a sense of liberty that is

compatible with liberalism and non-strict libertarianism. Liberty, according to Barry, is not the liberty to act without concern to others. Nor does it imply the necessity of making any or all deals that enhance the drive towards Pareto optimality.

I have suggested that everything turns on that phrase 'free to choose': being free to choose is not simply equivalent to not being coerced in the sense of threatened with the deprivation of a right. It has got to include the idea that not going along with the deal that is offered is an acceptable state of affairs. (Ibid., p. 26)

Barry argues for the kind of liberty that allows an individual to pass on exchanges that maximize economic utility or choose exchanges that are less than utility maximizing, for whatever personal reasons, as happens in everyday life. Thus, even if a social welfare function yields a 'socially preferred' state of affairs, it should not imply the enforcement and the actualization of such an outcome. Furthermore, Barry argues that free choice is violated in at least two additional types of exchanges the drive for Pareto optimality allows. First, he believes that when one of the parties to the exchange has a significant economic or psychological advantage over the recipient of the exchange, the recipient may not make such a choice voluntarily. Among the many examples of such cases Barry mentions are instances where the deal expresses contempt for the disadvantaged party as when individuals are contracted to dig holes and fill them up again, or where the deal is intrinsically degrading for the recipient as when individuals are turned into prostitutes. A second type of deals Barry considers as violating the principle of free choice are those that prey on the good nature of the recipients.

In effect, these involve not appealing to psychological or economic weakness but to the recipient's better nature, but in an inappropriate way. Examples would be: 'If you don't marry me, I'll kill myself': 'If you don't give me the job, it will blight my life': . . . The point of these cases is that the person is not making a threat ruled out by the usual bans on coercion. Yet at the same time there is no doubt that the person's decision is taken under duress. (Ibid., p. 25)

Barry argues that deals made under such violations of the proper meaning of free choice, even when these deals advance the drive to Pareto optimality, are unjustified. He believes that such violations of liberty warrant state interference for the protection of those whose liberty is so violated. As you recall, Hospers had advanced a similar position regarding voluntary action and the justification of some state paternalism. (Sec. 1.2.g) Indeed, Barry presents a view of paternalism similar to Hospers'.

The whole idea of anti-paternalism is, after all, that some consequences admitted to be superior should not be brought about if the means are a reduction of freedom of choice. I believe myself that anti-paternalism has got completely out of hand when it issues in objections to the mandatory use of seat belts or crash helmets. But hardly anybody would wish to say that a reduction in freedom of choice is *always* permissible (still less required) whenever it brings about better outcomes, and this is all we require for the present case. (Ibid., p. 41)

Moreover, argues Barry, this proper conception of free choice or liberty is compatible with traditional views of liberty such as Hobbes's and Mill's and contemporary views of liberty such as Hayek's. Those who understand freedom of choice in this way argue that the principles of self-interest and non-interference are valid only if they are equally distributed over the whole community. Any self-regarding action that violates the liberty of another is thus unjustified and violates the principle of liberty itself. Libertarians, who indiscriminately believe that all deals that contribute to the drive for Pareto optimality are justified, concludes Barry, either misunderstand or violate the principle of free choice properly conceived.

Barry asserts that the social welfare function fails because "What we neither have nor could have is some algorithm for taking these divergent judgments [about social welfare] and producing some 'social' judgment." (Ibid., p. 39, my brackets) This claim, according to Barry, affects not only the social welfare function, but also social choice theory in general. "If I am correct, the implication is that we cannot expect to get any help from social choice theory in analyzing rights

because the whole concept of social choice or social preference is too simple to accommodate the concept of a right.” (Ibid., p. 40) Thus, in matters of social welfare, Barry asserts, we do what we do now. We debate, compromise, and sometimes we reach agreements on the basis of which social policy can be designed. Finally, Barry says,

What we do need, in order to have a stable society, is a constitution that specifies how collectively binding *decisions* are to be taken. And if the society is to be liberal as well as stable, either the constitution or the legislation enacted under it should set out individual rights. (Ibid., p. 39)

To sum, Barry argues that the attempt to establish what is ‘socially preferred’ via a social welfare function fails because it is not possible to arrive at a unique Pareto-optimal state of affairs under actual conditions. Indeed he concludes that social choice theory is inadequate for handling rights as well as issue of social welfare. Moreover, Barry rejects libertarianism because of its inadequate sense of liberty, and because the Pareto optimality that he says libertarians hope to establish in a wholly free market economy violates the more meaningful sense of liberty advocated by traditional as well as contemporary liberals. The proper sense of freedom of choice, says Barry, must promote the principles of self-interest and non-interference under some constraints. The freedom to choose to act in self-interest does not justify harming another since it would violate the other’s right to non-interference. The freedom to choose must allow for the possibility of not choosing. It is also restricted by concern for the welfare of others, especially the worse-off. Unchecked free exchange, argues Barry, is not always the best social and political principle. A legitimate government must establish fair conditions for an adequate free exchange. Left for themselves, some people will be all too happy unfairly to benefit from the weaknesses of others. For the sake of stability of the state, a democratic and liberal government should secure and maintain the rights of its membership. Like Hospers, Barry believes that some state legislated paternalistic laws are justified. Although social choice theory has taken an important role in the general discussion of welfare, at least in the past three

decades, I join Barry in maintaining that it is inadequate to handle rights and social welfare issues in the way just represented. Therefore, for the remainder of this work I will not discuss possibilities of determining adequate standards of welfare raised by social choice functions.

Michael J. Sandel

Michael J. Sandel, in “Morality and the Liberal Ideal” (1984), contrasts liberal right-based ethics with communitarian morality and the politics of the common good. He traces the contemporary libertarian view of freedom back to utilitarianism, where the rights to self-interest and non-interference are said to maximize general happiness or utility. He, then, presents Kant’s rejection of utilitarianism on the basis that such an empirical, instrumental principle is unfit to be the basis for morality since it treats individuals merely as means to the happiness of others, rather than ends in themselves, worthy of dignity and respect. In a similar vein, says Sandel, contemporary liberals reject utilitarian approaches to morality because the utilitarian conception of the good does not take the distinction between persons seriously and conflates the plurality of diverse desires of many people into a single system of commensurable desires.

Sandel traces contemporary egalitarian liberalism to Kant’s categorical imperative that declares that treating everyone as ends in themselves is the proper basis for morality. Contemporary egalitarians, says Sandel, maintain the Kantian distinction between the right and the good, where the right is prior to the good. What is right, accordingly, demarcates the neutral framework required for a morality that does not arbitrarily discriminate between the multiple conceptions of the good prevalent in society. Such a framework ensures that individuals and groups may pursue their values and ends while no one conception of the good determines their rights, and that individual rights are not sacrificed for the sake of any singular conception of the good. In contrast to both libertarianism and egalitarianism, communitarians, argues Sandel, reject rights-based morality because, “. . .

whether egalitarian or libertarian, rights-based liberalism begins with the claim that we are separated, individual persons, each with his own aims, interests, and conceptions of the good; it seeks a framework of rights that will enable us to realize our capacity as free moral agents, consistent with a similar liberty for others.” (In *Justice and Economic Distribution*, 2nd ed., 1991, p. 247) Rights-based ethics, says Sandel, involve the views that (1) the independent self, and its basic rights, are prior to the independent self’s conception of the good, and that (2) the independent self and its rights are constituted separately from the independent self’s attachments and social roles. Sandel believes that such views are faulty since in our reality conceptions of the good are, for the most part, consequences of the environmental and cultural conditions into which we are born, which contradicts (1); and, liberty is the domain of free action permissible in a specific community, which negates (2). Moreover, argues Sandel, this widely accepted conception of the separated individual is a major contributor to why our present societies are collections of alienated individuals rather than real communities. This conception of the individual has weakened our societies since, currently, there is a lack of individual social and political involvement and little effort is made to enhance the bonds that unite society. The real danger of such a weakening, concludes Sandel, is that “Insofar as our public life has withered, our sense of common involvement diminished, we lie vulnerable to the mass politics of totalitarian solutions.” (Ibid., p. 249)

In opposition to the view of the independent self, communitarians, such as Sandel, maintain that a large part of our constitution as individuals is due to our roles as citizens and as members of certain communities and interest groups.

The communitarian critics, unlike modern liberals, make the case for a politics of the common good. Recalling the arguments of Hegel against Kant, they question the liberal claim for the priority of the right over the good, and the picture of the freely choosing individual it embodies. Following Aristotle, they argue that we cannot justify political arrangements without reference to common purposes and ends, and that we cannot conceive of ourselves

without reference to our role as citizens, as participants in a common life. (Ibid., p. 247)

As such, our needs and aims are embedded within the general conception of the good prevailing in the community in which we live. Any idea of the common good conceived by disassociated individuals, argues Sandel, is too impoverished to provide an adequate conception of the common good.

Open-ended though it may be, the story of my life is always embedded in the story of those communities from which I derive my identity – whether family or city, tribe or nation, party or cause. In the communitarian view, these stories make a moral difference, not only a psychological one. They situate us in the world and give our lives their moral particularity. (Ibid., p. 248)

Our individual constitution thus involves the history of our community, its particularity and its morality. Hence, communitarians conclude that morality is based on the common life of society, and they advocate the ideal of good citizenry and the politics of civil virtue.

Even though Sandel promotes communitarianism in opposition to both libertarianism and egalitarianism, I shall, as I have done in Chapter 1, align Sandel's communitarianism with egalitarianism for the purposes of this work. I do so because I believe that Sandel's advocacy of the common life as the basis for morality, and his promotion of the politics of civic virtue presuppose that all members of the community are political equals whose interests and liberty can only be meaningful within the context of a community that has a strong sense of the common good. Thus, I believe that Sandel's communitarianism indirectly implies the supremacy of equality over liberty.

2.2.d: The general problem

The arguments both sides put forward in favor of their preferred normative priority are well entrenched. The concerns each side expresses are sincere and important. In fact, these concerns demarcate one of the most significant philosophical divisions of our times. A solution to the tension between those who

advocate economic freedom as the basis for welfare and those who believe that society is responsible for establishing and maintaining adequate standards of welfare for all, is not forth coming. Nevertheless, I believe Sandel has the correct insight into the core of this conflict. "Where libertarian liberals defend the private economy and egalitarian liberals defend the welfare state, communitarians worry about the concentration of power in both the corporate economy and the bureaucratic state, and the erosion of those intermediate forms of community that have at times sustained a more vital public life." (Ibid., p. 248) It is this mistrust of concentrated power I believe to be the cause of and motivation for the normative priority problem. And it is the enhancement of individual involvement in public life, particularly the participation in political processes, which may yield large enough overlapping agreements, which I believe may offer a way to determine adequate standards of welfare acceptable to both libertarians and egalitarians. I will discuss the extent of individual involvement in public life required for the establishment of adequate standards of welfare acceptable to libertarians and egalitarians alike in Chapter 4.

For now, let us focus on the mistrust of concentrated power. 'Concentrated power' is here a technical term by which I mean a capacity to determine and affect all sorts of social policies and to alter the basic structure of society. Libertarians argue that the prospect of social development and prosperity depends on the amount of liberty obtaining in society. The more freedom a society secures, libertarians argue, the greater the probability that this society will flourish and its members are content. The libertarian normative priority does not, however, depend on the complete rejection of equality. After all, libertarians believe that each citizen should equally enjoy state protection of their body and property. And libertarians maintain that the necessary stability of the state benefits all members of the community. Rather, the main reason libertarians give a normative priority to liberty is their mistrust of having the power to control and direct the economy, and with it the whole society, be concentrated in government. They believe that such a

concentration of power will result in egalitarian policies that go far beyond anything the free market might yield. And they do not trust governments to limit their use of coercive power to the extent their sense of liberty legitimizes. They believe that governments endowed with the power to direct the economy are too likely to misuse this power in ways that will violate the liberty of many, especially the well-off, to act for their self-interest. They argue that it is their innovation and freedom to act self-interestedly that yield prosperity to them and to everybody else in society. Libertarians also maintain that such virtues as helping others should be up to the individual's discretion rather than be part of the official government policy. Especially when political parties, with distinct egalitarian tendencies, hold the reins of a democracy, libertarians fear that their own interests and welfare are at risk. They believe that such governments might allocate resources and raise taxes in order to provide everyone with primary goods for which libertarians believe they should not pay. In short, I argue that, given the libertarian views surveyed, libertarians advocate giving liberty a normative priority over equality because they mistrust concentrating the power to control and direct society in government.

Egalitarians, I argue, give equality a normative priority and reject the minimal state and the libertarian version of freedom because they do not believe a free economy is a sufficient condition for a just and fair democracy. They do not believe that the powers that dominate the free market, and the good will of those who enjoy economic advantage, can be trusted to bring about conditions that enable every individual to live a life that is decent. And they maintain that an unchecked economy leaves the worse-off without the means for more than mere survival. Especially when libertarian parties are in power, egalitarians worry that state resources will end up benefiting those who are already well-off, leaving those who are not behind. After all, they say, when adhering to the principle of acting in self-interest, why would the well off sacrifice some of what they have in order to improve the condition of others? They believe that enhancing social

cooperation and a strong sense of the common good requires an economy that is to some degree controlled and fair, as well as a sense of liberty that includes care for other members of society and future generations. They mistrust libertarian regimes to advance such concerns because libertarians do not consider these concerns justified or worth acting to ameliorate at the expense of freedom.

Egalitarian concerns, they concede, may lead to some state paternalism. However, acting on egalitarian concerns does not necessitate the use of the kind of government coercion that goes beyond the legitimate power of state institutions. In the case of democracies, government policies are presumed to be widely accepted by citizens since they express a general consensus (Rawls 1971, pp. 18, 517-30; Nagel 1991, pp. 33-41; Raz 1994, pp. 45-81), or are authored by experts and representatives of the general population (Elster 1992, pp. 1-17). Indeed, some reduction of absolute individual freedom is implied by egalitarian conceptions of society. For example, the case of seat-belt laws may infringe on individual liberty for the sake of a general conception of road safety, and environmental laws may curtail the profitability of factories. Nevertheless, reasonable persons may recognize that when the common good is served, their own interests are served, as well as the interests of their peers and families. Egalitarians maintain that from this kind of loss of liberty to authoritarian and oppressive regimes the road is quite long, and need not be traveled.

In short, libertarians give a normative priority to liberty over equality because they mistrust the concentration of the power, to establish state policies and the ability to alter the basic structure of society, in the hands of governments with egalitarian tendencies. On the other hand, egalitarians give a normative priority to equality over liberty because they mistrust the concentration of the same powers in the hands of business executives. Both sides do not want to put themselves in the position of having to accept the decisions of those with whom they do not share a common philosophy. They simply do not trust each other with the responsibility

to make such decisions. I hardly want to argue that only diehard libertarians and egalitarians express such mistrust. Rather, I argue that to different degrees, most of us mistrust the concentration of the power, to direct our lives and alter the basic structure of our society, in the hands of a few, whether government officials or business executives. Unfortunately, I have no solution for the general normative priority problem. Such a solution, or a possibility of a solution, is beyond the scope of this work. However, when it comes to distributive justice, it seems to me that the problem can be eliminated.

2.2.e: Instituting welfare standards – a special case of the general problem

I begin with reiterating the distinction between infrastructure primary (or basic) goods and the inclusive sense of primary goods I have made earlier (Sec. 1.4.b). I believe that there is significantly less disagreement between libertarians and egalitarians regarding infrastructure primary goods in comparison with the disagreement regarding non-infrastructure primary goods. This is so because both libertarians and egalitarians take infrastructure primary goods to be essential for the security of body and property of all members of society, as well as for the stability of the state and the maintenance of a healthy economy. However, when it comes to non-infrastructure primary goods the disagreement is intense. My aim here is to diffuse this particular disagreement. I now resume referring to 'non-infrastructure primary goods' when I mention 'primary goods'. (Sec. 1.4b)

Primary goods directly enhance the standards of welfare of all, especially the less advantaged and the worst-off. I do not aim at eliminating all social and economic inequalities. But I focus on those inequalities that place some members of society below an acceptable social minimum and those that prevent citizens, who are situated at or just above the social minima, from being enabled to realize their preferred life plans. Thus, focusing on primary goods serves to direct our attention to what I take to be the essence of the disagreement between libertarians and egalitarians in matters of welfare.

Libertarians argue that providing primary goods is not the business of the state. They maintain that the supply of such goods should be left to the workings of the free market and the good will of advantaged individuals. If one is creative, productive and acts self-interestedly, they say, one is able to participate in a free market economy in a way that yields adequate standards of welfare and the ability to conceive and act on one's choice of a life-plan. If a person is incapable of doing so, due to bad luck or natural limitations, then, there are enough well-off persons who would help this person realize her life plan. Moreover, in order to provide such goods to all members of society, the state would have unjustly to use its coercive powers to take from the well-off and give to the less advantaged. Libertarians argue that such use of coercive power violates the rights of the well-off not to be interfered with, to pursue their self-interest, and to keep or freely dispose of what rightfully belongs to them. Furthermore, libertarians assert that social and economic inequalities are natural and healthy in a free and competitive economy. Inequalities motivate the disadvantaged to improve their lot and the advantaged to keep theirs. Accordingly, curtailing inequalities reduces the incentive to use one's talents and energy in the competition of the free market. If these tendencies are suppressed and competition withers, the economy is weakened, and with it the whole society. For these reasons libertarians promote the minimal state, where liberty is normatively prior to equality, and where welfare policies are either non-existent or kept to a minimum. Thus, libertarians give a normative priority to liberty over equality because they mistrust the concentration of power – to establish distributive justice policies that serve libertarian interests and values – in the hand of governments with egalitarian tendencies.

Egalitarians, on the other hand, argue that in the same way that the state is obligated to ensure political and legal equality to its membership, it is obligated to enable its members to achieve decent standards of living and more. Egalitarians argue that one's station in life, for the most part, is not deserved, but is the

outcome of luck, the environment and life experience. Through their own efforts, without help from the state, most people are not able significantly to improve their station, especially in comparison with those who are advantaged from birth, and more so when advantaged positions are scarce. They hold that no individual is strong enough, even when the individual tries long and hard, to change the basic structure of society or modify undeserved inequalities. Moreover, egalitarians argue that undeserved inequalities require amelioration. Especially in prosperous societies (such as ours,) it seems unfair that some, but not every citizen, control and disproportionately benefit from the resources of the community. What seems fairer to egalitarians is a state of affairs where all members of society share control of, and benefit from the total resources of society. That is not to say that all should control identical parts of these resources or that all should draw identical benefits. Rather, egalitarians believe that fair sharing of control and benefits can bring about a situation where each member of society is enabled at least to achieve an adequate standard of decent living. In the same way that we have adopted the view that the physically impaired should not be discriminated against, we should embrace the view that those who are culturally, economically or socially impaired should be provided, by society and through the government, with the goods that may offset their undeserved condition. For these reasons egalitarians promote the welfare state, where equality is normatively prior to liberty, and where welfare policies are extensive and robust. Thus, egalitarians give a normative priority to equality over liberty because they mistrust the concentration of power – to establish distributive justice policies that serve egalitarian concerns and values – in the hand of governments with libertarian tendencies. Nevertheless, it is clear that neither side completely rejects the validity of the principle the other holds dearly. I conclude, however, that the deeper motivation for promoting a normative priority has to do with the worry about what happens when the other side has the power to determine economic and social policies.

With this I have demonstrated what I have set out to show, namely, that both sides advocate giving their preferred principle a normative priority for the same reason – the mistrust of concentrated power at the hands of the opposition. Next, I will show that the normative priority each side claims for its preferred principle fails them both. Nevertheless, this misguided mistrust may explain why, given the initial plausibility of instituting some levels of welfare in a just democracy (Chapter 1), libertarians and egalitarians disagree on who should have the power, and what methods are to be used, to establish adequate standards of welfare.

2.2.f: The common error

Concentrated power comes at least in two kinds: economic power and government power. In our scheme of things, these are two aspects of the same phenomenon. Concentrated power, economic or governmental, determines welfare standards obtaining in society at a given time through economic factors or through government policies and action. In either case, those who have that power determine the welfare of the community and its members. Thus, resolving one aspect of the mistrust of concentrated power does not resolve the problem completely, since it leaves the other kind of mistrust alive and kicking. Libertarians believe that giving liberty supreme status solves their mistrust of government power. But, of course, they leave society at risk of being dominated by economic powers that flourish in the seedbed of liberty. Egalitarians, on the other hand, believe that giving equality a leading position solves the mistrust of economic power. But, of course, they leave society and individuals subject to possibly unfettered government power.

To illustrate my point I offer the following argument:

1. Libertarians and egalitarians are motivated to give a normative priority to liberty and equality respectively in order to eliminate their mistrust of concentrated power.

2. Both, on their own, through maintaining such a normative priority, fail to accomplish their goal.
3. Thus, I submit that giving any such principle a normative priority must be rejected.

I have not resolved the general normative priority problem. Yet, based on the above I conclude that when issues of welfare are determined, both normative priorities should be eliminated.

2.2.g: The effects of the elimination of normative prioritization on welfare

Subsequent to the elimination of the normative priority problem any political theory or model of welfare (as defined in sec. 1.4.b above), which is to gain the acceptance and trust citizens must satisfy the following no-normative-priority conditions.

- (1) Political determinations of welfare standards in liberal democracies are legitimate only if they are the outcome of theories and models that do not include any (explicit or implicit) principle or device that gives either liberty or equality a normative priority over the other.

Of course, in practice, especially in public debates, negotiations and compromise, citizens may voice opinions aligned with their preferred doctrines. However, the above condition means that when attempting to establish the largest overlapping agreement, through negotiations and compromise, claims and decisions based on the normative superiority of either liberty or equality are excluded. By imposing condition (1) I also mean that when the supply of a certain primary good gives rise to a lasting practice of giving one principle a priority over the other, the provision of such a primary good constitutes a violation of this condition. Claims and determinations that do not violate this condition are those that are based on concerns regarding the quality of life each citizen can reasonably expect, citizens'

ability to plan and act on their reasonable life plans, and the conditions that enhance social cooperation and economic growth.

Nonetheless, temporary determinations of welfare standards and policies may give either principle a temporary priority. Temporary priority is determined according to local circumstances and citizens' opinions obtaining at the time the largest overlapping agreement is established. Thus,

(2) Temporary determinations of the standards of welfare can be based on reasons aligned with libertarian or egalitarian principles or doctrines. But the legitimacy and duration of such determinations, and the legitimacy of the social and economic policies they authorize, is limited and must be reevaluated and reestablished periodically.

Accordingly, specific claims and ephemeral determinations of standards of welfare can express allegiance to one principle at the expense of the other. For example, a citizen may argue that since society is well-off, it can afford to enhance egalitarian values such as social cooperation, unity, dignity and mutual respect, by minimizing its class differentials or the difference between the better-off and the worse-off groups. Alternatively, a temporary social policy that promotes libertarian values such as efficiently acting for self-interest or applying the principle of non-interference may prompt increasing the supply or quality of a primary good such as education. But all legitimate determinations must be (a) supported by the largest overlapping agreement, (b) temporary, and (c) subject to reevaluation once their time limit expires. Given the scarcity of state resources, changing circumstances and citizens' preferences, the ephemeral character of welfare determinations is essential. The two conditions must be understood to apply to democratic procedures of establishing the largest overlapping agreement regarding adequate standards of welfare. In chapter 4 I will suggest a theory for establishing adequate standards of welfare that includes these two no-normative-priority conditions.

2.2.h: Conclusion

In the aftermath of the normative priority problem, when both normative priorities have been rejected, we are left with only one plausible alternative, the position which opts for balancing the two principles rather than giving one a normative priority over the other. At this point we may note that eliminating normative priority absolves us from having to approach distributive justice, particularly the determination of standards of welfare through legitimate political processes, with a predetermined allegiance to one of the principles. If, on the level of the general theory of justice, we are committed to such a priority, any issue of welfarism has to be settled under this commitment. On the other hand, if no such general commitment is made, none constrains us when we arrive at determining the set of primary goods and the levels and quality of their supply. The elimination of normative priority may also clear the way for citizens and those who are entrusted with the power to determine adequate standards of welfare in their community to do so through an unbiased process of negotiations and compromise.¹⁰ In the absence of normative priority to either liberty or equality the prospects of having a less constrained process of negotiations and compromise significantly increases. Nevertheless, even though eliminating the priority problem may clear out some theoretical obstacles, it does not solve the problem of finding a proper procedure or model for determining the set of primary goods and the levels of their supply.

At this point, when the explication of the normative priority problem has been completed, I return to my lumping egalitarians and non-strict libertarians together under the welfarist banner. Hereafter, when I speak of welfarists, I refer to both approaches to welfare.

¹⁰ This conclusion may, indirectly, point to the solution of the general normative priority problem. But I do not want to press the issue here.

2.3: Why should libertarians join the political process by which standards of welfare can be established?

2.3.a.: Introduction

Even if both libertarians and welfarists share the rejection of the normative prioritization of the two democratic principles, this does not mean that they are automatically motivated to join a political process by which adequate standard of welfare can be determined. We can safely assume that welfarists are inclined to participate in such a process. The multiplicity of welfarist approaches to welfare includes many initial positions that advocate instituting less than maximal welfare standards. This plurality, conjoined with the fact that welfare standards will most likely never reach maximal levels because the scarcity of resources, makes welfarists prone to join a political process in order to reach an overlapping agreement that approximately reflects their views and the actual circumstances obtaining in the state. Libertarians, who advocate minimal welfare, may say that despite the elimination of 'rule-priority' (i.e., giving liberty a normative priority in all cases of conflict between liberty and equality), they can adopt 'act-priority' (i.e., giving liberty a priority in each case of such conflict), especially when they want to keep welfare levels to a minimum. In order to do so the libertarian would either refuse to participate in a process in which the libertarian position could be compromised, or join the process with the intention to prevent any possible compromise that would not correspond to the libertarian view. In other words, the elimination of normative priority may not remove the libertarian mistrust of the political process, the results of which the libertarian wants to avoid. In this section I present four ways to motivate the (strict) libertarian to join such a political process and accept compromises based on the largest overlapping agreement obtaining among members of the libertarian's own society.

2.3.b: Participation in the political process enables libertarians to have their doctrine and interests affect the determination of adequate standards of welfare

In western democracies governments, pursuant to decisions made in the various legislative bodies, normally determine important social policies. Even decisions regarding security and stability, to which libertarians are willing participants, are made in this way. I argue that libertarians have good reasons to join such a policymaking process regarding instituting more than just minimal welfare levels. To do so I reiterate Gilbert Harman's argument in "Libertarianism and Morality" (1982, Chapter 1; Sec. 1.2.e above). Based on a conventional conception of morality, Harman argues that the same justification libertarians use for enforcing some aspects of morality, (e.g., keeping contracts made,) justifies imposing additional aspects of morality libertarians are not too keen on enforcing (e.g., helping others). If some of these latter aspects of morality are not enforced, argues Harman, the state is at risk of dissolution. Harman concludes that in order to avoid the risk of dissolution a democracy must enforce additional aspects of morality such as helping others and establishing welfare standards. (1982, pp. 227-8, Sec. 1.2.e above)¹¹ I will not repeat the details of this argument but focus on Harman's view of the role of libertarians in the political process by which those additional aspects of morality are determined.

I want to suggest both, that in a way, the libertarian aspects of morality are imposed by the 'ruling class' and also that there are good reasons for these aspects of morality. In suggesting this I assume that there is no a priori source of morality, nor any source in God or human nature. (Ibid., p. 231)

Instead, the conventional character of morality, presupposed by Harman, means that morality (which is the basis for the legitimate obligations of the state) is established through social consensus. Moreover, "... our ordinary commonsense

¹¹ Even when libertarians are in the majority, Harman's argument implies that not enforcing those aspects of morality libertarians do not favor, such as helping others and establishing adequate welfare standards, may bring about the dissolution of the state. This means that, when in power, libertarians should enforce those aspects of morality for the preservation of the state. (Sec. 1.2.e)

morality is the result of an implicit continuing compromise between people of different powers and resources.” (Ibid., p. 231) This also means that aspects of morality, including the moral justification and legitimacy of welfare provisions, are subject to continuous negotiations, bargaining and compromise. If the well-off members of society and those who are not well-off participate in such a political procedure, then the resulting compromise would entail that interests common to both sides would be served, and that some middle ground regarding interests that are not common could be agreed upon.

Such compromises are also considered stable because they are the result of an overlapping agreement. In joining such a political process, says Harman,

The stronger and richer members [of society] would prefer strong prohibitions against harm, theft, and fraud and no duty to help those who need help. The poorer and weaker members would prefer a strong duty to help as well as a strong prohibition against harm, theft, and fraud. One would expect the continual implicit bargaining between these groups to yield as a compromise a strong prohibition against harm, which everyone wants, plus a somewhat weaker duty to help, since not everyone favors such a duty. This, of course, is just what we have in our society. (Ibid. p., 231, my brackets)

In participating in a political process to determine adequate standards of welfare, the libertarians can promote their doctrine and interests. They can point out the significance of the principles of self-interest and non-interference. They can campaign and enlist those who are well-off to promote those aspects of morality libertarians find worthy and the obligations these aspects imply. They can point out the high cost and possible increase in tax rates entailed by the provision of extensive welfare standards. In these ways libertarians can affect the consensus creating process such that the compromise achieved is as close as possible to their own initial minimal position.

On the other hand, if libertarians refuse to participate in negotiations, or they reject any compromise regarding those aspects of morality they do not want to

enforce, they not only take the risk that the state may disintegrate. in effect, they also take themselves out of the process by which the nature and legitimacy of welfare policies is determined. Harman points out (Ibid., p 234) that libertarians must recognize that the establishment of adequate welfare standards is a political matter determined by standard political procedures. If so, they must accept that positions other than their own are part of the political process, and that any compromise will reflect the weight of such positions. If libertarians do not participate in the negotiations process, their doctrine and interests would not be represented nor included in the consensus. And if they participate but are not willing to compromise, they might end up outside the largest overlapping agreement, where, again, their doctrine and interests remain mute on the issue of welfare. Either way, by not participating in the process, or by not willing to join a compromise, libertarians become ineffective in regard to the determination of the standards of welfare mandated in their own society. Only through participation and compromise can libertarians influence the process to the extent that the compromise achieved is closest to their minimal initial position and furthest from the welfarists' maximal position. Thus, for the sake of having their doctrine and interests represented in the political process, and in order to effect the compromise this process yields, libertarians should join the procedure by which standards of welfare are determined.

2.3.c: Sophisticated citizenry best serves libertarian ideals

Towards the end of section 1.4.a above I argued that the libertarian initial position regarding welfare is less minimal than it appears at first sight. I argued, for example, that the construction of an adequate road system, necessary for security and stability, at least involves the extra expense of instituting traffic laws and administering traffic enforcement. Similarly, the expenses that are involved in national defense far exceed the armed forces' direct budget and stretch from having weather forecast systems and intelligence satellites to ensuring a steady supply of shoe strings. Based on such examples I argued that the provision of just

security and stability turn out to be extensive and expensive, and indeed, not so minimal as it first seemed. This shows that the libertarian minimal initial position regarding welfare and the welfarist approximate initial position are less distant, which should make the prospects of bridging over this distance, by compromising on some intermediate position, that much closer. It stands to reason that any person would be more willing, or motivated, to participate in a process of negotiations and compromise if the distance between the initial positions of the two sides is closer than expected.

But I want to take this line of reasoning in a different direction and in broad and imprecise strokes argue that not only libertarians and welfarists positions are closer than they appear to be, they both presuppose a certain kind of a citizen. They presuppose that citizens are competent moral agents; that adhering to the laws is applying this moral agency even to everyday activities such as driving; and that forming life plans and acting on those plans depends on mutual cooperation and respect among citizens. These sorts of capacities have been described by Rawls in his account of citizens in the "Preface for the Revised Edition" of *A Theory of Justice* (1999). Rawls says that free and equal citizens are characterized by

. . . their two moral powers – their capacity for a sense of justice and their capacity for a conception of the good – in what I call the two fundamental cases. Very briefly, the first fundamental case is the application of the principle of justice to the basic structure of society by the exercise of citizens' sense of justice. The second fundamental case is the application of citizens' powers of practical reason and thought in forming, revising, and rationally pursuing their conception of the good. (Ibid., p. xii)

To illustrate the role these capacities play in everyday life, consider the following examples. Traffic laws, for instance, are formal but far from being arbitrary. They are formal in the sense that they equally apply to all drivers without discrimination. Moreover, they do not tell drivers where to go, or by which road, but only how to behave when driving someplace. Traffic laws are not arbitrary

since they aim at making vehicular traffic efficient and safe. Rules governing which side of the street to use, how to pass or turn and how fast can one go aim at facilitating the flow of traffic and at preventing accidents. In turn, general adherence to these rules prevents accidents, saves lives, decreases the use and cost of emergency services, keeps car insurance premiums down, etc. Similarly, the laws that govern the free market are meant to preserve one's right to property, fair trading, keeping contracts, and preventing fraud, deception, theft, etc. They are not designed to favor one person over another and apply to all equally. Individuals adhere to the laws that govern the free market because they believe they will benefit from exchanging with others under such rules. To be sure, some end up losing. But the laws are designed to ensure that the losers lose because of their own mistakes, bad luck, or circumstances not under their control, rather than because some features of the law benefit some at the expense of others. In general, the laws of western industrialized democracies aim at securing the individual's right to act self-interestedly while extending the same right to every other citizen and ensuring that one citizen's right does not interfere with another's. But why should citizens obey the law if violating the law may benefit them more than obeying it? And, how can laws be properly enforced?

There are at least two ways of enforcing the law: one through the fear of punishment, the other through education and voluntary adherence. If one views human beings, as Hobbes did in the *Leviathan* (1651, Chap. XIII), as selfish and violent, whose lives are 'nasty, brutish and short', one naturally opts for enforcing the law by the fear of punishment. After all, fear is very familiar to such human beings from their everyday life experience. Thus, it can effectively be used to ensure people act in accordance to the law. But for one who expects citizens to be moral and have an applied sense of justice and to use their talents and creativity while participating and exchanging in the free market, fear would not be the most favorable environment or the best means to encourage adherence to the law. The libertarian advocates the free use of talents and efforts in the competition of

the market in order for individuals to be able to realize their self-interested life plans. At the same time, the libertarian expects that such activities do not violate the principles of self-interest and non-interference through acts of violence, fraud, theft and the like. The libertarian presupposes a very sophisticated, developed, and skilled citizenship that can freely participate in such social and economic activities under the law. To such citizens, it seems to me, education and voluntary adherence to the law are more fitting than the fear of punishment. I believe that welfarists have a very similar view of the character of citizenry.

Now, libertarians presume such a view of citizens (or some close variation of it), then the social, educational, and welfare conditions required to enable people to develop these moral powers and become such citizens must exceed the mere provision of security and stability as extensive as it may be. These additional primary goods are required to develop the capacity to apply the principles of justice to the basic structure of society, and by implication to subordinate domains such as trade and traffic, let alone the development of the power to form, revise and reasonably pursue individual conceptions of the good.

To recap, I restate this argument schema. The libertarian presumes the existence of a sophisticated citizenry. This level of sophistication is required for establishing any (ideal) libertarian (or welfarist) society even if it is based only on the libertarian interpretation of the principles of self-interest and non-interference. This level of sophistication can be achieved through the workings of the free market or through the provision of additional primary goods. Thus, in cases where not all citizens are enabled to achieve such levels of sophistication through the workings of the free market, as is the case in most western democracies, libertarians have good reasons to advance the quality of the general citizenship through giving due consideration to the provision of additional enablements. This argument schema, though admittedly quite porous, illustrates an additional way to

motivate libertarians to support the provision of some additional primary goods, at least until each citizen is sufficiently sophisticated.

2.3.d: Social and economic equalities are the next step in the tradition that made political equality and equality before the law essential features of current democratic societies

In section 1.3.b I have used Nagel's view in *Equality and Partiality* (1991) to present the position I called 'individualistic egalitarianism', which included his argument for the ontological priority of equality over liberty. I now turn to an argument inspired by Nagel's assertion that instituting welfare is justified, on the basis of his theory of impartiality, because social and economic equalities are the next logical step in the same line of reasoning that made political equality and equality before the law essential components of current democratic societies.

Modern political theories agree that a society must treat its members equally in some respects, but they disagree over the respects, and the priorities among them. For someone accustomed to the forms of equality before the law and equality of citizenship that hold first place in a liberal democracy, the natural question is how far it is desirable or possible to extend the rule of equality into the areas of social and economic relations. (Ibid., p. 63)

Even though political equality and equality before the law are not new rights, for long periods in Western history they were reserved only for the privileged members of society. The philosophical, social and physical struggles to make political equality and equality before the law inalienable rights of each citizen of western democracies took long and required much sacrifice from all those who participated. We, who are accustomed to such rights, tend to take them for granted, and tend to forget the tremendous sacrifice they involved. We also tend not to think of the possible struggle it would take to institute new rights. During the previous century many improvements related to these rights took place. "It was not easy to overthrow racial and sexual discrimination, and that is in a way encouraging, for it shows that the strength of resistance to a change does not necessarily forecast the instability of result." (Ibid., p. 97). Even with all these

improvements, it is clear that social and economic inequalities result in different levels of access to political and legal equalities. For example, it is more likely that one get to be elected to an important public (or private) office if one is better educated, belongs to the high echelons of society and has large amounts of money to spend on one's political campaign, as opposed to being less educated, having no social 'connections' or no large campaign funds. Similarly, high-quality legal representation is usually expensive and is mostly available to those who can afford it. Even though we should recognize that social and economic inequalities affect the exercise of these two rights, we hold these rights dearly and many insist on separating the exercise of these rights from the surrounding social and economic conditions.

Although nowadays such political and legal rights seem natural, some members of democratic societies, particularly libertarians, refuse to acknowledge that further social and economic equalities can be justified, or even be desired.

It may be a psychological condition of progress that people should become accustomed to the last advance and take it as the natural order of things, before gradually coming to perceive that there is a further advance bearing certain analogies to it which would not be morally consistent to reject: However hard one tries, one can't distinguish between the two on grounds which justify one but not the other. (Ibid., p. 90)

We uphold political and legal rights because we believe that in some essential sense we are all the same. In general, theories of justice and political theories provide justifications for these rights and that is why they are distributed equally to all citizens. Analogously, in some essential sense each member of a prosperous society should have a justified claim to live a decent a life under some established social and economic standards of welfare that this society can afford.¹² If the

¹² Of course this can go the other way: in poor societies, due to extremely low levels of available resources, each member has a justifiable claim to only low levels economic and social standards, which may not be considered decent when compared to standards of living obtaining in wealthy societies. Nevertheless, this does not necessarily entail poor access to legal and political rights, or that

exercise of political rights and equality before the law are impeded because of low levels social and economic conditions, and if the justification of social and economic rights to some adequate level of welfare standards is analogous to the justification of political and legal rights, then the burden of proof to justify the provision of one kind of rights (or primary goods) and not the other kind of rights (or primary goods) falls on the those who uphold such a distinction. The challenge presented to the libertarian is to show that the two cases are not analogous and that aiming at providing some equal base line of welfare standards to all citizens is not justified. If the libertarian fails to show the difference in analogy, then the libertarian is morally obligated to pursue instituting adequate standards of welfare to each member of society inasmuch as the libertarian is obligated to preserve established political and legal rights.

There are many replies the libertarians can make. I will not treat all because I believe most will invoke the basic philosophical differences between libertarians and welfarists I have already discussed. But I believe that the majority of libertarians' replies will boil down to two kinds. The first kind counters the challenge by saying that while political equality and equality before the law preserve the rights to act self-interestedly and not to be interfered with, social and economic rights (or an institutionalized provision of welfare determined by the largest overlapping agreement) infringe on these basic rights. This reply, however, does not defeat the analogy between the two kinds of rights. It is more of an attempt to reject the analogy and preserve the artificial separation between the legal and political from the socio-economic realms. Especially when there is such a direct connection between socio-economic conditions and the degree to which political equality and equality before the law are useful to each member of society, increase in standards of welfare of the less advantaged can offset the current

conditions cannot improve. The connection between poverty and limited access to these rights is rather a feature of some Western industrialized societies which I believe is not justified and should be eliminated. I also mentioned the case of impoverished societies toward the end of section 1.4.b above.

difference of access and exercise of these rights between the well-off and the those who are not well-off. Indeed, I do not see a way to defeat the analogy except by insisting that the current order of things is natural and thus change should be resisted.

The second kind of reply the libertarian can make would boil down to a complaint about cost. The libertarian can say that the cost of instituting adequate standards of welfare would overburden the resources available to society as a whole and be unfairly taxing on the well-off. This sort of reply can be met by reminding the libertarian that political equality and equality before the law were very costly, but we would not want to be without them today because our forefathers did not want to sponsor the change and struggle these involved (e.g., The French Revolution and the American Civil War.) Indeed, we believe that the end result is worth the past investment. If the provision of some base-line standards of welfare is morally justified, we have the obligation, like our forefathers, to act on it. Furthermore, the provision of consensus-based adequate welfare standards can be curbed by the amount of resources available to society, and can sensitive to the necessity to preserve the wealth of society as well as the necessity to safeguard society from an economic disaster because of over-extended welfare provisions. Moreover, welfare policies do not aim at the leveling off of all inequalities, but aim at ensuring to each citizen a decent life and the ability to realize a preferred life plan. Establishing such standards enhances the moral character of society and rectifies some remnant deficiencies in distribution of political and legal rights. Decreasing social and economic differences among citizens makes it more possible for the economically disadvantaged to exercise their political rights. It can also enable disadvantaged persons to have better access to and exercise of their legal rights. Acting on further moral obligations, and enhancing our efforts to properly act on current obligations can make the extra expense cost-effective: that is to say that the end result is worth the cost.

This argument does not aim to defeat the libertarian doctrine, but to direct attention to the unsoundness of the libertarian approach to issues of welfare. Rather than infringe on the liberty to act self-interestedly and not to be interfered with, the argument builds on those very basic rights, and takes them to the next stage of moral implication and social obligation. It aims to encourage libertarian participation in a political process to determine levels of welfare that go beyond the minimum they advocate. The libertarian can reject the force of this argument, choose to neglect the socio-economic aspects of social moral obligation and be satisfied with merely political equality and equality before the law. But this unjustified neglect can ultimately, as we shall see in the next section, result in some serious unwanted results.

2.3.e: The right to keep and the right to take

The last argument I will put forward to convince the libertarian to join a political process of determining adequate standards of welfare that go beyond the minimum welfare libertarians advocate has two aspects: practical and theoretical. The practical aspect has to do with cases where enough disadvantaged persons come together and act on their anguish in ways such as taking from the rich, looting, interfering with the economy and interfering with government activities, which may destabilize the state, topple governments and even lead to the dissolution of the state. The theoretical aspect has to do with weighing the right of the rich not to be interfered with in how and when they dispose of their wealth, against the right of the poor not to be interfered with in how and when they take from the surplus of the rich for their own survival. For example, the situation in Argentina in the past few years has reached the boiling point during the end of December 2001 and the first week of January 2002, when demonstrations and violence broke out, which led to the replacement of four newly designate presidents within two weeks. The situation in Argentina is quite complex, but there is no doubt that welfare standards and adequate distribution of common wealth (of which, in terms of natural resources, Argentina is blessed) are very

central to the political situation. There are many versions of this argument. In this work I will employ James Sterba's version because of its contemporary context and because it elucidates both aspects of the argument.

As a background to his argument in "Reconciling Conceptions Of Justice" (1995) Sterba considers "... a typical conflict situation between the rich and the poor. In this situation, the rich have more than enough resources to satisfy their basic needs. By contrast, the poor lack the resources to meet their most basic needs even though they have tried all the means available to them ... for acquiring such resources." (Ibid., p. 4) If liberty, as libertarians understand it, is interpreted as the right to non-interference, then the rich may use their resources in any way they wish, even if this comes at the expense of the satisfaction of the poor's most basic needs. The rich may choose to be charitable and share their resources with the poor, but are not obliged to do so. On the other hand, the right to non-interference, which must be consistent with the right to life, is also the right of the poor not to be constrained from getting what they need to satisfy their basic needs for survival. In this case, if the scarce resources they need are already appropriated, it seems the poor are justified in taking from the surplus of the rich in order to satisfy their own basic needs. Under actual conditions, the rich lose some of their surplus, non-vital, property, and the poor are able to live. When the rich, (and libertarians) who maintain this view of liberty, are faced with this possibility, says Sterba, "... they are often genuinely surprised, one might even say rudely awakened, for they had not previously seen the conflict between the rich and the poor as a conflict of liberties." (Ibid., p. 5) Thus, on one level such a conflict expresses a class struggle, and on another level, the conflict is about ideal liberties.

I do not review Sterba's whole argument here (Ibid. pp. 5-11), for it seems not only correct in moral and conflict resolution terms, as Sterba presents it, but also on common sense grounds where the rich have reasons to protect, if not all, at

least some of their surplus resources from the possible actions of the poor. Rather, consider Sterba's comment on the possible conclusion libertarians can draw when reflecting on such a conflict situation.

For once libertarians come to recognize the legitimacy of negative welfare rights, then in order not to be subject to the discretion of rightholders in choosing when and how to exercise these rights, libertarians will tend to favor the only morally legitimate way of preventing the exercise of such rights: they will institute adequate positive welfare rights that will then take precedence over the exercise of negative welfare rights. (Ibid. p. 11)

The negative welfare right of the poor is the right not to be interfered with when pursuing their right to life, the right to survive. Acting on such a negative right to welfare, the poor may choose when, where and how much to take or loot from the surplus wealth of the rich without consent from the rich. Of course, the rich would consider such behavior criminal. But crime may not be the biting problem. The more dangerous problem is situations where civil wars occur because of social and economic inequalities. The poor are normally disenfranchised, but when things get bad, the poor may unite, or many of them may act simultaneously in ways that destabilize or dissolve the state. When the state is destabilized or dissolved it cannot even provide the minimum security to body and property to any of its citizens. Grave social and economic conditions can also turn democracies into totalitarian regimes. For example, in Germany during the 1930's, such social and economic circumstances were conducive for the democratic raise of the totalitarian regime lead by Hitler. Even when a western industrialized democracy is not under such risks at a given moment, it should pay attention to these possibilities and take additional preventive measures, at least to the same extent that it is willing to pay attention and take additional preventive measures to avoid nuclear conflicts when none is an imminent threat.

The theoretical aspect of the argument does not directly involve crime, revolutions or the possibility of a nuclear war. It has to do with the rights to life, property, to act for self-interest and non-interference and the laws that protect these rights.

Sterba argues that libertarians “ . . . think that liberty always has priority over other political ideals, and since they assume that the liberty of the poor is not at stake in such [rich/poor] conflict situations, it is easy for them to conclude that the rich should not be required to sacrifice their liberty so that the basic needs of the poor may be met.” (Ibid., p. 5, my brackets) Yet it is the very basic right of the poor to life that justifies the liberty of the poor to take from the rich. “What is at stake here is the liberty of the poor to take from the surplus possessions of the rich what is necessary to satisfy their basic needs.” (Ibid., p. 5) And since the poor, for the most part, do not share the libertarian minimal position regarding basic needs or welfare, they are justified in seeking those goods, even if those goods are already appropriated as someone’s surplus wealth. The philosophical aspect is about the conflict between the liberty of the poor and the liberty of the rich. The liberty of the rich to do as they wish with their property, and the laws that protect this right act as interferences with the efforts of the poor to act on their liberty to interfere with the surplus of the better-off in order to survive, or live a life that is more than mere survival. When weighing the rights of the rich against the rights of the poor, the poor may end up being more justified in taking from the rich than the rich are justified in hanging on to their surplus wealth. It is this sort of reasoning which leads Sterba to conclude that libertarians “ . . . will institute adequate positive welfare rights that will then take precedence over the exercise of negative welfare.” (Ibid., p. 5)

Even though Sterba’s argument may not be decisive, I believe it is the strongest argument of the reasons and arguments I have presented in the last four sections. Sterba’s argument concludes that libertarians should be motivated to institute adequate welfare policies in order to protect the rich and their property from actions of the poor. In doing so libertarians also ensure that meaningful liberty (as the principles of self-interest and non-interference) is extended to all citizens of democracies, or else liberty returns to be a privilege of the few. The force of the argument, as I use it, is not directed at defeating libertarian doctrine and practice.

It is aimed at persuading libertarians to join the political process by which adequate standards of welfare are determined, and to accept the compromise such a process might yield. Doing so will reduce the danger the poor pose to the property of the rich and will give due respect to the liberty of the disadvantaged to pursue a decent life.

2.4: Conclusion

My view of welfare, presented in Chapter 1, section 1.4.b, shifts the focus from the justification and legitimacy of any particular set of primary goods onto the justification and legitimacy of the political procedure itself. What justifies and mandates the provision of a certain set of primary goods, or establishing a certain standard of welfare, is the largest overlapping agreement among citizens by which it is arrived. In this chapter I concentrated on two necessary preconditions for a fruitful utilization of political procedures in establishing the largest overlapping agreement regarding adequate welfare standards. First, I devoted much attention to eliminating the normative priority problem (Sec. 2.3). It is not any one doctrinal difference, but the mistrust of concentrated power that I believe is at the core of the political disagreement regarding welfare. The elimination of such normative prioritizing of liberty and equality, I argue, removes a major impediment, and allows both sides to enter the negotiations process without doctrinal restraints which can prevent reaching compromises. That does not mean that either side gives up its beliefs. On the contrary, the political process, when it is suitably construed and applied, is the appropriate forum in which each side can express and influence decisions according to its convictions.

Second, in section 2.4 I presented an array of reasons and arguments intended to persuade libertarians that participation in such a political process is the most effective way to advance their beliefs and interests. This intention is sustained by

the fact that welfare levels are currently determined in western democracies through negotiations and compromise, and, as Harman notes (Sec. 2.4.b), libertarians should not take themselves out of this political process. Rather they should be motivated and mobilized to influence the process, as much as they can, in the direction they prefer. The aim of persuading libertarians is also served by the fact that the libertarian and welfarist initial positions regarding welfare are closer than they seem. (Sec. 2.4.c) Moreover, I argued that libertarians and welfarists presuppose a certain view of a sophisticated citizenry that is aware of rights and conventional morality and is able effectively to participate in the economic and social life of productive society. I argue that in order to maintain this level of sophistication, libertarians should reconsider what enablements ought to be provided to each citizen. Nagel's argument (Sec. 2.4.d), that social and economic equalities are the next logical and moral steps on the path that brought about the equal distribution of political equality and equality before the law, adds another moral aspect to persuading libertarians to join the process of negotiations and compromise. Finally, I presented Sterba's argument (Sec. 2.4.e) to motivate libertarians to join the political process in order to protect the rights of those who are well-off and in order to better safeguard the rights of those who are not well-off.

I do believe that this cluster of arguments and reasons have lead libertarians such as Hayek to justify some qualified provision of welfare in just democracies. But I do not believe, nor do I propose, that libertarians give up their philosophical convictions. All I aim at here is to persuade libertarians to join a political process of determining adequate welfare standards, which would not violate their senses of justice and liberty, even if they would have to, at least periodically, compromise their ideals in the same way welfarists compromise theirs. I believe that the reasons and arguments I mentioned above are sufficient for this purpose. In the next chapter I discuss a few models of distributive justice designed to determine standards of welfare in light of the issues discussed so far. What we are

looking for is a model of distributive justice that is consistent with the principles of self-interest and non-interference, that accords neither liberty nor equality a normative priority but balances these two principles, and that can be used to establish standards of welfare in a way that can be accepted and trusted by both libertarians and egalitarians.

CHAPTER 3: THREE RECENT DISTRIBUTIVE JUSTICE MODELS

3.1: Introduction

The distributive justice models examined in this chapter are consistent with the conclusions of the preceding chapters in the following ways. Given the plausibility of instituting welfare standards and my tentative view of welfare discussed in Chapter 1, we are looking at models that aim at establishing and implementing such adequate standards of welfare in particular societies. Assuming the elimination of the normative priority discussed in Chapter 2 (Sec. 2.2), we examine models that attempt to balance liberty and equality without attributing a normative priority to either. These models are compatible with the plurality of liberal conceptions of justice prevalent in western industrialized democracies. Finally, these models enable libertarians (and others) to participate and affect the results of the bargaining and compromise process of establishing adequate welfare standards according to their inclinations.

The following examination of distributive justice principles and models invokes the principle of redress. The principle of redress in liberal democracies means that undeserved inequalities obtaining among the members of a particular society deserve to be reduced. As such, the terms inequality and equality will take center stage in the remainder of this work. It is important to note, however, that this focus on equality does not amount to advocacy of giving equality a normative priority. The focus is rather a result of the nature of the context. The three models I am going to review in this chapter do not amount to an exhaustive representation of all available models. However, these three represent an adequate range of possibilities because they utilize three different senses of equality. Ackerman's model is based on some version of strict equality. Dworkin's model is based on equality of resources. And Rawls's model is based on equality of basic rights and

liberties along with equality of opportunity. The models are not examined in chronological order but in order of increasing plausibility, beginning with Ackerman's theory, which I will show is the least successful, and ending with Rawls's revised view, which I will adopt and try to improve on in Chapter 4.

In light of the libertarian and welfarist concerns discussed in Chapters 1 and 2, and in anticipation of the theory and model put forward in chapter 4, the examination of the three models focuses on a few issues. (1) I will pay special attention to counterfactual initial situations since those are utilized to derive ideal principles of distributive justice. (2) I will pay attention to the sort of information available in initial situations since decisions regarding principles, as well as standards of welfare, are made in reference to this information. (3) I will consider the feasibility of implementing these models and the ability to adjust or revise principles and determinations, in case actual conditions warrant changes. (4) I will consider the adequacy of the standards of welfare derived from these models. I maintain that any model of distributive justice has to handle these issues successfully if it is to gain the acceptability and trust of libertarians and welfarists alike.

3.2: Bruce Ackerman's pioneer planet

3.2.a: Introduction

In *Social Justice and the Liberal State* (1980), Bruce Ackerman advocates a liberal theory of distributive justice that is based on neutrality towards particular conceptions of the good. He begins by claiming that the struggle for power is an essential characteristic of the human condition, where "Each of us must control his body and the world around it." (Ibid., p. 3) In a world of scarce resources, such a human condition gives rise to conflicting individual claims over resources (most of which are already appropriated). Ackerman suggests that by following certain

conversational rules a liberal state can resolve such conflicts without giving unjustifiable preference to any particular persons or conceptions of the good. “Rather than linking liberalism to ideas of natural right or imaginary contract, we *must learn to think of liberalism as a way of talking about power, a form of political culture.*” (Ibid., p. 6) Accordingly, members of society, who have conflicting claims for resources, engage in conversations where they justify their conflicting claims. These conversations conclude when one of the claimants provides reasons for her claim the other claimant cannot reject. In addition to employing the conversational principles of ‘rationality’ and ‘consistency’ (to be explicated below), liberal talk about power is ultimately governed by strict neutrality toward specific conceptions of the good. This means that one can not be justified in claiming or holding a certain resource just because one believes one’s conception of the good is superior to another’s and that this conception of the good is better served when one controls this resource. When such power talk is effective, argues Ackerman, it leads to distributional patterns the liberal government is obligated to enforce and maintain.

According to Ackerman,

Liberal government, in the end, is an expression of hope – that citizens, by reasoning together, can domesticate the power struggle that is an unavoidable part of their social situation. This aspiration is constantly at war with another reality – that government is itself a central focus of the power struggle, permitting exploiters to cement their power over their fellow citizens. There can be no hope for a “final” institutional solution to this tension between aspiration and reality. Yet, without the constant effort to repair and construct liberal institutions of government, the aspiration will come to seem a childish dream. (Ibid., pp. 312-3)

Ackerman believes that liberal democracies that embrace neutral democratic procedures and egalitarian social policies are justifiable, and can be organized to resolve power struggles by adherence to strict conversational neutrality. He aims only at establishing an initial equality of resources and leaves further distributions to be primarily determined by the free market. Ackerman presents his theory in

three stages. In the first stage we are invited to engage in a thought experiment which establishes initial equality. In the second stage, the ideal conditions of the initial situation are dropped but the principles of the first stage are assumed to have been adopted and adhered to by the population under actual conditions. And in the third stage the complete compliance of the population assumption is dropped and related problems are dealt with. Through the three stages, beginning with the thought experiment and ending with Ackerman's justification of current liberal democratic welfare states, Ackerman argues that neutrality is preserved, "... modern liberalism has its own inner coherence when understood as a sustained effort to achieve a power structure in which all members of the political community can engage in a distinctive form of dialogue with one another." (Ibid., p. 30) Ackerman's project can be seen as an attempt to vindicate and legitimize current democratic welfare states and their social policies on the basis of an active 'Neutral dialogue'. As before, a full-blown description and analysis of Ackerman's theory is beyond the scope of this paper. What is of interest to us is how the proposed distributive model handles the few central issues we are concerned with.

3.2.b: The model

At the first stage of the theory we are invited to imagine a group of pioneers arriving on a new planet where only one kind of a perfectly divisible resource, 'manna', awaits them. They are also equipped with a 'perfect technology of justice', which enables them to precisely and costlessly negotiate and trace transactions once production and trade have begun. The new planet is a place where "... *there never is any practical difficulty in implementing the substantive conclusions of a Neutral dialogue.* (Ibid., p. 21) Before the pioneers land on the planet, they engage in dialogues which aim at establishing a just principle of distribution of manna under three 'conversational constraints': (1) "*Rationality*: Whenever anybody questions the legitimacy of another's power, the power holder must respond not by suppressing the questioner but by giving a reason that

explains why he is more entitled to the resource than the questioner is.” (Ibid., p. 4) (2) “*Consistency*. The reason advanced by the power wielder on one occasion must not be inconsistent with the reasons he advances to justify his other claims to power.” (Ibid., p. 7) And (3).

Neutrality. No reason is a good reason if it requires the power holder to assert:

- (a) that his conception of the good is better than that asserted by any of his fellow citizens, *or*
- (b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens. (Ibid., p. 11)

After presenting a few examples of such neutral dialogues, Ackerman concludes that the only distributive principle compatible with these conversational constraints is a simple arithmetic division of manna into identical shares. This is so, according to Ackerman, because.

We search in vain for a neutral yardstick for measuring ‘real’ value of different conceptions of the good. To justify one yardstick over all other possible ways of ranking values will require utterances that are inconsistent with at least some of the ideals affirmed by some of our fellow citizens. (Ibid., p.48)

Regardless of how much value each person or a life plan has, since each pioneer is considered as good as any other, each pioneer is entitled to as much initial resources as any other, even though no definite amount of manna is designated. Thus, at this first stage, Ackerman argues, on the basis of neutrality, for an ideal right of each individual to an initial equal share of manna.

At the second stage of his theory (‘Part Three’ of his book), Ackerman considers how ideal rights (or justified claims) to initial equality may be realized under second-best conditions. He drops the assumption regarding manna, and instead resources resemble the actual variety of goods. He also gives up the assumption regarding the perfect technology of justice that enables pioneers to precisely and costlessly negotiate and trace transactions once production and trade have begun. But he retains the assumption that members of society are committed to the ideal

right to initial equality of resources. Under these second-best conditions, Ackerman advances egalitarian policies which compensate those who do not benefit from initial equality because of social, economic and natural differences. Since under second-best conditions people find themselves at varying distances from the ideal initial equality, Ackerman invokes the notion of 'unequal sacrifices'. "If, *ceteris paribus*, two people begin adult life with assets whose market value is unequal in money terms, the poorer citizen has been called upon to make a greater sacrifice than the richer." (Ibid., p. 240) 'Unequal sacrifice' represents the amount (in market values) of rights to an equal share one 'sacrificed', or 'lost', relative to the ideal initial equal share of resources. Consequential, those who end up poorer are considered 'exploited' because of the greater sacrifice they suffer. Society, according to Ackerman, needs to adopt distributive policies that aim at leveling unequal sacrifices; that is, policies that attempt to compensate those 'exploited' up to the limit defined by the ideal initial equality. Thus, under actual conditions, the ideal right to initial equality becomes the principle of redress.

To measure levels of unequal sacrifice, Ackerman begins with identifying some clear cases of exploitation where one person enjoys an initial advantage over another in only one type of basic resources. For example, under actual conditions, if one person is endowed with the same kinds of basic resources as another, except that she has more assets (relative to the ideal amount of assets defined under ideal conditions), we are presented with a case of unequal sacrifice on the part of the person with fewer assets. In this case, according to Ackerman, a liberal state has a duty to compensate the less advantaged up to the limit defined by the ideal initial distribution. Moreover, the liberal state is obligated to ensure that the unequal sacrifice in one resource does not effect the equal distribution of another resource. For example, the state needs to ensure that the person who owns less than specified by the ideal equal share of initial resources is materially compensated, and, at the same time, the state needs to ensure that this material

disadvantage does not result in further disadvantages in other domains such as, say, education or transactional means. Thus, justice demands from society a double distributive obligation: to compensate the exploited (those who suffer from unequal sacrifices) so that they may approximate the ideal situation of initial equality of resources, and at the same time, to ensure that one kind of an unequal sacrifice does not cause further unequal sacrifices.

Ackerman briefly discusses the realization of ideal initial equality under third-best conditions where members are no longer assumed to accept and comply with the principle of initial equality, and where problems such as free-ridership and malfeasance are treated. ('Part Four' of his book) But he leaves the explication of a complete third-best theory for the future. For our purposes, it seems sufficient to note the problems involved with first two steps, since they already entail critical difficulties in Ackerman's theory.

3.2.c: Problems

Although the ideal distributive principle Ackerman derive from his thought experiment appears to be simple, its application to second-best conditions is not successful. Ackerman's thought experiment, based on strict neutrality, makes a simple arithmetical division of resources inevitable because it rules out all other alternative, non-arbitrary distributions. Moreover, because resources to be distributed are limited to only one kind – perfectly divisible all-purpose 'manna' – this simple arithmetical division is even possible. But this simplicity does not work when applied to the distribution of resources under actual, or second-best conditions. When examining Ackerman's theory, in his book *Social Justice Reconsidered* (1989), David Maple notes the following,

... under actual circumstances we do not have any manna. Instead, we must assess the relative importance of many competing resources, and this necessitates controversial cardinal judgments of welfare that Ackerman's theory forbids in principle. In short, Ackerman's argument at the level of ideal theory makes it logically

impossible to solve actual problems of distribution once his initial assumptions about the circumstances of justice are dropped. (p. 59)

Ackerman attempts to answer this difficulty by invoking a 'liberal trusteeship' obligation, where "Each citizen, at the moment of his death, can assert that he has fulfilled his obligation of *liberal trusteeship*, passing on to the next generation a power structure no less liberal than the one he himself enjoyed." (1980., p. 28) Passing on this power structure is a part of a scheme that ensures that "Each citizen begins adult life under conditions of *material equality*." (Ibid., p. 28) Accordingly, liberal trusteeship requires that the initial equal distribution of resources, however measured, be preserved over time, regardless of the nature of resources. Indeed, Ackerman applies this condition when he considers the problem of distributing non-homogenous resources under actual conditions.

Up to now, I have measured compliance with trusteeship in terms of my favorite unit: manna. This simplification is not as unrealistic as may first appear. While it is often costly to shift specialized land and capital from one use to another in the short run, many resources are much more fungible in the longer run. And presumably, it is the longish run that is relevant to the practical assessment of trusteeship compliance. (Ibid., p. 212)

The problem with Ackerman's attempted answer is that commensurating the value of resources in the long run requires the ability to measure their commensurability at different points in time in order to assess the overall trusteeship compliance given conflicting claims to, and different measurements of particular resources. Since we cannot estimate the value of a disputed resource in a non-controversial or neutral way, we cannot resolve such conflicts at all. Moreover, a person who cannot provide an immediate reason for her right over a certain resource can always argue that, given her superior ability to predict the future values of resources, it is better, for the long run, that she controls the resource in question. First, the one who stands to lose would reject such an answer. Second, it is no answer at all, because it can be used, by each person, to end all conversations regarding conflicting claims over particular resources. This would render the

method of neutral conversation ineffective. The blessing of manna, as the only resource, is too counterfactual, and the simple arithmetical principle of equal distribution is too plain to be effective under actual conditions. We face a thought experiment of an initial situation that yields some principles of justice and distribution which fail once the ideal conditions are discharged and the applicability of these principles is tested.

Another problem is related to Ackerman's version of the principle of redress, which is based on his notions of 'unequal sacrifice' and 'exploitation' (see definition in Sec. 3.2.b above). According to Ackerman, the liberal state is obligated to compensate those who are exploited. In what he calls 'clear cases of exploitation', such as severe physical impairment, the state is obligated to compensate a handicapped person in two ways. First, the state is obligated to compensate the handicapped person, if need be, in all domains of initial resources, where this person suffers from unequal sacrifice, up to the limit of the ideal simple arithmetical initial distribution. And, second, the state needs to make sure that the specific impairment, which may prevent that person from enjoying some domains of initial resources, does not effect this person's enjoyment of other domains of resources. (Ibid., pp. 246–49) But, with no way of commensurating the value of particular resources at specific points in time, the problem now becomes how to measure exploitation, and in turn, how to measure compensation? In other words, how much compensation is required in order to reach the ideal initial equality? Here Ackerman appeals to the wisdom of a liberal statesman to determine adequate levels of compensation. (Ibid., p. 247) Ackerman treats the problem as a budgetary problem, where a liberal statesman is required to design a budget that offsets exploitation and ensures compensation to those who suffer from unequal sacrifice.

Given a B_i -sized bundle of structural resources, it is relatively easy for the statesman to identify a subset of exploitative budgets that are *prima facie* unacceptable; harder to select from the remainder the subset that satisfies his affirmative understanding of equal sacrifice; harder still to select the particular budget that, within the

preceding constraints, promises the most adequate realization of liberal values. This tripartite structure of statesmanly judgment, moreover, can be expected to control the texture of political discourse in a liberal state. (Ibid., p. 250)

However, the appeal to some sort of 'wise statesmanship' means that measuring exploitation and affirming compensation is a function of the evaluative capacities of statesmen. This appeal does not imply any specific criteria or principles of measuring exploitation or compensation in clear cases, let alone in unclear cases.

Most cases of claims to compensation would probably not be of the clear type, where, say, the least advantaged are compared with ideal pioneers, but rather of the unclear type where persons who are closely situated present claims for control over resources. In such cases the lack of distinct criteria or principles to commensurate cases of exploitation and compensation might lead to conflicting judgments among statesmen. To settle such unclear cases Ackerman suggests employing neutral democratic procedures such as voting. "It is here that I shall explore, and vindicate, the liberal claim that majority rule is the best way of solving – at least for a time – the wide range of issues upon which citizen-statesmen may legitimately disagree." (Ibid., p. 29) Ackerman suggests that the assembly of statesmen consider the various solutions to unclear cases of competing claims for resources or compensation and if a decision cannot be reached by neutral conversation, then the solution that gets most of the votes in the assembly is the one adopted as government policy in all similar cases. Assuming the possibility of screening out those democratic voting procedures that have built-in biases toward particular conceptions of the good and/or those voting procedures that rely on other non-neutral principles of distribution such as utilitarianism, then, only non-biased, majority-supported solutions are going to be employed. With multiple applications of this procedure, in compliance with liberal trusteeship, argues Ackerman, neutral and legitimate government policies will continuously evolve and be revised to fit changing circumstances. (Ibid., Chapter 9, pp. 273-327)

Ackerman's explication is much more complex than the above brief description. Yet it does not answer the main difficulty. The problem is that actual statesmen voting on alternative solutions to conflicting claims over particular resources normally do so on the basis of some principles of justice or conceptions of the good. Indeed, voting according to one's conception of justice or the good, or any other principle one believes is justifiable, is an essential part of democratic voting procedures. However, strict neutrality prohibits advancing solutions to such conflicting claims on the basis of any conceptions of justice or the good. Thus the appeal to ordinary democratic voting procedures violates Ackerman's principle of strict neutrality. When considering this aspect of Ackerman's project, Maple expresses a similar view. "Ackerman's major difficulty, however, is that the idea of neutrality prevents him from employing a definite theory of the good, which might in turn allow him to develop a metric for assessing the overall situations of particular individuals under actual circumstances." (1989, p. 70) In itself, the appeal to democratic procedures in order to solve unclear cases of conflicting claims to resources seems to me plausible in liberal democracies. But Ackerman's appeal to voting procedures, on the level of second-best theory, or actual conditions, directly violates his own principle of strict neutrality at the ideal theory level. Thus, when it come down to actual conditions the two stages of Ackerman's theory are inconsistent and the justification of an equal distribution of initial resources and the continuous maintenance of such a distribution over time does not carry over from the level of ideal theory to actual conditions.

3.2.d: Conclusion

Ackerman's elegant solution to distributive justice problems would be plausible if it were not intended to apply to actual conditions as well. On the ideal level, all Ackerman needs to derive from his initial situation is the validity of the simple arithmetical division of resources. But once actual conditions obtain, where there is no manna and resources are scarce, the ideal arithmetical equality of resources

becomes a principle of redress, where all those who are exploited have justified claims for compensation from an actively liberal state. However, finding a way to measure unequal sacrifice, and thus a measure of appropriate compensation, is not ready at hand. In 'clear cases' of exploitation, Ackerman appeals to wise statespersonship, which is not normative enough. In all other 'unclear cases' Ackerman appeals to procedural justice. But employing such procedures violates his original principle of neutrality. Ackerman does not solve the problem of finding a common denominator by which exploitation and compensation, up to the ideal limit, can be determined at particular points in time, under actual conditions.

Once these problems are understood in the second stage, there are good reasons to go back to the pioneers' situation in order to revise the conception of justice and the distributive justice model. But it is not clear that going back to the same thought experiment, under the same conditions, can yield any other solution to the actual problems. In any case, such a path for going back is not even considered an option by Ackerman. Moreover, when it comes to the initial set of resources, Ackerman's initial situation yields a perfect distributive directive: give each the same amount of manna. However, under actual conditions, except for knowing that all should be given the same amount of resources over their life times, or be compensated up to level of ideal equality of resources, we get no further specification to be used to determine actual distributions or solve actual conflicting claims over particular resources. I thus submit that such a model is not useful enough to gain the trust and acceptability of actual members of democratic societies.

3.3 Ronald Dworkin's immigrant island

3.3.a: Introduction

Dworkin, in "What Is Equality? Part Two: Equality of Resources" (1981b) presents a theory of distributive justice that attempts to be sensitive to individual preferences.¹³ He asserts that liberty is as fundamental to social justice as it is for the economy. Yet liberty is not compatible with any particular conception of the good, because imposing a specific conception of the good would violate the most fundamental principle of treating individuals with equal concern and respect. (1978, p. 345) According to Dworkin, one's personal decisions, regarding the use of the material resources available to one, directly affect the material resources available to others: the more one's choices and action contribute to the lives of others, the less they need to draw from society's collective resources for their own livelihood. Moreover, Dworkin argues that the value of the resources needed for one person's life-plan can be measured in terms of the loss of these resources to others' life-plans. Dworkin postulates an initial situation where the distribution of resources is guided by his version of the principle of equality of resources. "Equality of resources supposes that the resources devoted to each person's life should be equal." (1981b, p. 289) This principle ensures that in the initial situation, each person gets an equal share of all available resources that can be privately held. Yet, after the initial situation, once production and trade commence, each person decides how to use these resources – consume, invest, save – according to her inclinations. The different uses of equal shares of initial

¹³ Indeed, in "What is Equality? Part One: Equality of Welfare" (1981a), Dworkin argues against equality of welfare, which somewhat undercuts my argument for welfarism in Chapter 1. Nevertheless, Dworkin argues that the force of the initial situation depends on a principle more abstract than equality of resources, namely, "equal concern and respect" to all individuals (Dworkin, 1978, p. 345). It seems to me that this more abstract principle may serve as the basis for a variety of principles, welfarism included. Moreover, I will show that many features of Dworkin's program are relevant to our ongoing investigation. Thus, it seems appropriate to examine his model.

resources leads to justifiable inequalities of personal holdings. In this way equality of resources is sensitive to individual preferences. Dworkin also argues that no one should get more material resources merely on the basis of natural endowments. In this he joins Rawls and many others in maintaining that differences in natural endowments do not justify social, economic and political inequalities even though they cause them. Combining the requirement that equality be sensitive to individual preferences with the view that differences in talents do not justify differences in initial holdings, Dworkin sets out to devise a distributive model that is 'ambition-sensitive' but not 'endowment-sensitive'. (Ibid., p. 311)

The above presentation of Dworkin's position is obviously oversimplified. However, what we need to focus on, what is relevant for our purpose, is the way in which Dworkin constructs a distributive model that facilitates determining what everyone should get from the total resources available to a society.

3.3.b: The auction

Dworkin constructs his distributive model in two steps. In the first stage he tries to show what would complete initial equality of resources may be. In order to do so he invites us to engage in a thought experiment. He asks us to imagine a group of shipwreck survivors who land on a deserted island that has a certain amount of material resources, some available technology but no native population. We are asked to assume that the immigrants retain the individual preferences with which they arrive on the island. And we are asked to assume that all of them are equally talented in the sense that given the materials and technology available on the island, each can produce about the same from the same initial set of resources. In effect, these two assumptions fix the 'ambition-sensitive but not endowment-sensitive' aspects of Dworkin's proposed model. Next, pondering how to achieve equality of resources in their newly found home, the migrants come up with the idea of an auction. They hold an auction of all resources that can be privately held.

Each person is given the same amount of clamshells for bidding. Thus, each person bids for bundles of material resources of the same value as any other person. In the auction, each person bids on the resources she believes will best serve her in achieving her life-plan, against all others, until all available bundles of resources are auctioned off. Through bidding, each person is also given the opportunity to take an equal part in determining the comparative value of the available resources. Ultimately, although Dworkin does not explicitly put it in this way, I believe it is reasonable to say that the immigrants bid on three kinds of resources that are basic to their life-plans: occupations, wealth and leisure. The auction is a theoretical device for determining an initial equal distribution of these resources. It determines the value of resources, the division of resources into bundles, and the eventual distribution of those goods. As such, the auction also serves as a reference point against which all subsequent inequalities are evaluated.

3.3.c: Problems with the auction

Dworkin assumes equality of talent in his initial situation in order to fix the 'not-endowment-sensitive' aspect of his model, and to preserve equality after the auction is over. "Suppose all immigrants are in fact sufficiently equal in talent at the few modes of production that the resources allow so that each could produce roughly the same goods from the same set of resources." (Ibid., p. 304) Equality of talent implies, for example, that one hour of labor is worth the same for all, and can be assigned the same numerical value, or the same price. In other words, fixing equality of talents yields a common denominator on the basis of which assets and income of different people can be commensurated. This fixed rate of production serves to compare and evaluate the situation of persons after production and trade have begun. However, different people have different ambitions. Some would prefer a life of leisure and use their material resources to achieve this goal. Others would prefer to produce and accumulate additional material assets. This later situation, argues Dworkin, will only look like a case of inequality since people vary in ambitions. But, in fact, the equality of the initial

situation is preserved. By having equality of initial resources and talents fixed, says Dworkin, all later inequalities, obtaining after trade and production begin, are based only on differences in ambitions and not talents. "If everyone had equal talents . . . the initial auction would produce continuing equality of resources even though bank-account wealth became more and more unequal as years passed." (Ibid., p 306)

But how plausible is the assumption that all are equally talented?

We want to find some way to distinguish fair from unfair differences in wealth generated by differences in occupation. Unfair differences are those traceable to genetic luck, to talents that make some people prosperous but denied to others who would exploit them to the full if they had them. (Ibid., p. 314)

To distinguish fair from unfair differences in wealth, Dworkin fixes the amount of initial resources and talents in the initial auction, and attributes differences of wealth to the ambition that drive persons to use their given resources and talents once production and trade ensue. In these way differences of wealth are justifiable on the basis of ambition and not on the basis of initial resources or talents. However, once we leave the theoretical level, the thought experiment, and try to apply its results to actual circumstances, how can we maintain that all are equal in talents, that all have the same productive abilities, and that each hour of labor performed by one is the same for all? Once actual conditions obtain, where equality of talents does not obtain, the sense of equality developed in the initial situation fails to be preserved since inequalities are no longer due only to differences in ambitions (choices and preferences,) but also to talents. In this case we lose the common denominator established in the initial situation and with it the ability of measure, compare and justify inequalities.

In addition, the model is presumed to be ambition-sensitive but not talent-sensitive. But this distinction itself seems implausible. Dworkin himself admits that "Talents and ambitions are too closely intertwined" (Ibid., p. 314) It seems

very unlikely that we can draw a definite line dividing one's preferences from one's abilities.

It might be helpful . . . if we were able to find some way of identifying, in any person's wealth at any particular time, the component traceable to differential talents as distinguished from differential ambitions. We might then try to devise a tax that would recapture, for redistribution, just this component. But we cannot hope to identify such a component, even given perfect information about people's personalities. For we will be thwarted by the reciprocal influence that talents and ambitions exercise on each other. Talents are nurtured and developed, not discovered full-blown, and people choose which talents to develop in response to their beliefs about what sort of person it is best to be. (Ibid., p. 312)

Even if all we wanted is to advance a progressive income tax scheme that will serve to compensate the less talented, it does not seem likely that we can isolate, trace, and commensurate talents of particular persons. Indeed, it seems that talents and ambitions interact and both normally determine one's life-plan. Thus, not only fixing equal levels of talents for all seem lacking when we move from the initial auction to real conditions, but also the plausibility of distinguishing clearly between talents and ambitions, which is essential for tracing and justifying unequal distribution of wealth.

Another issue of concern is the tacit implication that people have the ability to tell the future. When one is bidding on material resources one does so in order to develop a certain career which will complement the wealth and leisure expectations of one's life-plan. But how can one be certain that after the auction is over, and production and trade have evolved, one still wants the same kind of life one wanted before? Even if one could not tell the future with certainty, but only make probabilistically based bids in the auction, what happens when one changes one's mind? If the career she chose does not work out for her—does not satisfy her or does not yield the high income her life-plan requires— or, if after a while she wants to change her mind, what can she do? She began with the same resources as others. But by now she probably traded and consumed some of those resources.

Given that she is no longer satisfied with the way her plans have been realized, she no longer see herself equal to those for whom the use of initial resources worked out well. Among the practical problems Dworkin sets aside in his essay is this very problem of what happens when one changes one's mind.

Nor have I said anything about what accommodation an equal distribution of resources should make for radical changes in people's mind about how they wish to spend their lives. Is someone entitled to a fresh stock of resources when he rejects his former life and wants a fresh start? (Ibid., p. 334)

Yet, this problem does not only affect the transition from theory to actual conditions. It remains unsolved even on the level of theory alone because there is no principal way of handling such possible changes of mind on this level. The problem is that there is no way back to the initial situation of complete equality of resources. If one took a risk in bidding and proved wrong, there is very little room, if any, for correcting the situation.

3.3.d: The insurance market

Due to the problems involved with the initial auction, Dworkin proceeds with the second stage of his proposal, the insurance market. He invites us to imagine that after the auction those who are not certain they may command the income their life-plans require are able to protect themselves against such failure by buying insurance. "By way of supplement to the auction, they now establish a hypothetical insurance market which they effectuate through compulsory insurance at a fixed premium for everyone based on speculations about what the average immigrant would have purchased by way of insurance had the antecedent risk of various handicaps been equal." (Ibid., p. 301)¹⁴. If they do not achieve the

¹⁴ Although this quotation mentions a simple counterfactual insurance scheme against handicap, Dworkin develops a similar, yet more complex insurance scheme against risks that are traceable to possible differences in skills and talents; pp. 315-6.

income indicated on the insurance policy, the insurance company would supplement the difference.

Insurance is provided against failing to have an opportunity to earn whatever level of income, within the projected structure, the policy holder names, in which case the insurance company will pay the policy holder the difference between the coverage level and the income he does in fact have an opportunity to earn. Premiums will vary with the level of coverage chosen, must be the same for everyone at any particular coverage level, and will be paid, not out of the policy holder's initial stock of resources (or clamshells) but rather from future earnings after the auction at fixed periods. (Ibid., p. 317)

It is assumed that the individual's self-knowledge and preferences would determine how much insurance each would buy. The hypothetical insurance market allows individuals to further participate in determining the value of available resources through choosing to insure against failure to succeed in specific careers that require particular resources.

However, Dworkin concedes, the insurance market may not guarantee the high income most would want. In most cases people are not going to earn the high incomes they wish because of fierce competition for high income careers and because their actual abilities may not match their expectations. If one chooses to buy insurance against failure to earn a very high income, then when one fails to earn the designated high income the insurance company will have to pay this person large amounts of money. This, in turn, will drive insurance premiums so high such that persons who designate high income expectations would have to use much of their resources to pay their insurance premiums. It is quite conceivable that persons paying such high premiums will lose some, if not much, of their leisure time and wealth, and/or be forced to change their occupations in order to make these payments. Thus, Dworkin concludes, few people will choose to buy insurance that will guarantee them very high incomes. Rather, he suggests, individuals would opt to buy policies that cost less and guarantee less income, thus enabling them to choose not one of the few careers that guarantee very high

income, but one of the many careers that yield enough income to satisfy their adjusted life-plans and pay the insurance premium at no great loss of time, leisure and wealth. (Ibid., pp. 319-23) Dworkin also suggests that revenue from insurance policies can be converted into tax revenue to be distributed among those who fail to achieve their expected income levels. This tax can be a percentage of what individuals actually earn, resulting in a progressive income tax scheme. (Ibid., pp. 313, 326) All this would happen in the second stage of Dworkin's project, the insurance market, where conditions of uncertainty obtain and persons are motivated to establish a society based on a balance between equality of resources and their individual preferences of life-plans.

3.3.e: Problems with the insurance market

Dworkin assumes that in their own lives most people want quite a similar balance between the three basic resources: careers, leisure and wealth. That is, most people would not want to sacrifice one resource to gain much of another. Moreover, Dworkin assumes that given an initial equality of resources and talents, most people would be satisfied to earn some average income relative to the income structure of their society. Thus, they would buy insurance that would guarantee them such average income. Those who want to earn more do so because of their ambitions, not talents. For example, one who wants to accumulate wealth might do so by giving up leisure time and consume less of her initial wealth. However, in order to be able to buy a reasonable level of insurance and have average income expectations, one needs to know the income structure and the cost of average insurance policies.

Dworkin speculates that in a society regulated by equality of resources, a computer can predict both the income structure and the cost of average insurance policy.

Suppose that, before the initial auction has begun, information about tastes, ambitions, talents, and attitudes toward risk of each of the immigrants, as well as information about the raw materials and

technology available, is delivered to a computer. It then predicts not only the results of the auction but also the projected income structure – the number of people earning at each level of income – that will follow the auction once production and trade begin, on the assumption that there will be no income tax. (Ibid., pp. 316-17)

The computer predictions, then, will serve to calculate the cost and the value of the insurance policies most people would buy. The minor problem has to do with the stipulation that equality of talents is fixed and thus talents need not be a part of the information delivered to and calculated by the computer. If different individual talents are calculated, then the model becomes talent-sensitive and is inconsistent with Dworkin's description of the auction. But the more serious problem is that in order for the computer to yield these results, Dworkin has to supply the computer with a program that can adequately, by the use of some criteria, generate the wanted income structure and average insurance cost. Merely listing the sort of information to be delivered to the computer is part of the description of the problem, not the solution. The incommensurability of individual preferences, talents and ambitions cannot be solved by simply entering data into a computer. What is still needed is a 'program' that can process the information (e.g., assign values to individual preferences, rank and compare preferences, talents and ambitions, as well as calculate cultural effects and risk attitudes) in order to yield the income structure of society as well as the cost and terms of insurance policies. Unfortunately, no such program has been successfully put forward by Dworkin or anyone else so far. Thus, it is unlikely that Dworkin's insurance market can yield a sound basis for individual compensation.

Another problem related to the insurance market is that when buying insurance people protect themselves from failing to achieve a certain income, not from failing to succeed in certain careers. In the auction people express their preferences through bidding for particular careers. But the insurance market focuses on the expected levels of income regardless of their preferences of occupation. At least in this sense the insurance market makes Dworkin's model

less sensitive to individual preferences than it seems at the auction stage. This is so because in the insurance market particular preferences of careers seem irrelevant.

A last, and very serious problem has to do with the relationship between the two stages of Dworkin's thought experiment, the auction and the insurance market. As Maple points out,

At this point the deep incoherence of Dworkin's project becomes apparent again, for Dworkin bases the insurance market on the income structure produced (via computer) in the initial auction. But, as I pointed out, in order for the initial auction to be successful, we must assume that talents are *already* equal and that those participating in the auction can already *foresee* the income structure that will result once trade and production begin. In other words, the insurance market is either superfluous or impossible. The insurance market is superfluous if we can hold the auction because in this case the auction already ensures equality over time. The insurance market is impossible if we cannot hold the auction, because in this case the insurance market presupposes that trade and production have occurred—and this presupposes, in turn, that we begin from some *initial* distribution of income that is already fair. Without running the auction, however, we have no idea whether the income structure we begin with is fair or not. For this reason, then, neither part of Dworkin's description of equality in resources makes sense. (1989, p. 52)

3.3.f: Conclusion

Dworkin attempts to construct a model for distributive justice that balances (economic and personal) liberty and equality of resources, that is sensitive to individual preferences and offers some solutions to practical and particular problems of equality over the lifetime of individual members of society. Through the thought experiments, the auction and insurance market, Dworkin is able to develop a sense of initial equality of resources. However, some of the assumptions involved in this initial situation— e.g., that all are equally talented, that it is possible to distinguish clearly between talent and ambition in one person, and that the immigrants are able to predict the future of their economy— seem implausible

and yield some theoretical and practical difficulties. In the attempt to construct a model that is ambition-sensitive Dworkin allows much information to be calculated by a computer in order to project the income structure and insurance scheme needed for the operation of the auction and the insurance market. But the lack of a program, to be used by the computer, suggests that Dworkin evades, rather than solves, the problem of the incommensurability of individual preferences problem. Until we get this missing program, no computer can generate the wanted results.

The discrepancy between the initial situation (the computer, the auction and the insurance market) and actual circumstances gives rise to the need to go back to the initial situation and revise initial conditions and decisions made in the initial situation. However, when actual circumstances obtain and a person realizes, for example, that she dislikes her chosen career, or fails to earn the income she expected, or simply wants to change her career, there is no way, offered by Dworkin, to revert back to the initial situation and adjust the initial resources she expected to use throughout her life. Moreover, the initial equality of resources establishes a set of primary goods, namely, careers, wealth and leisure. The problem here is that this list is too vague: this set of primary goods may include almost anything. Finally, the levels of supply of these goods are presumed to be an upshot of the auction and the insurance market. But if those devices are faulty, we have no clear idea of what are the proper levels of supply of these primary goods.

Given these problems, Dworkin proposal does not seem to present a workable model for distributive justice. I would suggest that when the immigrants become aware of the problems mentioned above, they might not opt for participating in the auction and the insurance market, and might not accept the results of this initial situation as part of the foundations of their society. If so, it seems, actual persons under actual conditions may also have good reasons not to trust such a model with issues regarding their very actual lives and welfare.

3.4: John Rawls's original position

3.4.a: Introduction

Ever since John Rawls's *A Theory of Justice* was first published (1971, hereafter referred to as *TJ*) it has been subject to much review. In 1999 Rawls published *A Theory of Justice. Revised Edition* (hereafter referred to as *TJR*) which incorporates such changes Rawls deemed necessary. In the interim Rawls has revised and adjusted his theory in many essays in order to meet some objections and clarify some misunderstandings. Referring to these publications, Rawls says, in *Justice As Fairness: A Restatement* (2001, hereafter referred to as *JFR*)

. . . the essays are not fully compatible, and ambiguities in stating various ideas – for example, that of an overlapping consensus – make it difficult to find a clear and consistent view. The interested reader is entitled to assistance in seeing how these essays and *Theory* might fit together, where the revisions go and what difference they make. This assistance I try to provide by presenting in one place an account of justice as fairness as I now see it, drawing on all these works. I have tried to make this formulation more or less self-contained. (*JFR*, p. i)

In *JFR* Rawls asserts that justice as fairness is not a (wide) comprehensive moral, philosophical or religious doctrine, such as utilitarianism or Christianity, but rather a narrow political theory, suitable to handle some aspects of liberal democracies, particularly the general political principles and institutions of justice for the basic structure of such societies. He also presents a restatement of the two principles of justice as fairness and a systematic enhancement of the theory of distributive justice. Therefore, I will use *JFR* extensively and develop my view of welfare, in Chapter 4, in line with Rawls's restatement.

The scope of Rawls's works is much too great to be fully treated here. It surely exceeds the scope of this work. This makes it difficult to separate some issues and present a limited discussion of distributive justice and the principles and institutions of welfare. I will assume familiarity with Rawls's thought and the

standard commentary. I structure the ensuing discussion in the following way. I will first compare the old version of the two principles of justice (*TJ*, p. 61) with the revised version of these principles (*JFR*, p. 42) as a way of presenting the core of Rawls's theory and the major changes in Rawls's political conception of justice. Next, I will focus on his theory of distributive justice, particularly, on his view of primary goods and the difference principle. Then, I will discuss the lexical priority of the two principles of justice and the ideas of public justification and an overlapping consensus. I maintain that Rawls's general view of distributive justice, based on the proper set of primary goods, equality of opportunity and the difference principle, has remained essential to justice as fairness. However, some of the specifics have been significantly improved.

Rawls presents his theory as a better alternative to theories of justice such as utilitarianism, which focus on individual preferences. Focusing on individual preferences involves the problem of the incommensurability of individual preferences. In order to avoid the problem, Rawls conception of justice focuses on the basic structure of society. The basic structure of society is composed of the fundamental principles and institutions that regulate liberal democracies. Focusing on these elements allows Rawls to quantify over individual preferences and treat society in terms of the general interests of groups or classes as presented by representative persons in the original position. The basic structure contains various social, economic and political circumstances into which people are born. These circumstances give rise to inequalities which, according to Rawls, cannot be said to be deserved. (*JFR*, pp. 73-4) Nevertheless, these inequalities are part and parcel of any liberal democracy of the type we are considering here. Thus, if the basic structure of society is to allow a justifiable range of inequalities, argues Rawls, it needs to contain a procedure of redress that corrects undeserved inequalities. (*JFR*, pp. 50-2) In particular, redressing undeserved inequalities calls for securing basic rights and liberties for each citizen, the distribution of certain

primary goods, and ensuring that no citizen lives below a certain level of decent living, as will be explained below.

Rawls invites us to engage in a thought experiment called 'the original position'. The original position is a device where fair background conditions, under the 'veil of ignorance' obtain for all, and where free and equal (representative) persons affirm their choice of a conception of justice and select principles and institutions to regulate their society. "To conclude: we introduce an idea like that of the original position because there is no better way to elaborate a political conception of justice for the basic structure from the fundamental intuitive idea of society as a fair system of cooperation between citizens as free and equal persons." (*TJ*, p. 330) Rawls presents his theory of justice as a high level social contract theory. The original position is the occasion of establishing the social contract. Although the original position is a thought experiment, the conception of justice and the principles and institutions it yields are justified, according to Rawls, because they would be unanimously selected in this initial situation. In Rawls's words,

... the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. (*TJ*, p. 11)

But, before we go on to spell out the principles and institutions selected at in the original position, it seems valuable to note that the selection of a conception of justice in the original position is a first stage in a four-stage sequence. (*TJ*, pp. 195-201; *TJR*, pp. 171-176; *JFR*, p. 48) In the original position the conception of justice and some fundamental regulatory principles and institutions are selected. In stage two, the veil of ignorance is partly lifted and the representative persons underwrite a constitution. Next is the legislative stage in which laws are ratified in line with the constitution and the principles of justice, by going back and forth

from the constitution to particular laws until imperfect, yet stable, laws are established. The last stage is setting up applications of rules to particular cases through the implementation of laws by administrators, the interpretation of laws by judges, and through citizens' general adherence to laws. This four-stage program shows how important are the decisions made in the original position since they filter down and determine all latter social transactions.

3.4.b: The Principles of Justice

The outcome of the process of deliberation in the original position, if all goes Rawls's way, is the adoption of the conception of justice as fairness expressed in *TJ* through the following two principles of justice:

The first statement of the two principles reads as follows.

First: each person is to have as equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

(*TJ*, p. 61)¹⁵

In *JFR* Rawls presents the following revised statement of the two principles:

- (a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which 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 office and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle). (*JFR*, pp. 42-3)

¹⁵ Although *TJ* includes more elaborate versions of the two principles, this first formulation is presented here because it clearly exposes the deficiencies Rawls attempts to correct in his later works. Indeed, Rawls takes this formulation to be the benchmark definition on which he improves in *JFR*, pp. 40-52.

3.4.c: Revisions to the first principle

According to Rawls, the use of the singular term 'basic liberty' in the earlier formulation, as opposed to 'basic liberties' in the revised version', obscures the sense of liberty Rawls is employing in at least two ways. First, it gives the false impression that liberty is a singular term and not a cluster of terms. Second, it gives the inaccurate impression that 'liberty' as such has a priority over all other political and moral values. (*JFR*, p. 44) I will discuss the priority issue in a separate section below. For the time being let us focus on the plurality of liberties Rawls refers to by the term 'basic liberties':

. . . 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. (*JFR*, p. 44)

According to Rawls, his previous use of the singular term 'liberty' lent itself to misinterpretations. For example, his previous use of 'liberty' could have been interpreted in the way the strict libertarian understands liberty. This is not Rawls's intention since justice as fairness, as a political conception of justice, specifically rejects adherence to such a comprehensive doctrine.

The general list of basic liberties and rights may be drawn in two ways: historical and analytical. It may be drawn by surveying past successful democratic regimes and selecting those liberties that lead to their success. Or, it can be drawn by determining the essential conditions required for the development and maintenance of successful democratic regimes. Either way, the list of basic liberties is designed to correspond to Rawls's revised view of human nature. As I have mentioned before (Chapter 2, Sec. 2.3.c) Rawls revised his view of human nature. In *TJ* human beings are characterized self-interested individuals. In *JFR* Rawls describes a political view of human beings as free and cooperative citizens

of particular societies governed by a shared conception of justice. For such citizens.

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. (*JFR*, p. 45)

That is, citizens of a society governed by justice as fairness must be able to (1) understand, apply and act from their shared conception of justice, and they must be able to (2) design, revise and act on their preferred life-plans within the moral limits defined by this conception. Thus, the revision of the first principle does not only emphasize the plurality expressed by liberty. It also reflects and matches Rawls's revised view of human nature.

However, beyond the specification of the plurality of basic liberties according to Rawls's revised view of human nature, basic liberties are ultimately determined according to their usefulness to citizens. Constitutional liberties are equally specified for each citizen. They aim to protect and secure to each equally free citizen the conditions required for the development and exercise of her two moral powers. (*JFR*, p. 112) "But the worth, that is the usefulness of these liberties, which is estimated by the index of primary goods, is not the same for all." (*JFR*, p. 149) The worth of these liberties is not judged by the way they are specified. Since these liberties are, or should be, fixed in a constitution, they are specified in the same way for all. The worth of these liberties is rather measured by how useful they are to citizens who live under various socio-economic conditions and receive different levels of supply of primary goods. Accordingly, to those who are disadvantaged (in a narrow sense, those who suffer from low levels of income and wealth), basic liberties are less useful than to those who are advantaged and enjoy high levels of primary goods. (*JFR*, p. 148) Rawls is asserting here a direct connection between the usefulness of basic liberties to each citizen and the level

of primary goods available to different citizens. Justice as fairness aims not only at equally specifying the list of basic liberties but also at protecting and securing the maximal usefulness of those constitutional essentials to each citizen. Indeed, Rawls asserts, "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." (*JFR.*, p. 46) Only after each citizen enjoys that level of socio-economic conditions and primary goods, which enables her to gain the maximal usefulness of her constitutional rights and liberties (when she is maximally enabled to exercise her moral powers), can she be considered an equal and free citizen who is then enabled to take part in political processes that determine additional political concerns. Further support to the connection between constitutional essentials and primary goods (that meet basic needs) is given in Rawls's assertion regarding the possible preconditions for justice as fairness, "This principle [the first principle of justice as fairness] may be preceded by a lexically prior principle requiring that basic needs be met, at 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." (*JFR.* p. 44n7, my brackets)

Thus, the revision of the first principle of justice as fairness in *JFR* accomplishes at least the following. The revision emphasizes the plurality of basic liberties and that they are specified in the same way for each citizen. Ultimately, it emphasizes that the worth of liberties and rights is determined according to their usefulness to each member of society. The revision implies the requirement that the maximal usefulness of constitutional essentials to each citizen must be obtainable by each before other political issues should be considered. It reflects Rawls's revision of his view of human beings from the conception of self-interested persons to the political conception of free, equal and cooperative citizens of liberal democracies. In distributive justice terms, the first principle of justice implicitly connects the provision of some adequate levels of primary goods with the development of free

and equal citizens who have maximal use of their constitutional rights in exercising their moral powers.

3.4.d: Revisions to the second principle

Rawls says that “The revisions in the second principle are merely stylistic” (*JFR*, p. 43) They include the reordering of the two parts of the second principle such that equality of opportunity precedes the difference principle, and a restatement the difference principle (which will be discussed in detail in sec. 3.4.g below). Rawls claims that the reordering of the second principle emphasizes that equality of opportunity, especially of political opportunities, needs to be established before social and economic inequalities are addressed. Equality of opportunity is a difficult idea that attempts to cover possible deficiencies of formal equality not covered by the first principle. “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.” (Ibid., p. 43) Rawls does not elaborate extensively on the meaning of equality of opportunity but is satisfied with the following limited explication.

To accomplish its [equality of opportunity] 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 concentration of property and wealth, especially those likely to lead to political domination. Society must also establish, among other things, equal opportunity of education for all regardless of family income. (*JFR*, p. 44, my brackets)

The intention is to ensure that those who have similar natural endowments and similar readiness to use those endowments are not hindered by their socio-economic positions from obtaining any public office or social position. Following Rawls, I will not further elaborate equality of opportunity at this point although it, or some of its features are going to be referred to below. But before continuing to discuss Rawls’s view of distributive justice, let us consider the lexical priority of

the two principles in order to check whether this ordering violates my rejection of the normative priority discussed in Chapter 2. Sec. 2.2 above.

3.4.e: The priority of the two principles of justice as fairness

As you may recall in chapter 2, I have asserted that normative priority means that when, in a democracy, issues of justice involve a conflict between liberty and equality, the effects of the principle that gets a normative priority standardly overrides the effects of the secondary principle. (Sec. 2.2.a) Such a normative priority is problematic since for each such conflict, it issues directives that favor the principle that gets priority regardless of circumstances, even if, say, the majority of citizens would actually prefer a directive aligned with the principle that does not get the priority. Indeed, the normative priority problem in liberal democracies is not exclusive to the sphere of distributive justice. However, I argued, it has a blocking influence on the feasibility of devising principles and models for distributive justice needed to supplement the initial plausibility of instituting widely acceptable welfare standards (Chapter 1). I concluded (Sec. 2.2.h) that such a normative priority ought to be rejected because it is unsuccessful in achieving its aim, i.e., the elimination of the mistrust of concentrated power. In this section I will argue that the lexical priority of Rawls's principles and their parts do not fall under the normative priority problem. I will demonstrate that the priority Rawls is advocating is more in line with the attempt to establish a model of distributive justice that balances the two principles (one that gives neither principle absolute normative priority) rather than normatively prioritize the two.

Rawls clearly states that liberty does not get any normative priority of the sort I have rejected in Chapter 2. When explaining the revisions made to the first principle, Rawls asserts,

The 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 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. (*JFR*, pp. 44-5)

Accordingly, the lexical ordering of the two principles does not give liberty a normative priority of the sort the strict libertarian maintains.¹⁶ Even though Rawls asserts that coercion needs to be justified for the maintenance of a well-ordered society, which includes its social and economic policies, he does not adopt a strong sense of the non-interference principle. Thus, it seems fair to conclude that the priority of the first principle over the second does not fall under the normative priority problem as I have defined it. Why this is so will become clearer as I lay out what it does attempt to accomplish.

To begin with, Rawls claims that there are four grounds to distinguish between the two principles:

- (a) The two principles apply to different stages in the application of principles and identify two distinctive 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 outline.
- (*JFR*, p. 49)

Taken together, these four grounds imply that the first principle is prior to the second because of practical reasons rather than normative considerations.

Moreover, Rawls states, "This priority means that in applying a principle (or checking it against test cases) we assume that the prior principles are fully satisfied." (*JFR*, 43) As we have seen in section 3.4.c. above, Rawls revised the

¹⁶ For examples see my discussion of Nozick's view, Sec. 2.2.b above, or Barry's criticism of ideal Pareto Optimality cited in Sec. 2.2.c above.

first principle in order to emphasize that a plurality of basic liberties, or constitutional essentials, is required to ensure the establishment of fair background institutions necessary to enable citizens to exercise their two moral powers. And until these constitutional essentials are defined and accepted, and citizens are enabled to draw their maximal usefulness to them, there is no legitimate, or principled, basis for making further decisions regarding equality of opportunity and distributive justice. "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 the setting of background institutions that satisfy the requirement of the first principle (including the requirement of securing the fair value of the political liberties), as by definition they will be in a well-ordered society." (*JFR*, p. 46) In a well-ordered society – i.e., a society regulated by a commonly accepted conception of justice (*JFR*, p. 8) – constitutional essentials must be accepted and instituted before all other issues can be seriously considered. Indeed, Rawls four-stage program (Sec. 3.4.a) expresses the requirement that constitutional matters be politically settled before further stages can unfold.

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 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 many kinds of issues arising at this point. (*JFR*, p. 48)

Furthermore, the lexical priority of the first principle ensures that constitutional essentials reflect the interests common to each member of pluralistic democracies and do not favor the concerns of some segments of society over others.

To explain, then, why the first principle of justice has priority over the second, we note that the basic liberties protect fundamental interests that have special significance. This distinctive feature is connected with the often intractable nature of religious, philosophical, and moral conflicts in the absence of a secure public basis for mutual trust. . . . we maintain that this public basis is best founded on a constitution that guarantees the equal basic liberties

once and for all. The same grounds that favor the equality of the basic liberties also favor their priority. (*JFR*, p. 105)

For the moment, let us ignore the phrase 'public basis for mutual trust'. we shall return to it later. (Sec. 3.4.h. below) The priority the first principle gets is intended to block the possibility that the cluster of basic liberties might reflect values of comprehensive doctrines that would not be appealing to each and every citizen.

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 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. (*JFR*, p. 46)

And in addition to preventing the possibility that government, rather than its citizens, define basic liberties, Rawls intends that the priority of the first principle (even before equality of opportunity is satisfied) serves as a bulwark against economic domination by establishing fair background institutions that " . . . prevent excessive concentration of property and wealth, especially those likely to lead to political domination" (*JFR*, p. 44)¹⁷

Moreover, Rawls says,

. . . . 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 exist, effective political institutions can be established to give adequate scope for the exercise of those freedoms. These conditions mean that the barriers to constitutional

¹⁷ Let us note, however, that the 'absence of a secure public basis for mutual trust', and that the priority of the first principle aims to prevent political dominance induced by economic dominance, both echo the reasons I advanced for rejecting the normative priority problem. But since Rawls never discuss these matters in terms of the mistrust of concentrated power, I will not pursue this any further.

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. (*JFR*, p.47)

But, whenever these favorable conditions do not obtain, the priority of the first principle “ . . . 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.” (*JFR*, p. 47)

In conclusion, the priority Rawls gives to the first principle of justice over the second principle is not absolute or normative. As such, it does not fall under the kind of normative priority I have rejected in Chapter 2. Rawls’s priority is motivated by (1) the need to secure and develop the kind of free and cooperative citizenship that can exercise its two moral powers; (2) the practical necessity to establish constitutional essentials before any further political issues can be considered; (3) the need to secure a pluralistic body politics that is not dominated by comprehensive doctrines, economic interests and governmental biases; and (4) to ensure that, even when conditions are not favorable, basic rights and liberties are not sacrificed for other political or economic values. This sort of lexical priority, I conclude, is not normative but practical because it is not motivated by the belief that liberty is intrinsically more important than equality. It is rather motivated by the necessity of adjoining the two principle into what Virginia Held, among others, calls ‘equal liberty’, “ . . . which results from combining rights to liberty and rights to equality.” (1989, p. 121). As such, the priority Rawls is advocating is more in line with the attempt to establish a model of distributive justice that balances the two principles rather than normatively prioritizing them.

At this point, after we reviewed Rawls’s conception of justice as fairness, the revisions made to the two principles, and the nature of their ordering, we focus on the elements of Rawls’s theory of distributive justice.

3.4.f: Primary goods

The scheme of constitutional liberties serves as the basis for social and economic cooperation that binds together all members of society from the worst-off to the best-off. Primary goods are required for the realization of this scheme of equal liberties and the appropriate kind of citizenry. "These are various social conditions and all-purpose means that are generally necessary to enable citizens adequately to develop and exercise their two moral powers, and to pursue their determinate conceptions of the good." (*JFR*, p. 57) Furthermore, primary goods aim to satisfy citizens' objective needs of and not individuals' desires.

Primary goods are things needed and required by persons seen in the light of the political conception of persons, as citizens who are fully cooperating members of society, and not merely as human beings apart from any normative conception. These goods are things citizens need as free and equal persons living a complete life; they are not things it is simply rational to want or desire, or to prefer or even crave. We use the political conception, and not a comprehensive moral doctrine, in specifying those needs and requirements. (*JFR*, p. 58)

Moreover, this formal conception of primary goods yields a maximal, or proper set of primary goods that does not represent some average level of goods that satisfy average needs. Rather, it gives rise to an agreement that originates in the original position concerning what each citizen requires regardless of her favorite comprehensive doctrine. Indeed, Rawls argues, "This normative conception is necessary to identify the appropriate list of primary goods." (*JFR*, p. 58)

According to Rawls there are two ways to determine the appropriate list of primary goods, one of which is wrong, the other right. (*JFR*, p. 60, pp. 188-9) Specifying the list of primary goods may involve surveying the various comprehensive doctrines prevalent in society and identifying the index of primary goods that is common to these opposing doctrines.

But this is not how justice as fairness proceeds. Instead, it works up a political conception from the fundamental idea of society as a fair system of social cooperation. The hope is that this conception with

its account of primary goods can win the support of an overlapping consensus. We leave aside the comprehensive doctrines that now exist, or have existed, or might exist. Our thought is not that primary goods are fair to conceptions of the good associated with comprehensive doctrines by striking a fair balance between them. Rather, primary goods are fair to free and equal citizens: these goods enable them to advance their permissible conceptions of the good (those the pursuit of which are compatible with justice). (*JFR*, p. 61)

Although surveying opposing comprehensive doctrines and compromising on a sort of an average index of primary goods may win the support of a majority of citizens, which would make such a specification political, Rawls argues that this kind of specification is “. . . political in the wrong way.” (*JFR*, p. 189) This is so because some basic needs or essential liberties are likely to be outside this average, majority-supported specification. Those whose basic needs are unsatisfied or whose basic rights are neglected can become obstacles to the maintenance of this specification, and thus to social and economic cooperation to the extent that society becomes unstable. On the other hand, if the specification of the set of primary goods is built into the basic structure of society, one which accommodates, or avoids conflict with opposing comprehensive doctrines, then “Our hope is that this idea, with its index of primary goods arrived at from within it, can be the focus of a reasonable overlapping consensus.” (*JFR*, p. 189) Assuming an intuitive understanding of the idea of an overlapping consensus, which I will explicate below (Sec. 3.4.h), let us note that not only the set of primary goods, internally specified, is presumed to enjoy the support of an overlapping consensus in the original position. This specification of primary goods is also presumed to enjoy the sustained support of an overlapping consensus among citizens in any well-ordered actual society whose basic structure is governed by justice as fairness.

Rawls proposes the following list of primary goods, which would be specified by representative persons in the original position in accordance with justice as fairness:

(i) The basic rights and liberties: freedom of thought and liberty of conscience, and the rest (§ 13). These rights and liberties are essential institutional conditions required for the adequate development and full and informed exercise of the two moral powers (in the two fundamental cases (§13.4)).

(ii) Freedom of movement and free choice of occupation against a background of diverse opportunities, which opportunities allow the pursuit of a variety of ends and give effect to decisions to revise and alter them.

(iii) Powers and prerogatives of offices and positions of authority and responsibility.

(iv) Income and wealth, understood as all-purpose means (having an exchange value) generally needed to achieve a wide range of ends whatever they may be.

(v) The social bases of self-respect, understood as those aspects of basic institutions normally essential if citizens are to have a lively sense of their worth as persons and be able to advance their ends with self-confidence. (*JFR*, pp. 58-9)

In reply to Sen's charge that such an index of primary goods would be too inflexible to be fair because citizens have different capabilities to use primary goods and thus different capabilities to formulate and act on their conceptions of the good (1992, pp. 12-28), Rawls says, first, that primary goods do not only satisfy the basic needs of citizens, they are also determined in relation to citizens' ideal basic capabilities, namely, their two moral powers. As we have seen before (section 3.4.c above), it is not enough to specify constitutional liberties. What is also required is ensuring that citizens are capable of procuring the maximal usefulness of these essentials to them, regardless of their wealth and income levels. And second, Rawls asserts that this specification on the level of ideal theory in the original position is indeterminate since its completion can only be achieved under to actual circumstances. (*JFR*., pp. 172-3) The complete index of primary goods is to be specified at the legislative stage (the third stage of Rawls's four-stage program) where information regarding citizens' capabilities and

possibilities is available and integrated into the index of primary goods. Moreover, since citizens have different capabilities to use primary goods to advance their conceptions of the goods, Rawls distinguishes between two cases of differences of capabilities.

The first case concerns differences among citizens' capabilities within the normal range but above the minimum essentials required to be a fully cooperating member of society. These differences are accommodated by an ongoing social process of pure background procedural justice. (*JFR*, p. 175)

Indeed, when citizens have those primary goods that enable them to be fully cooperating citizens, who can to pursue and realize their conceptions of the good, there is no need to measure and compare differences of capabilities since they result in inequalities that are justified and regulated by the difference principle. However, in the second kind of case, where citizens' capabilities are curbed by illness, accidents (and even handicap), the index of primary goods needs to be more flexible.

Here we rely on the fact that the index of primary goods is to be more definitely specified at the legislative stage and, as always, in terms of expectations. These features allow it to be flexible enough to meet different medical needs arising from illness and accident. Important here is the use of the conception of the citizen as a cooperating member of society over a complete life, which enables us to ignore differences in capabilities and endowments above the minimum. That conception directs us to restore, or in an appropriate way to make good, our capabilities when by illness and accident we fall below the minimum and are unable to play our part in society. (*JFR*, p. 175)

Citizens' legitimate expectations arise from the scheme of basic liberties and the ideal of citizenship entailed by the two principles of justice as fairness: citizens legitimately expect to be able to exercise their moral powers and be enabled to realize their conceptions of the good (permissible by justice as fairness). If the ideal set of primary goods fails to satisfy the legitimate expectations of some citizens, then it should be stretched out, expanded, to satisfy those unfulfilled legitimate expectations. The degree of flexibility required to determine the

appropriate set of primary goods for a particular society is to be specified by moving back and forth between the third and the fourth stages: the legislative stage, and the administrative and interpretive stage. Thus, although Rawls operates on the level of ideal theory, it is clear that he believes that justice as fairness accounts for practical issues such as the special needs and capabilities of those who are incapable because they are ill, or injured, or handicapped, or poor.¹⁸

In the original position, under the veil of ignorance, representative members utilize the maximin rule to select principles for the basic structure of society.

Since the maximin rule directs the parties to evaluate the alternatives only by their worst possible outcomes, it must be rational for the parties as trustees not to be much concerned for what might be gained above what can be guaranteed (for those they represent) by adopting the alternative whose worst outcome is better than the worst outcomes of all other alternatives. Let's call this best worst outcome the "guaranteeable level." (*JFR*, p. 98)

Although this claim is directed at the selection of the principles of justice for the basic structure of society, the use of the maximin rule must also obtain for the selection of the appropriate general list of primary goods entailed by the first principle of justice as fairness. In the original position the 'guaranteeable level' is specified according to some idealized application of the maximin rule, on the assumption that the maximin rule is an adequate decision-making rule. Applied to the specification of an actual list of primary goods, such a 'guaranteeable level' implies securing a minimum set primary goods (which includes developing capabilities to use primary goods, if capabilities are lacking) to each citizen, which enables each to gain the maximal usefulness of constitutional essentials to her when she exercises her moral powers in realizing her legitimate expectations. Such a specification of a particular set of primary goods, appropriate to a particular society, requires further interpretation of justice as fairness and

¹⁸ An interesting discussion of 'sufficientarianism' and 'prioritarianism' – how to prioritize needs and goods below the minimum level – can be found in Richard J. Arenson (2002)

legislation that is relative to given circumstances and relies on an overlapping consensus obtaining among the citizens of this society.

In connection to the two cases of differences in capabilities Rawls notes,

This rather simple distinction between the two cases – of differences above and below the minimum essentials – is an example of the kind of practicable distinction that is, I believe, vital to any political conception that has some chance of being the focus of an overlapping consensus in a democratic regime. Our aim is to avoid difficulties, to simplify when simplification is possible, and to keep in touch with common sense. (*JFR*, p. 176)

I think it is very significant that both on the ideal theory level (or in the first stage of the four-stage program) and on the practical level (or in the third and fourth stages) a strong sense of a minimum level of provision of primary goods is advocated in Rawls's restatement of justice as fairness. And it is also significant that both ideal and practical levels are determined according to, or made legitimate by, an overlapping consensus.

In sum, primary goods are things and conditions that guarantee the equal realization of constitutional essentials among cooperating, free and equal citizens. They enable citizens maximally to use their moral powers in formulating and achieving their permissible conceptions of the good. The list of primary goods is political and normative and thus (politically) objective. The index of primary goods is also flexible to the extent that any complete and particular list of primary goods satisfies citizens' legitimate expectations relative to circumstantial conditions obtaining in their society. In a significant sense the establishment of an appropriate set of primary goods implies, on the ideal as well as the practical level, a guaranteed minimum level of equally distributed primary goods. Finally, the ultimate determination of either ideal or a particular appropriate list of primary goods depends on an overlapping agreement obtaining among parties to the original position and citizens of a particular society respectively.

3.4.g: The difference principle

The difference principle is explicitly restated in the second part of Rawls's second principle of justice. In its revised form it says that "Social and economic inequalities . . . are to be to the greatest benefit of the least-advantaged members of society (the difference principle)." (*JFR*, pp. 42-3) It is crucial to note, first, that the difference principle is not intended to apply in isolation but rather in concert with the preceding principles of justice as fairness. And, second, the difference principle aims at more than just regulating justified inequalities above the 'guaranteeable' minimum. To begin with,

Recall that it [the difference principle] is subordinated to both the first principle of justice (guaranteeing the equal basic liberties) and the principle of fair equality of opportunity (§ 13.1). It works in tandem with these two prior principles and it is always applied within background institutions in which those principles are satisfied. (*JFR*, p. 61, my brackets)

Moreover, according to Rawls, the difference principle is a principle of reciprocity in several senses. Besides the presumption of fair background institutions, the application of the difference principle assumes that social cooperation obtains and that it is productive, since " . . . without cooperation there would be nothing to produce and so nothing to distribute." (*JFR*, p. 61) Given that natural talents are viewed as a common asset (*JFR*, pp. 75-6) the production of those who are more talented is to be shared with those who are less talented such that both the advantaged and the disadvantaged benefit from this production. In addition, although Rawls's program generally assumes favorable conditions, continual economic growth is not required and the situation of the least advantaged may fluctuate according to varying economic circumstances. "What the difference principle does require is that during an appropriate interval of time the differences in income and wealth earned in producing the social product be such that if the legitimate expectations of the more advantaged were less, those of the less advantaged would also be less." (*JFR*, p. 64) The difference principle as a principle of distributive justice works both ways: it requires benefiting the least

advantaged when economic growth obtains and the more advantaged can improve their situation; and it requires the reduction of benefits to the least advantaged, and everybody else, when the economy is weak and the situation of the more advantaged declines. "This condition brings out that even if it uses the idea of maximizing the expectations of the least advantaged, the difference principle is essentially a principle of reciprocity." (*JFR*, p. 64)

The reciprocity of the difference principle is crucial in one additional and significant sense.

... together with the other social policies it regulates, the difference principle specifies a social minimum derived from the idea of reciprocity. This covers at least the basic needs essential to a decent life, and presumably more. We suppose citizens to view themselves as free and equal, and to regard society as a fair system of social cooperation over time. They also think of distributive justice as regulating economic and social inequalities in life-prospects, inequalities affected by one's social class of origin, natural endowments, and good fortune over the course of life. (*JFR*, p. 130)

Accordingly, not only citizens legitimately expect 'guaranteeable' primary goods (Sec. 3.4.f. above) that secure the maximal usefulness of basic liberties and equality of opportunity to them, they also legitimately expect additional primary goods, not specified by the guaranteeable level, that ensure a decent life for them. According to Rawls, the difference principle presumes that the position of the least advantaged is defined by the level of primary goods (especially income and wealth) available to citizens at the 'guaranteeable level' entailed by the first principle of justice. (*JFR*, p. 64) It then regulates all justified inequalities above this level. By implication, then, the subset of primary goods, required to fulfill citizens' life-prospects, or expectations of a decent life, at this 'guaranteeable level', can be used to specify the social minimum derived from the reciprocity of the difference principle. In other words, citizens who cannot fulfill their life-prospects or reasonable expectations for a decent life by utilizing the guaranteeable level of primary goods available to them, have legitimate complaints or

expectations to be provided with additional primary goods to enable them to achieve a decent life, where inequalities are justified and regulated by the difference principle. Again, this social minimum and the required subset of additional primary goods are to be established according to an overlapping consensus.

Furthermore, the difference principle is standardly considered an egalitarian principle because it focuses on the social and economic conditions of least advantaged. "Taking the simplest form of the difference principle, the least advantaged are those who share with other citizens the basic equal liberties and fair opportunities but have the least income and wealth." (*JFR*, p. 65) Although basic liberties are specified in the same way to all citizens, the worth of these liberties varies according to the socio-economic ability of citizens to use them: the more advantaged get better use of their liberties, and thus more value, than the least advantaged. Thus, "The difference principle, in maximizing the index available to the less advantaged, maximizes the worth to them of the equal liberties enjoyed by all." (*JFR*, p. 149) Nevertheless, the difference principle, in its complex form, is more egalitarian than in its simplest form since it applies to society as a whole. To begin with, "The difference principle specifies no definite limits within which the ratio of the shares of the more and less advantaged is to fall." (*JFR*, p. 68) This implies that the difference principle does not ultimately reject actual social and economic inequalities, and that the advantaged do not need to forgo their holdings, although they are required to share with the less advantaged the benefits they draw from their holdings and talents, if they want to improve their lot. This implication of the difference principle shows concern for citizens situated above the position of least advantaged. Moreover, Rawls asserts,

In ideal theory, the only defense of inequalities in the basic structure is that they make the worst off (whoever they may be, . . .) better off than the worst off (whoever they may be) under any alternative (practicable) scheme consistent with all the requirements of the two principles of justice. In this way, the

difference principle expresses, as any principle of political justice must, a concern for all members of society. (*JFR*, p. 71)

Thus, it seems safe to conclude that the difference principle is egalitarian not only because it focuses on the least advantaged. It uses the situation of the least advantaged as the benchmark for comparison and improvements. It is egalitarian also because it accounts for the social and economic situation of all citizens both in theory and in practice.

Yet even if the difference principle expresses concern for all citizens, why should the better off accept it with the implication that improving their situation (in terms of income and wealth) is always dependent on the improvement of the situation of the worst off? Put differently, why should the better off agree to 'drag' the worse off behind them whenever they push forward in order to improve their own situation? Rawls provides three reasons for the advantaged's ascent (*JFR*, pp. 125-6). First, justice as fairness entails that the basic structure of society is designed to allow equally free citizens to engage in social and economic cooperation that is advantageous for all, from the worst-off to the best-off. The reciprocal character of the difference principle enhances such mutually advantageous cooperation, which is required for the better-off in order to have that very status. In other words, in liberal democracies, the better-off are better-off because of the environment of mutually advantageous cooperation. Thus, it serves their interests to preserve this environment. Second, "... the more advantaged see themselves as already benefited by their fortunate place in the distribution of native endowments, say, and benefited further by the basic structure (affirmed by the less advantaged) that offers them the opportunity to better their situation, provided that they do so in ways that improve the situation of others." (*JFR*, p. 126) Indeed, if the better-off want not only to preserve their status, but also to improve their lot, they should be motivated to support a basic structure regulated by the difference principle in which they have the opportunity to achieve their aims. Third, the difference principle, by being part of the basic structure of society

rather than the result of political bargaining, ensures that the general good is promoted for all citizens. Political bargaining that is not part of the basic structure, on the other hand, may result in outcomes that are not beneficial to the better-off. For these three reasons, concludes Rawls, the better off should be motivated to support the difference principle even though it puts the burden of improving the situation of the least advantaged on their shoulders.

To sum, Rawls's difference principle, to be applied only after equal liberty and equality of opportunity are secure, regulates social and economic inequalities. It is a reciprocal principle in several senses that enhances social cooperation, and it implies an additional level of supply of primary goods that secures a social minimum and a decent life to each citizen. It is egalitarian in expressing concern for the economic and social conditions of all citizens, even to the better off. As such, Rawls concludes, each citizen of well-ordered liberal democracies should support it.

3.4.h: Public justification and overlapping consensus

According to Rawls "We include in the first principle of justice a proviso that equal political liberties, and *only* these liberties, are to be guaranteed their fair value." (*JFR*, p. 148) The worth of all other basic liberties depends on their usefulness to citizens according to citizens' socio-economic positions. However, the maximal usefulness of political liberties to each citizen must be guaranteed since justice as fairness, including all other political issues connected to it, is justified by political means. Political justification is a process that begins with discussion and debate and is guided by public reason or reasonable disagreement. The conclusions of public reason are then rectified by the support of an overlapping consensus. Thus, reasonable disagreement provides the method and the establishment of an overlapping consensus provides the procedure by which political decisions are justified. "The most reasonable political conception for us is the one that best fits all our considered convictions on reflection and organizes

them into a coherent view. At any given time, we cannot do better than that.” (*JFR.*, p. 31) Once such a political conception of justice is adopted, further political decisions are legitimate only if they are consistent with it and are determined through public justification and an overlapping consensus. “The aim of the idea of public justification is to specify the idea of justification in a way appropriate to a political conception of justice for a society characterized, as a democracy is, by reasonable pluralism.” (*JFR*, p. 26) According to Rawls, political decisions, on all levels, should be made under a wide (or full) reflective equilibrium (*JFR*, pp. 30-2). Under a wide reflective equilibrium, well-reasoned persons consider alternative judgments that originate in various comprehensive doctrines and are reasonable to various degrees. But, rather than adjudicate between different, often opposing, alternative judgments, public justification, under a wide reflective equilibrium, aims at arriving at political decisions each reasonable citizen can accept and adopt, regardless of the citizen’s favored comprehensive doctrine, if any. Justice as fairness, in turn, relies on public justification as a political decision making process.

An essential feature of a well-ordered society is that its public conception of political justice establishes a shared basis for citizens to justify to one another their political judgments: each cooperates, politically and socially, with the rest on terms that all can endorse as just. This is the meaning of public justification. (*JFR*, p. 27)

Public justification, then, is not a mere agreement or compromise between opposing views. Rather, it expresses public support of a core of beliefs and rules of inference that serves as the basis for justifying further political decisions. “Public justification proceeds from some consensus: from premises all parties in disagreement, assumed to be free and equal and fully capable of reason, may reasonably be expected to share and freely endorse.” (*JFR*, p. 27) Once constitutional essentials are fixed, further controversies can be consistently settled, through public justification, at the third and fourth stages of justice as fairness. “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 there, fair

social cooperation among citizens can, we hope, be maintained.” (*JFR*, p. 41) In other words, if a coherent and consistent set of principles and institutions are established on the level of ideal theory, the indeterminacy regarding further particular completions can be resolved by appeal to public justification. Indeed, many social issues can only be ultimately settled in the legislative stage and/or by voting procedures that might be influenced by non-political values. (*JFR*, p. 152n26)

The idea of public justification depends on rules of reasonable disagreement that lead from widely divergent judgments and values to political unity. It is the kind of unity, asserts Rawls, which methodically leads, for example, the diversity of theories of natural science to cohere and present fields of human knowledge and practice that are more or less unified. (*JFR*, p. 35) Diversity, according to Rawls, arises from the multiplicity of comprehensive doctrines and human experience, the different types of evidence and the different ways life experience and evidence are assessed and evaluated. Especially when it comes to moral values, vagueness and ambiguity often lead to disagreement and indeterminacy. Even normative considerations sometimes conflict to the extent that ultimate judgments cannot be reached. (*JFR*, pp. 37-8) For the method of reasonable disagreement to yield an overlapping consensus, in the face of such diversity, regarding the political conception of justice, decisions have to be made according to the kind of reason that is transparent and available to each citizen. It is the kind of public reason that resembles the methods and principles of scientific method, that relies on common sense, and that is acceptable to citizens’ ‘common reason’. (*JFR*, p. 90) In Rawls’s words,

... public reason is the form of reasoning appropriate to equal citizens who as a corporate body impose rules on one another backed by sanctions of state power. As we have said, shared guidelines for inquiry and methods of reasoning make that reason public, while freedom of speech and thought in a constitutional regime make that reason free. (*JFR*, p. 92)

However, clarifies Rawls, there is no guarantee that an overlapping consensus will always support justice as fairness or any other political conception of justice in liberal democracies. (*JFR*, p. 37) It may very well be the case that some comprehensive doctrine is dominant enough to override reasonable disagreement or win majority support. Nevertheless, justice as fairness begins with the conviction that democratic regimes are defensible and workable regardless of prevailing disagreements. It rejects compromises between opposing comprehensive doctrines but adopts a conception of justice that is defensible on its own and can be endorsed by citizens who differ in their fundamental beliefs. "This leads to the ideal of a political conception of justice that presupposes no particular comprehensive view, and hence may be supported by an enduring overlapping consensus of reasonable doctrines, given good fortune and enough time to gain allegiance to itself." (*JFR*, 37) Finally, reasonable disagreement makes the enforcement of the principles and institutions of justice legitimate because it is derived by publicly accepted rules of inference and mandated by an overlapping consensus, rather than be solely dependent on decisions of government officials. As such it ultimately places the justification for the use of coercive power in the hands of citizens.

Together, the values of justice and of public reason express the liberal ideal that since political power is the coercive power of citizens as a corporate body – a power in which each has an equal share – this power is to be exercised, at least where constitutional essentials and questions of basic justice are at stake, only in ways that all citizens may reasonably be expected to endorse. (*JFR*, p. 190)

In well-ordered liberal societies, a conception of justice, especially justice as fairness (and its implications) is publicly justified because (1) it is arrived at by free and open discussions guided by public reason, and because (2) it is supported and legitimized by an overlapping consensus. Applied to the context of distributive justice, or to establishing adequate standards of welfare, the idea of an overlapping consensus regarding the list of primary goods (implied by the first principle of justice as fairness) and the regulation of social and economic

inequalities (according to the difference principle) expresses public decisions reached by reasonable disagreement. Justice as fairness assumes that issues of distributive justice can be thus resolved in a way that is widely supported by citizens. The idea of public reason, or reasonable disagreement, presents a unity of method and procedure in determining appropriate levels of constitutional essentials as well as social and economic common goods. A reasonable disagreement regarding such levels of goods is presumed to be endorsed by the multiplicity of doctrines prevalent in the society in which it obtains. Justice as fairness ultimately puts the responsibility to establish such levels of primary goods, and the power to enforce social and economic policies, in the hands of the citizens who join together in some sort of an overlapping consensus.

Rawls's idea of an overlapping consensus is the sort of consensus required for public justification. Indeed, it is the vehicle for public justification. In *TJ* (p. 388; also in *TJR*, p. 340), the term 'overlapping consensus', as Rawls acknowledges (*JFR*, p. 186n9), appears only once in his discussion of civil disobedience. In *JFR* on the other hand, it is used widely and on many levels as the means by which public justification is recognized and rectified. To begin with, "The idea of an overlapping consensus is introduced to make the idea of a well-ordered society more realistic and to adjust it to the historical and social conditions of democratic societies, which include the fact of reasonable pluralism." (*JFR*, p. 32) When reasonable persons, who subscribe to different comprehensive doctrines, come together in an actual overlapping consensus a few things are gained. First, on the level of ideal theory, when (representative) persons are reasonable and willing to select and adopt a political conception of justice, which may not reflect the totality of their deepest convictions, they do so for the sake of establishing fair conditions of social cooperation for all. Such behavior expresses high degrees of tolerance and mutual respect necessary for the maintenance of a pluralistic democracy. Second, an overlapping consensus regarding constitutional essentials also enhances the degree of unity within societies whose citizens participate in the

establishment and share the maintenance of this consensus. (*JFR*, p. 32) Third, such an overlapping consensus, on the legislation and implementation levels, ensures wide support for government policies, which, in turn, contributes to the stability of the state. (*JFR*, pp. 184-5)

According to Rawls, the idea of an overlapping consensus is important to any political conception of justice, and particularly to justice as fairness, because "Any political conception has a view of the political and social world and relies on certain general facts of political sociology and human psychology." (*JFR*, p. 33) Rawls presents five such general facts on which his conception of justice relies through the idea of an overlapping consensus. First is the fact of reasonable pluralism: "Under the political and social conditions secured by the basic rights and liberties of free institutions, a diversity of conflicting and irreconcilable comprehensive doctrines will come about and persist, should it not already exist." (*JFR*, p. 34) Justice as fairness, publicly justified and supported by an overlapping consensus, adequately accommodates this permanent historical and cultural feature of liberal democracies. "A second and related general fact is that a continuing shared adherence to one comprehensive doctrine can be maintained only by the oppressive use of state power, with all its official crimes and the inevitable brutality and cruelties, followed by the corruption of religion, philosophy, and science." (*JFR*, p. 34) According to Rawls, relying on an overlapping consensus rather than adherence to any single comprehensive doctrine makes justice as fairness immune to this 'fact of oppression'. Third, "... an enduring and secure democratic regime, one not divided by bitter doctrinal disputes and hostile social classes, must be willingly and freely supported by at least a substantial majority of its politically active citizens." (*JFR*, p. 34) That is, establishing an overlapping consensus accommodates the need to ensure that democratic diversity is productive rather than destructive. Fourth, an overlapping agreement in a democracy gives political justification to those liberties and rights

which, then, can be the basis of a constitution, written or unwritten.¹⁹ Fifth, the kind of an overlapping consensus Rawls is advocating does not aim at the leveling off of diversity because “ . . . many of our most important political judgments involving the basic political values are made subject to conditions such that it is highly unlikely that conscientious and fully reasonable persons, even after free and open discussion, can exercise their powers of reason so that all arrive at the same conclusion.” (*JFR*, p. 36) Indeed, the idea of an overlapping consensus does not contradict the first fact of reasonable pluralism inherent in liberal democracies. Rather, it employs this fundamental diversity and promotes a platform for free discussion that allows the possibility of arriving at (something like) an overlapping consensus to be shared and utilized by citizens over time and from one generation to the next. Thus, justice as fairness, publicly justified through the establishment of an overlapping consensus relies and accommodates these general facts of political sociology and human psychology.

To sum, public justification is the union of method (public reason or reasonable disagreement) and practice (the establishment of an overlapping consensus) that makes political decisions, on all levels of Rawls's theory, justified.

3.4.i: Problems

Many of the changes and adjustments Rawls made to justice as fairness in *JFR* (and particularly his focus on the idea of an overlapping consensus) are meant to answer some of the well known objections to his theory of justice made over the past thirty years.²⁰ Since I believe Rawls has more or less met many of these

¹⁹ Rawls considers this fact important to all democratic regimes, but especially to the kind of constitutional democracies he favors: see *JFR*, Part VI, section 44, pp. 145-8.

²⁰ To mention a few: Rawls replies to objections, such as Barry's (1973) against the maximin principle in p. 43n3 and 5, pp., 94-99, 101-11; he treats criticism that the difference principle unproportionally focuses on the worst-off in p. 46n10, 67-71, 140-9, see Sec. 3.4.g above; he replies to Nozick (pp., 51-3); to Nagel (pp.,

objections. I will only focus on some issues concerning the feasibility of implementing the distributive aspects of justice as fairness in actual liberal democracies. These complications are mainly the result of a certain discontinuity between the levels of ideal theory and actual implementations of justice as fairness. Since Rawls insists that justice as fairness is a high level political theory that can be completed under actual conditions, the principles and institutions of his ideal theory are presumed to be sufficient for achieving actual distributive justice completions. (Sections 3.4.f and 3.4.h above) I argue that some of the features of Rawls's ideal theory are not sufficiently clear when attempting to specify actual and consistent implementations of justice as fairness. These features are exposed when Rawls explicates the kind of form of government best suited for realizing justice as fairness.

When Rawls considers alternative forms of government that would best realize justice as fairness he rejects civic humanism and recommends constitutional regimes. (*JFR*, 142-8) Civic humanism, in Rousseau's sense, argues Rawls, is a form of Aristotelianism because it maintains that democracies best fit human nature as social beings whose ultimate good is the participation in political life. As such, civic humanism is a comprehensive doctrine that is incompatible with justice as fairness. (*JFR*, pp. 142-3) Moreover, Rawls states,

Justice as fairness agrees with the strand of the liberal tradition (represented by Constant and Berlin) that regards the equal political liberties (the liberties of the ancients) as having in general less intrinsic value than, say, freedom of thought and liberty of conscience (the liberties of the moderns). By this is meant, among other things, that in a modern democratic society, taking a continuing and active part in public life generally has, and may indeed reasonably have, a lesser place in the conception of the (complete) good of most citizens. In a modern democratic society politics is not the focus of life as it was for native male citizens in the Athenian city-state. (*JFR*, p. 143)

141-5, 153-7); and Sen (pp. 168-76). Additional objections are treated, directly or indirectly, throughout the book.

Even though some citizens may find political life the center of their conception of the good, most citizens of contemporary liberal democracies do not view political life as such. (*JFR*, p. 144) Furthermore, Rawls argues that procedural democracies are unstable because they depend on an ever-changing, majority supported rules under no constitutional limits. "While these rules specify the required democratic procedures, these procedures themselves impose no limits on the content of legislation." (*JFR*, p.145) Such dependency on majority rule could result in the violation of basic rights and liberties of some of citizens. Such an outcome, even if temporary and correctable, is unacceptable to justice as fairness. Although Rawls does not deny the value of participation in political life, he believes it is a matter of degree and should be limited in scope. (*JFR*, pp. 143-4). For these reasons Rawls concludes that justice as fairness is not best realized in procedural democracies.

In contrast, classical republicanism²¹ is to be preferred because it depends on limited direct participation and it fixes a core of constitutional essentials that cannot be overridden by democratic procedures. Since classical republicanism is not based on any one comprehensive doctrine, it is compatible with political conceptions such as justice as fairness. (*JFR*, p 144) Classical republicanism is the bedrock of the kind of constitutional regimes Rawls believes best realizes justice as fairness. In constitutional regimes constitutional essentials are fixed and serve to delineate limits on political life. Citizens of constitutional regimes can be guaranteed the maximal usefulness of constitutional rights and liberties to them, and are free to pursue their conceptions of the good so long as they do not violate those constitutional essentials. It is the responsibility of the legislator and the court system to secure those rights and liberties to each citizen and maintain the kind of social cooperation and interaction required for a well-ordered society. Rawls acknowledges that

²¹ Rawls mentions the Machiavellian tradition to illustrate the sense of classical republicanism he employs. (*JFR*, p. 144n13)

Of course, it has its dangers: courts may fail in their task and make too many unreasonable decisions not easily corrected. Legislators may leave to courts too many matters that legislation should handle. Here the historical conditions of a people become relevant, but this does not affect the point at issue: namely, that the greater educational role of a political conception in a constitutional regime may alter its political sociology so as to favor it over procedural democracy. (*JFR*, p. 147)

These dangers are to be handled through public debate of disputed political decisions and some form of judicial review that are not only a part of the basic structure of a well-ordered society, but also a part of the political sociology of constitutional regimes.

The conceptions of person and society are more fully articulated in the public charter of the constitution and more connected with the basic rights and liberties it guarantees. Citizens acquire an understanding of the public political culture and its traditions of interpreting basic constitutional values. They do so by attending to how these values are interpreted by judges in important constitutional cases and reaffirmed by political parties. If disputed judicial decisions – there are bound to be such – call forth deliberative political discussion in the course of which their merits are reasonably debated in terms of constitutional principles, then even these disputed decisions, by drawing citizens into public debate, may serve a vital educational role. (*JFR*, p. 146)

The hope is that the educational role of justice as fairness will ingrain its principles, over time, in citizens, legislators and officers of the court to the extent that as time goes by there will be fewer disputed issues and a lesser need, if any, to appeal to political discussions and citizens' participation in order to resolve controversies regarding the meaning and implications of constitutional values. But this hope does not resolve urgent disputes that call for immediate and practical solutions. Indeed it puts them on hold until the long-term effects of political sociology and the educational role of justice as fairness yield judicial decisions and new legislation. Needless to say, these decisions may themselves be disputed and in need of further handling. At the end, final decisions are made by appeal to public discussion and debate. This is how things work out in general. However,

Rawls's view is still not clear on how public discussion leads to new legislation and judicial review, especially on basic issues involved in distributive justice. Given Rawls's reservations regarding using voting procedures, it remains unclear how else can public discussion be connected to legislation and judicial review, particularly concerning issues that require immediate and regular or periodical evaluation and adjustment.

It is here we would expect the idea of an overlapping consensus to play a determining role. However, Rawls does not mention the idea here and does not specify how exactly public discussion is to affect disputed issues or correct controversial decisions. This is the source of the discontinuity between ideal and actual levels of justice as fairness. And it is this discontinuity – which is not bridged over by implementing the potential practical aspect of the idea of an overlapping consensus – that makes the idea of an overlapping consensus somehow vague. This may not be a serious problem for Rawls's ideal theory. But it presents a serious problem when attempting to specify a particular implementation of justice as fairness for a particular society. Issues of distributive justice may not be the focal point of political life, but they make for some of the most debated and controversial political topics. If the public should have a role in resolving such disputes, what better tool justice as fairness has to offer than the idea of establishing an overlapping consensus among citizens who reasonably participate in public discussions? And how else can the establishment of an overlapping consensus among citizens be achieved and recognized but through direct participation? Rawls, I believe, is not clear on these matters. Although the educational role of justice as fairness and the political sociology of democratic societies encourage and contribute to public discussion of disputed issues, these two features of justice as fairness are insufficient to handle particular and urgent disputes, particularly regarding decisions that need to be constantly updated. Distributive justice issues, are not only controversial in current liberal democracies, but are also tightly connected to the two principles of justice as

fairness at least in two fundamental instances: the determination of the 'guaranteeable' level of primary goods and the establishment of a social minimum of legitimate expectation of a decent standard of living above which the difference principle regulates all social and economic inequalities. These issues require constant handling and, in most cases, if not immediate, then timely resolutions.

Another distributive justice related problem, which arises from the discontinuity between ideal and implementation levels of theory, has to do with Rawls's intention to avoid the problem of the incommensurability of individual preferences, or what Raz has calls Rawls's 'epistemic abstinence' (1994, pp. 45-81; Chapter 1, Sec. 1.1.c above). In the ideal political conception of justice as fairness Rawls gives basic rights and liberties a lexical priority over conceptions of the good because constitutional essentials must be fixed and secured, as fair background conditions, before they can be maximally used by citizens to pursue their conceptions of the good. But how can citizens form and pursue conceptions of the good unless they know not only their rights and liberties, but also their circumstances? Rawls answers that this priority is merely instrumental, that the right and the good supplement each other, and that both should be developed and implemented in tandem. Moreover, Rawls states,

... just institutions and the political virtues would serve no purpose – would have no point – unless those institutions and virtues not only permitted but also sustained conceptions of the good (associated with comprehensive doctrines) that citizens can affirm as worthy of their full allegiance. A conception of political justice must contain within itself sufficient space, as it were, for ways of life that can gain devoted support. If it cannot do this, that conception will lack support and be unstable. In a phrase, the just draws the limit, the good shows the point. (*JFR*, p. 140-1)

Yet, even if conceptions of the good are rational, permissible by justice as fairness, and can be realized by use of primary goods (*JFR*, pp. 141-2), how can this 'sufficient space' be delineated without citizens' input? It cannot be completely determined in the original position because of lack of particular and

relevant information. It may not be adequately specified by legislators because of the possible effects of dominant comprehensive doctrines and because it should not represent an average or a compromise between different conceptions of the good. If the rational and permissible individual conceptions of the good are to have 'sufficient space', and if these conceptions are to be realized by use of primary goods, then these conceptions of the goods and the complete list of primary goods must be supported, and hence made legitimate, by something like a Rawlsian overlapping consensus obtaining among all citizens. Again, an appeal to direct voting here seems reasonable. Otherwise, how can one know that an overlapping consensus had actually been achieved? Intuitively it seems reasonable that such a powerful and practicable idea as an overlapping consensus would be useful for determining the essential elements of justice as fairness, from the level of ideal theory to its practical implementation and possible completions. However, I believe that Rawls's principal objection to civic humanism and the wide employment of direct voting makes the idea of an overlapping consensus vague and limited in practical value.

3.4.j: Conclusion

The rejection of civic humanism, especially Rawls's objection to direct participation, leads to a discontinuity between the ideal and implementation levels of justice as fairness. At least on issues of distributive justice, our focus here, the idea of an overlapping consensus devoid of any appeal to direct participation affects the ability to reach final completions of justice as fairness for a given society in the following senses: (1) in the sense of determining a specific 'guaranteeable' level of primary goods, (2) in the sense of establishing a minimal level of decent life above which all social and economic inequalities regulated by the difference principle are justified, and (3) in the sense that a sufficient space of conceptions of the good can be delineated. Rawls's conception of the idea of an overlapping consensus is too vague, which makes it lose some of the practicable value for which it was introduced. So long as we cannot specify these crucial

elements of justice as fairness, possible completions, or realizations, are not forthcoming. If justice as fairness fails to express a distinct way of handling these issues, the feasibility of its implementation and its philosophical value as a political theory is damaged. As it stands, these problems of implementation, as limited to the practical level as they may be, make justice as fairness hard to accept.

3.5: Conclusion

Ackerman's pioneer planet model and Dworkin's immigrant island model utilize counterfactual initial situations from which principles of distributive justice are derived. In both thought experiments the sort of limited information available to the agents yield principles of distribution that may imply adequate standards of welfare, but cannot be implemented under actual conditions. Ackerman's model (Sec. 3.2) yields a principle of strict arithmetical division of resources based on the primary principle of conversational neutrality. But, as we have seen in section 3.2.c. under second best conditions the implementation and maintenance of this principle of distribution fails, despite Ackerman's appeal to additional notions such as 'unequal sacrifice' or 'exploitation' and 'wise statesmanship'. Dworkin's model (Sec. 3.3) attempts to define a principle of initial equality of resources, which is 'ambition sensitive' but not 'endowment sensitive'. The two parts of the model intend to establish and maintain such an initial equality over time. Such a principle does not offer a way of establishing adequate standards of welfare, but it offers a way to secure adequate standards of living, at least in terms of careers, wealth, and leisure, to each member of society. Nevertheless, the implementation of Dworkin's model fails because of difficulties in each of the two parts of his model, and because of the incompatibility of the two parts. (Sec. 3.3.c and Sec. 3.3.e) Finally, both models do not offer a way back to their initial situations where the principles and institutions selected can be revised to fit problems of

implementation. Thus, I submit that although both models attempt to design models of distributive justice that reflect concerns for citizens' welfare and balance liberty and equality, they should be rejected because, as they stand, they can not be applied and implemented under actual conditions.

Rawls's original position is also a thought experiment whereby a counterfactual initial situation yields a conception of justice that entails principles of distributive justice to be used to define adequate standards of welfare. Although in the original position information available to the representative persons is restricted, the high level principles it yields are considered rough and indeterminate. These principles are to be interpreted further and issue particular specifications once actual conditions obtain in the third and fourth stages of justice as fairness. The implementation of these principles has been made, in *JFR*, much more feasible because of additional practical features, especially the idea of an overlapping consensus. Particularly, Rawls has developed the notions of a 'guaranteeable level' of primary goods, a notion of a social minimum that implies the provision of additional primary goods needed for a decent life, and a notion of a sufficient 'space' for permissible conception of the good citizens are enabled to formulate and pursue. However, as I have explicated in section 3.4.j above, a certain discontinuity between the ideal and actual levels of justice as fairness gives rise to some problems of implementation, and damages the practical value of the idea of an overlapping consensus. Moreover, Rawls does not offer a way of going back to the original position in case revisions and adjustments of conception or principles are needed. Indeed, the problems just mentioned are analogous to the problems that led to the rejection of Ackerman's and Dworkin's models. Nevertheless, Rawls's theory mostly pertains to the ideal level, where only rough versions of principles and institutions are established. This implies that particular interpretations and adjustments are to be made at latter stages, under actual conditions. If we make some modifications to the Rawlsian framework (Chapter

4). I think Rawls's theory can be made more practicable and implementable than the other two models considered in this chapter.

Rawls says that "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?" (*JFR*, p. 50) However, if justice as fairness is not implementable, it cannot be useful in particular societies for particular citizens who would want to preserve it for generations to come. Although justice as fairness is presented as a high-level social contract theory, Rawls has revised it with the specific intention that it becomes more practicable. "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." (*JFR*, p. 50) Indeed, as Rawls points out, which particular bundles of goods and what levels of supply are to be allocated to particular individuals are issues for allocative, rather than distributive justice. But whatever distributions may turn out to be, we cannot justify and implement them if they are not derived directly and consistently from the level of ideal theory to the level of actual conditions.

In chapter 4, I intend to propose a way, within the Rawlsian framework, of bridging over the discontinuity between the ideal and actual levels of theory and utilize the idea similar to that of an overlapping consensus such that it becomes possible completely to specify the distributive aspects of justice as fairness. This will increase the feasibility of justice as fairness in general and the possibility of implementing its model of distributive justice such that specific adequate standards of welfare can be established.

CHAPTER 4: A RAWLS-INSPIRED ALTERNATIVE THEORY AND MODEL FOR ESTABLISHING ADEQUATE WELFARE STANDARDS IN LIBERAL DEMOCRACIES

4.1: Introduction

In Chapter 1 I presented a plurality of libertarian and welfarist doctrines that converge in accepting the general plausibility and justification of instituting some levels of welfare in liberal democracies. But I demonstrated that there is neither global nor local agreement on particular standards of welfare acceptable to both libertarians and welfarists. After distinguishing between the initial welfare positions maintained by these opposing doctrines, in section 1.4.b I presented a tentative account of adequate welfare standards. It is an account similar to Rawls's account of primary goods. Welfare, according to the tentative proposal, is the proper set of (non-infrastructure) primary goods that is supported by the largest overlapping agreement established in a particular liberal democracy, at a certain point in time. It is the set of goods required such that each citizen is enabled to (a) live at or above a fixed social minimum of decent living conditions, and (b) realize a reasonable and legitimate life plan. A determinate proper set of primary goods also delineates a range of reasonable and legitimate life plans each citizen is enabled to realize by using these goods.

In this chapter I explicate a theory and develop a model that are based on the elimination of the normative priority problem (Chap. 2) and Rawls's account of distributive justice (Chap. 3). I present a Rawls-inspired system for establishing adequate welfare standards that can be trusted and accepted by both libertarian and welfarist members of liberal democracies. I begin by presenting what I take to be the Rawlsian framework. Then, I indicated which elements of this framework I use as

they are, and which features I modify in order to solve the implementation problem. Based on this modified framework, I present my theory and model for establishing an adequate set of primary goods in a well-ordered liberal democracy. Following a discussion of some of the aspects and features of the pie model, I conclude with examining some complications and objections.

4.2: The Rawlsian framework

4.2.a: Introduction

I use the Rawlsian framework as a background against which I explicate my theory and develop my alternative model. The Rawlsian framework is not problem-free, to which over three decades of on-going discussion and numerous qualifications and additions, made by Rawls and others, attest. Nevertheless, I adopt the Rawlsian framework for the following reasons. First, given the scope of Rawls's work, its widespread familiarity and acceptance, its compatibility with many diverse approaches to distributive justice, and the restatement of justice as fairness in *JFR*, it would be tedious and unnecessary to reconstruct a similar philosophical context for my theory and model. Second, my general view of justice and welfare resembles Rawls's political conception of justice for the basic structure of society, which entails the provision of primary goods. His development of some of the elements of distributive justice in *JFR* is particularly useful since it offers most of the features needed for the proposal I put forward. Third, in order to keep the argument focused, it is useful at this point to concentrate on the implementation problem mentioned in section 3.4.j above. I believe that if the Rawlsian framework is modified, this implementation problem can be solved. Thus, although my proposal is intended to pertain to any liberal democracy, for simplicity, focus of discussion and convenience, I use the Rawlsian framework to explicate a way of establishing adequate welfare standards.

4.2.b: The features of Rawls's theory I adopt

I adopt Rawls's political approach to justice, which rejects adherence to any comprehensive doctrines; what Raz calls Rawls and Nagel's 'epistemological abstinence'. (Chap. 1, Sec. 1.1.c) I assume that liberal democracies are well-ordered societies that exist under favorable conditions; i.e., they are democratic regimes that have the political and economic means required for the implementation of justice as fairness. (*JFR*, p. 47; Sec. 3.4.e above) I assume Rawls's contractual conception of justice as fairness (*JFR*, p. 16), and its four-stage implementation program. (*JFR*, p. 48; Sec. 3.4.a above) I take on the view of society as a fair system of cooperation between equally free citizens. (*JFR*, p. 6) Under this view, each citizen needs to be sufficiently sophisticated to employ the two moral powers: (1) to understand, to apply and to act from the principles of justice as fairness, and (2) to plan, to revise, and to rationally pursue a preferred life plan. (*JFR*, pp. 18-9; Sec. 2.3.c above) I share Rawls's general view of distributive justice as the problem of establishing a scheme of rules and institutions that bring about a fair and productive system of cooperation to be maintained over time. (*JFR*, p. 50; Sec. 3.5 above) And I adopt Rawls's revised statement of the difference principle. (*JFR*, pp. 42-3; Sec. 3.4.g above)

In particular I adopt several features of Rawls's conception of primary goods. Rawls's two principles of justice and his view of ideal citizenship directly imply the requirement that certain levels of primary goods are to be provided to each citizen. The provision of guaranteeable primary goods aims to ensure that citizens are enabled to obtain the maximal usefulness of the scheme of basic liberties and rights to them. (*JFR*, p. 98; Sec. 3.4.f above) Rawls's revision of the scope of the difference principle entails the institutionalized supply of additional primary goods, to those situated below a certain social minimum level, such that they are enabled to achieve their legitimate expectations of a decent life, and probably more. (*JFR*, p. 130; Sec. 3.4.g above) Rawls's theory also requires that social institutions be arranged such

that they ensure sufficient space for those reasonable and legitimate conceptions of the good citizens might choose to pursue, above the social minimum. (*JFR*, pp. 140-1, Sec. 3.4.i above)

Rawls's view implies that society is collectively obligated to protect and secure the maximal usefulness of the scheme of basic liberties and rights to each citizen by providing adequate levels of primary goods. (*JFR*, p. 148; Sec. 3.4.c above) Since maximizing the usefulness of this scheme to each citizen is central to Rawls's theory, as well as to mine, I further explicate and clarify this notion at this point. Rawls accepts that socio-economic inequalities are part and parcel of industrial democratic regimes both because they are features of any free-market economy, and because of the limited amount of resources available to such societies (even under favorable conditions). (*JFR*, p. 148; Sec. 3.4.c above) As such, socio-economic inequalities always affect the usefulness of basic liberties to variously situated citizens. (*JFR*, p. 50-2; Sections 3.4.a and 3.4.c above) That is, when using their two moral powers in acting, planning and attempting to realize their preferred life plans, citizens who are better-off are able to get more use from their basic liberties and rights than citizens who are less advantaged. The provision of primary goods aims at offsetting these affects of socio-economic inequalities, especially on the worst-off. Yet, the question remains: how can the proper set of primary goods (and the levels of their supply), which aims to maximize the usefulness of basic rights and liberties to each citizen, be determined?

Rawls says, "We include in the first principle of justice a proviso that the equal political liberties, and *only* those, are to be guaranteed their fair value." (*JFR*, p. 149) The fair value of political liberties means that each citizen has a sufficiently equal opportunity to be elected to public office and participate in and affect public life, regardless of her socio-economic situation. (*JFR*, p. 149) Moreover, when speaking about the revised difference principle, Rawls argues that "... maximizing the index

[of primary goods] available to the least advantaged maximizes the worth to them of the equal liberties enjoyed by all.” (*JFR*, p. 149, my brackets) Thus, Rawls concludes, “The requirement of the fair value of political liberties, as well as the use of primary goods, is part of the meaning of the two principles of justice.” (*JFR*, p. 149) Although the equal, or unconditional, usefulness of all equal liberties and rights cannot be guaranteed to each citizen because of the inevitability of socio-economic inequalities, the fair value of political liberties must be guaranteed to each citizen because “ . . . questions about those [constitutional] essentials are best settled by appeal to political values alone.” (*JFR*, p. 183, my brackets) Rawls’s account entails the following argument: if (1) questions regarding constitutional essentials are to be settled by appeal to political values arising from citizens’ exercise of their political liberties, and if (2) the question regarding the determination of the proper set of primary goods belong to the sphere of questions regarding constitutional essentials, then, (3) the determination of the proper set of primary goods (including the levels of their supply) is also to be settled by appeal to political values arising from citizens’ exercise of their political liberties. Thus, maximizing the usefulness of the scheme of basic liberties and rights to each citizen by the provision of primary goods is to be politically determined by citizens according to their preferences, and relative to the amount of resources available in their own society. Hereafter, when I mention the maximal usefulness of this scheme to each citizen, I refer to the political notion so defined.

In general, my view of adequate standards of living, as the politically accepted conception of a certain minimal social and economic environment of what would be sufficient to achieve one’s legitimate expectations of a decent life (Sec. 1.4.b), is inspired by Rawls’s idea of a social minimum entailed by the revised difference principle. My view of adequate welfare, as the provision of the proper set of (non-infrastructure) primary goods (Sec. 1.4.b), aims at specifying, through the establishment of the largest overlapping agreement, those primary goods that are

necessary for enabling each citizen to achieve reasonable and legitimate life plans above the social minimum defined by adequate standards of living (Sec. 1.4.b). This range of life plans, or conceptions of the good, is reasonable if it is achievable by utilizing society's available resources. It is legitimate when it is selected by the largest overlapping agreement. In these ways, Rawls's view and mine require that the provision of primary goods secure, for each citizen, a fixed minimal level of decent living standards, and the maximal usefulness of the scheme of equal liberties to each when she plans and acts on reasonable and legitimate life plans at or above this minimal level, on the assumption that favorable conditions obtain in her society.

Rawls claims that the indeterminacy regarding the proper set of primary goods on the ideal level is to be clarified under actual conditions, once relevant and particular information becomes available. (*JFR*, pp. 172-3; Sec. 3.4.f above) By going back and forth from constitutional directives to actual circumstances, the specification of an imperfect, yet stable, set of primary goods is to be established. Nevertheless, as I have argued in section 3.4.i above, a certain discontinuity between the ideal and practical levels of Rawls's program impedes the possibility of completely specifying the proper set of primary goods. Thus, the distributive justice features of Rawls's theory I adopt can only be meaningful and useful if this discontinuity is eliminated and the implementation problem removed.

4.2.c: The features of Rawls's theory I modify

In order to solve the problem of discontinuity and establish adequate welfare standards, by specifying a particular set of primary goods, two major modifications of the Rawlsian framework are required. First, Rawls's rejection of civic humanism, particularly of the wide use of voting procedures, needs to be relaxed. Second, a more practical sense of the idea of an overlapping consensus needs to be developed.

The root of Rawls's rejection of procedural democracies (particularly in *JFR*, Part IV, §§42-44, pp. 138-48) can be traced back to his theoretical attempt to quantify over individual preferences and thus avoid the problem of the incommensurability of individual preferences. However, this attempt gives rise to the discontinuity problem. (Sec. 3.4.j) In section 4.3.c below, I present a model that appropriately connects the ideal and implementation levels of Rawls's theory, not by presenting a solution to the incommensurability problem, but by offering a way of handling individual preferences through political means available in democratic systems. Yet, even if the model I propose is reasonable and acceptable, Rawls rejection of the appeal to democratic procedures can be maintained on the basis of two additional reasons that must be addressed. First, civic humanism, the bedrock of procedural democracies according to Rawls, presupposes that the political virtue of participation in public life is the ultimate good of citizens of liberal democracies. Rawls argues that although this good might have been the ultimate good of 'native male citizens of the Athenian city-state', citizens of modern liberal democracies do not view political life as their ultimate good. Second, Rawls argues that because procedural democracies rely on majority rule, they do not fix or guarantee constitutional essentials. As such, procedural democracies may endorse various laws that violate some basic liberties and rights of some citizens (even if just for a limited time). By restricting the appeal to voting procedures, Rawls's theory is made less vulnerable to the customary problems associated with majority rule. Rawls acknowledges the value of citizens' participation in public life, at least in public justification. Yet, he still believes that such participation should be limited in scope. (Sec. 3.4.i)

To begin my move to modify Rawls's rejection of the wide utilization of democratic procedures, I note the following remarks made by the editor of *JFR*, Erin Kelly, regarding the latter parts of the book.

Because of illness, Rawls has been unable to rework the manuscript in its final state, as he had planned. Still, most of the manuscript was nearly complete. Parts IV and V are the most unfinished, and with

more time, surely Rawls would have filled out those sections and integrated them more fully with the first three parts. Part IV reads as addenda to the more detailed and free-standing Parts I-III Although they are unfinished, Parts IV and V present important pieces of the overall argument for justice as fairness. The editorial decision has been to leave them, as well as other parts of the book, mostly untouched. (*JFR*, *Editor's Foreword*, pp. xii-xiii)

I do not argue that Rawls would have modified his rejection of procedural democracies in the way I do. But the editor's assertion that part IV of *JFR* is unfinished leaves open the possibility that Rawls could have modified it. I suggest that relaxing this rejection (accentuated in Part IV) and utilizing voting procedures, especially when determining the proper set of primary goods, fits well with the earlier and finished parts of the *JFR*. In parts I – III Rawls makes extensive use of the idea of an overlapping consensus in his effort to make justice as fairness more practicable. It stands to reason, then, that the idea, or some similar idea, should play a central role in the implementation stage of justice as fairness.

Besides this biographic reason, I believe that Rawls's restriction of the use of voting procedures should be relaxed for three substantial reasons. First, Rawls states, "In modern democratic society politics is not the focus of life as it was for the native-born male citizens of the Athenian city state." (*JFR*, p. 143) Rawls expresses his reservations regarding this focus on political life by posing the following question, "But how far did this depend on the fact that nine-tenths of the population (women, aliens, and slaves) were excluded? Is it fair to say that as the Athenian ecclesia was an all-male club of the native born, of course they enjoyed politics as the exercise of their domination?" (*JFR*, p. 143n9) Rawls's implied criticism of the discriminatory practices of the Athenian city-state is, of course, correct. However, in current liberal democracies the right to vote is no longer reserved just for male land owners. Rather, it is equally distributed to all citizens, regardless of gender, ethnicity, religious beliefs, social and economic status, etc. Thus, that the right to vote was a limited privilege in the Athenian city-state is not a good reason for its rejection nowadays.

Moreover, even if participation in public life is currently not the ultimate good of citizens, its importance is implied by Rawls's view of political virtue. (*JFR*, p. 116) Political virtue, according to Rawls, is one of the " . . . six ideas of the good that appear in justice as fairness." (*JFR*, p. 141) Thus, participation in public life should be encouraged rather than rejected by justice as fairness, at least in that vital part of public life where welfare standards are determined.

Second, if the justification of the two principles of justice as fairness is based on their selection in the original position, it stands to reason that the set of primary goods, derived directly from both principles, is to be established by similar procedures. Rawls grants that some controversial issues are to be decided by vote, after constitutional essentials have been fixed. (*JFR*, p. 152n26) If so, as I argued earlier in this section, utilizing voting procedures to settle controversies regarding the proper set of primary goods (required to guarantee the maximal usefulness of constitutional essentials to each citizen) seems appropriate. Third, making use of democratic voting procedures is the best way of giving the idea of an overlapping consensus its full meaning and usefulness, as I will show below.

Rawls's second reason for preferring constitutional regimes to procedural democracies is the possibility that reliance on majority rule may authorize the legislation of laws and regulations that violate the scheme of rights and liberties of some citizens. Even if such legislation is temporary and correctable, according to Rawls, this possibility is unacceptable. While this possibility is real, it is important to note that it is not necessary. Indeed, procedural democracies may not fix or guarantee constitutional essentials. Nevertheless, they can be structured in ways that yield the same results. In England, for example, where there is no written constitution, the U.S. scheme of liberties and rights is not guaranteed, yet the nature of their law and other social institutions, and long-lasting tradition, yield the same results. To begin with, a strong and stable formal legal system, based on some version of Kantian

constructivism, can produce and maintain the scheme of liberties and rights that is fixed in a constitutional regime. I am here referring to something like the Rule of Law mentioned by Hayek. (Chap. 2, Sec. 2.2.b) Accompanied with an efficient court system, one that is sensitive to and expeditious in handling issues of basic liberties and rights, such a legal system ensures that the rights and liberties of each citizen are not violated by majority based legislation. Moreover, the legislative body itself, when made up of reasonable and responsible officials who adequately represent and promote the political interests of diverse social groups, should act as a guardian of this scheme rather than a threat. Furthermore, a politically active public, an independent and free media, and fearless civil liberties organizations, can be instrumental in preserving and promoting basic rights and liberties. Finally, the endorsement and maintenance of such a tradition presuppose the same sophisticated citizenry that is presupposed by justice as fairness. I conclude that such procedural democracies, viewed as systems of fair cooperation between free and equal citizens, are suitable and equipped to secure and maintain the scheme of liberties and rights.

On the other hand, constitutional regimes may also violate the basic liberties and rights of some citizens. As mentioned in various parts of section 3.4, the mere equal specification of constitutional essentials does not necessarily imply that each citizen enjoys their full worth. Rawls argues that socio-economic inequalities directly affect citizens' ability to obtain the maximal usefulness of basic liberties to them. Indeed, the basic rights and liberties of the worse-off are violated when they are not capable of realizing their full potential. Thus, unless additional regulations and institutions, which guarantee the maximal usefulness of the scheme of equal liberties to each citizen, are set up, fixing such a scheme is insufficient

Moreover, as a matter of historical fact, the existence of a constitution sometimes makes it harder and longer to move on urgent matters of basic needs. For example, take the institution of an income tax law in the USA, which took about half a century

to legislate. President Lincoln first instituted it in 1862. It was repealed in 1872, instituted again in 1894, and rendered unconstitutional by the Supreme Court in 1895. Only in 1913, when the 16th Amendment was ratified, the US Congress was constitutionally empowered to institute income tax. (www.irs.gov) As objectionable as the idea of an income tax may have been, and still is to some, such an essential means by which a government is able to guarantee the maximal usefulness of the scheme of liberties and rights to each citizen took a half a century to institute. It took this long because it was not constitutionally fixed and its implied prohibition was difficult to overcome. Thus, the rejection of procedural democracies in favor of constitutional regimes does not eliminate the possibility that laws and rules violate the basic liberties and rights of some citizens.

I do not want to be understood here as arguing in favor of procedural democracies and against constitutional regimes. Rather, I point out that both systems may allow instances of violation of basic liberties and rights of some of their subjects. Therefore, the basic structure of society and the character of its citizenry, in both types of democratic regimes, must prevent the occurrence of such unwanted instances. I argue that one way of doing so is enhancing political participation and social cooperation. Such an enhancement is in line with the educational role of justice as fairness. Especially when we have the technological means and the social need to enhance social cooperation, it seems that promoting political virtue, such as citizens' participation, is desirable. Political participation in determining adequate welfare standards also develops citizens' moral powers and their capacity to use their moral powers. When citizens take part in the process of establishing welfare standards, through evaluation, negotiation and compromise, they are also more likely to trust the outcomes of such a process and be more accepting of their own station in life and in society. In Rawlsian terms, when speaking of the determination of the proper set of primary goods, if reliance on the participation of representative persons in the original position is required, so should be the participation of citizens in

making actual determination. Public participation does not only enhance justice as fairness, but also acts as a remedy to the weakening social fabric discussed by Sandel. (Chap. 2, Sec. 2.2.c) It is this possibility of enhancing social cooperation and diminishing social alienation that makes the wider application of voting procedures wanted.

To sum, I argue that citizens' direct participation is a desirable political virtue that is also suitable for the task of establishing the sort of social cooperation and diligence required for the maintenance and promotion of the scheme of basic liberties and rights. This is so because (1) both in procedural democracies and in constitutional regimes, citizens' democratic participation acts to secure the scheme of basic liberties and rights; and because (2) citizens' participation in public life enhances social cooperation and increases trust and acceptance of official policy, especially in regard to adequate welfare standards.

The second modification of the Rawlsian framework I propose has to do with Rawls's idea of an overlapping consensus. Rawls develops this idea in order " . . . to make the idea of a well-ordered society more realistic and to adjust it to the historical and social conditions of democratic societies, which include the fact of reasonable pluralism." (*JFR*, p. 32) It serves as the vehicle for public justification at the original position stage when the representative persons select justice as fairness and additional institutions to regulate the basic structure of their society. The idea of an overlapping consensus also plays an important role in public justification used to settle further controversial issues once constitutional essentials are fixed. Furthermore, it is presumed that where justice as fairness regulates the basic structure of society, a continuous overlapping consensus supports the stability of the state from one generation to the next. (*JFR*, pp. 184-5) In practice we expect it to serve to unite citizens and enhance social cooperation, as well as to support and mandate legislation and policy. (Sec. 3.4.h) However, there are some difficulties connected with the

application of this idea. To begin with, the idea, as depicted by Rawls, is too weak to achieve the purpose for which it was introduced. For example, in Chapter 1 I demonstrated that all libertarian and welfarist doctrines converge in what may be called an overlapping consensus on the plausibility of instituting some levels of welfare in liberal democracies. However, I noted that this consensus is too weak to sustain particular determinations of adequate welfare standards. I proposed that in order to convert such a consensus into the means by which particular and practical determinations of standards of welfare in pluralistic societies can be established, a stronger notion is required. Moreover, in section 3.4.j I pointed out that the problem of discontinuity cannot be resolved unless something like a stronger sense of the idea of an overlapping consensus is developed in order to bridge the gap between the ideal and practical levels of Rawls's theory. Given these problems, it is not clear how the idea of an overlapping consensus is useful in determining the proper set of primary goods for particular liberal democracies. I thus concluded that as it stands, the idea is too vague and does not fulfill the practical purposes for which it was introduced.

Indeed, it may be the case that the idea is not extensively used in the latter parts of *JFR* because Rawls had not finished working out its full integration into the later stages of his program and the political practices they involve. I suspect that the idea of an overlapping consensus implicitly, if not explicitly, appeals to direct voting and thus conflicts with Rawls's misgivings regarding the desirability of using such procedures. I, however, am not sure how Rawls would have ultimately used the idea in the implementation stages of his program, if at all. Thus, for the purposes of this work, I propose to modify Rawls's idea of an overlapping consensus. Indeed, I propose to replace it with my idea of the largest overlapping agreement. The largest overlapping agreement, as defined in section 1.4.b above, presents the intersect set of citizen preferences which becomes society's preference once it is supported by the majority of citizens. One may argue that Rawls's idea of an overlapping consensus and my idea of the largest overlapping agreement differ in their logical function,

where the former is used to justify the selection of justice as fairness in the original position and the latter in justifying particular determinations of welfare standards. However, given Rawls's professed intention of using the idea of an overlapping consensus to make justice and fairness more practicable and sensitive to historical and cultural conditions, I argue that at least on pragmatic or practical grounds, the two ideas aim to achieve the same. Moreover, in establishing the largest overlapping agreement among citizens not only is direct participation encouraged, but also negotiation, bargaining and compromise. The procedure utilizes the methodological aspect of Rawls's account of public justification, namely, public reason or reasonable disagreement. (Sec. 3.4.h) But it makes the practical aspect of public justification, the establishment of a consensus, more plausible by specifying the means by which it can be recognized and determined. The utilization of voting procedures in the establishment of the largest overlapping agreement makes public justification more meaningful and useful. As such, this idea is crucial to bridging the gap between ideal and implementation levels of Rawls's program. The indeterminacy of ideal principles and institutions can be eliminated by properly integrating individual preferences and relevant information into the program. Only then complete and consistent determinations of actual laws and institutions can be specified for particular societies.

Like Rawls's idea of an overlapping consensus, the establishment of the largest overlapping agreement corresponds to the general facts of political sociology and human psychology, and gives expression to diverse political, cultural and historical conditions. (Sec. 3.4.h) But, it offers a more practicable way of amalgamating individual inputs and general doctrinal tendencies into a coherent view regarding welfare. In the model I offer below, I will develop a realization of the idea of the largest overlapping agreement that can be effective as a tool for determining the proper set of primary goods, the notion of a social minimum of a decent life, and sufficient space for a range of reasonable and legitimate conceptions of the good in a particular society.

4.2.d: Conclusion

The adaptation of the Rawlsian framework allows us to focus on the problem of discontinuity, and on the distributive justice elements I believe cannot be completely determined without modifying Rawls's approach. The modifications I proposed, the relaxation of Rawls's restriction on the use of direct voting and the utilization of my idea of the largest overlapping agreement, are consistent with other parts of the Rawlsian framework. They are also designed to be consistent with both procedural democracies and constitutional regimes. In addition, the conception of the largest overlapping agreement, to be applied in the following theory and model for establishing adequate standards of welfare, provides a tool with which the discontinuity problem can be resolved in actual societies. Thus, although my sense of the idea of the largest overlapping agreement deviates somewhat from Rawls's idea of an overlapping consensus, I believe it makes Rawls's program less vague and more practicable.

4.3: Theory and model

4.3.a: Introduction

Assuming the proposed modified Rawlsian framework, I present a theory for establishing adequate standards of welfare in liberal democracies; i.e., establishing the proper set of primary goods and the levels and quality of their supply. The theory is designed to be consistent with Rawls's conception of justice as fairness, particularly with his view of distributive justice. To this end, the theory specifies principles that aim to institute a fair, efficient and practicable system of distribution that enhances social cooperation, and hence social productivity. It does so by providing the theoretical background for establishing the largest overlapping agreement required for determining (1) an appropriate sense of a fixed social minimum of a decent life, (2) the proper set of primary goods each citizen should get

in order to obtain the maximal usefulness of the scheme of the basic liberties and rights to each, and (3) the totality of primary goods required to create sufficient space for reasonable and legitimate conceptions of the good each citizen can pursue. As such, the theory aims at earning the trust and acceptance of libertarians and welfarists alike. Based on this theory I develop a model that prescribes a democratic procedure by which the proper set of primary goods can be established in liberal democracies.

4.3.b: Theory

The following theory is a set of principles required to guide and regulate the establishment of the largest overlapping agreement regarding adequate standards of welfare in liberal democracies:

Principle 1: In establishing the largest overlapping agreement, by which adequate standards of welfare are determined, citizens' rights to equal liberty are to be respected in that no normative priority is to be given to liberty or equality.

The respect to citizens' rights to equal liberty, or constitutional essentials, (*Theory*, 1991, pp. 171-228; *JFR*, pp. 46-8; Sec 3.4.h. above) and the imposition of a no-normative-priority condition (Condition (1), Chapter 2, Sec. 2.2.g) are necessary to regulate any legitimate procedure by which it is possible to establish the largest overlapping agreement regarding adequate welfare standards. Such a legitimacy-preserving procedure (Sec. 1.4.b) aims at balancing libertarian and welfarist preferences, and at earning the trust and acceptance of each citizen through utilizing a political process that does not normatively favor libertarian or welfarist doctrines. The features of Principle (1) are set to increase the likelihood of establishing the largest overlapping agreement in current liberal democracies.

Principle 2: The initial situation, from which the determinations of such adequate standards of welfare proceed, must be the actual historical situation obtaining at the time when the largest overlapping agreement is established.

Starting from an actual initial situation solves the problem of having to implement ideal standards under actual conditions, as have been discussed in Chapter 3. Indeed, such a principle does not permit utilizing counterfactual situations, or thought experiments, to serve as the device from which adequate standards are derived. This means that we accept the current situation as a benchmark, not because one doctrine or another justifies it, but because it is a particular and determinate starting point, to be appraised and revised. Citizens who participate in establishing the largest overlapping agreement, regarding the proper set of primary goods each should get, do so relative to the actual circumstances obtaining in their society. In cooperation they determine standards by which they will live for a definite period of time, and which they can reevaluate and revise as their circumstances and preferences change. Moreover, when the starting point is the current standards obtaining in society, it already includes a few markers. An actual, historical initial situation includes the current set of primary goods and the levels and quality of their supply. This set can be understood as representing what society takes to be the necessary set of primary goods required to achieve a social minimum of decent living, to obtain the maximal usefulness of the scheme of basic liberties and rights to each citizen, and to enable each to realize her reasonable and legitimate life plans.

Principle 3: The determination of new and adequate standards of welfare must be supported by the largest overlapping agreement obtaining among citizens, established at the time of determination, through direct participation in a democratic voting procedure.

This principle entails that the adequacy of standards of living and welfare is primarily a function of establishing the largest overlapping agreement by which they are legitimized. But in order to rally the largest overlapping agreement, such standards must also be reasonable. To this end, two sub-principles must be satisfied.

Sub-principle 3.a: Maximum relevant information must be available to participating citizens.

This sub-principle relies on the democratic ideal of self-governing where well informed citizen, who are capable fully to use their two moral powers (Sections 2.3.c and 4.2.b), participate in the decision-making process by which the laws and rules that regulate their society are determined and mandated. Applied to our distributive justice context, the ideal of self-governing implies that determinations be reasonable by being fiscally responsible. Thus, this sub-principle entails that establishing adequate standards of welfare requires that citizens, so qualified, achieve the largest overlapping agreement on the basis of maximum relevant information such as current standards, the cost of currently supplied primary goods, projections of the cost of additional primary goods, alternative schemes of standards, the amount of resources available to society, etc.

Sub-principle 3.b: Determinations must be provisional and periodically reevaluated.

To ensure that standards of welfare retain their legitimacy in a reality of ever-changing views, needs and material conditions, such standards are not absolute but temporary, and a periodical reapplication of the procedure described in Principle (3) must be instituted. That is, periodically, the procedure prescribed in Principle (3) is to be applied to particular, historical initial situations under conditions obtaining at the time of reapplication. In any reapplication, the results of previous applications can be

modified. And in every reapplication of the procedure modifications must be confirmed by the largest overlapping agreement obtaining at the time of reapplication. This sub-principle does not only ensure that recourse to previous decisions is available, but it also prevents theoretical or practical institutions of normative priority. (This sub-principle reflects and embodies the considerations that produced Condition (2). Chapter 2. Section 2.2.g.)

I submit that this set of principles amounts to a theoretical account of establishing adequate standards of welfare, or the proper set of primary goods, that can be trusted and accepted by both libertarians and welfarists. It also provides a principled way of connecting public justification and social preferences with the complete determination of reasonable and legitimate standards of welfare. It does so by politically establishing the largest overlapping agreement among well-informed citizens of a particular society at a specific time. In this sense, the theory supplies a principled way to bridge the gap between the ideal and practical levels of Rawls's theory. From this theoretical account particular models for establishing specific sets of primary goods, and the levels and quality of their supply, can be developed. One such model is developed in the next section.

4.3.c: The Pie model

The pie model is developed from the theory just presented. It is a political procedure for establishing adequate welfare standards in liberal democracies, based on a particular realization of the idea of the largest overlapping agreement obtaining among the citizens of such democracies. It is designed to yield reasonable determinations that can be accepted by libertarians and welfarists alike. It is a dynamic and self-generating system that registers social preferences regarding the set of primary goods required to enable each citizen to (1) achieve the social minimum of decent life, (2) attain the maximal usefulness of the scheme of basic liberties and rights to each at or above the social minimum, and (3) pursue reasonable and

legitimate life plans. The model is presented with an interpretation for the USA conceived, for simplicity, as a single political and economic system with a single progressive income tax scheme.²² Alternative models and interpretations can be constructed for every democratic community where libertarianism and egalitarianism are the prevalent doctrines.

The pie model utilizes the images of two pies: a primary goods pie and a tax pie. The primary goods pie represents the distribution of non-infrastructure primary goods. State-provided goods such as education, medical care, housing, etc., are considered non-infrastructure primary goods. These are goods that satisfy citizens' needs that if left unfulfilled bring about unjustified socio-economic inequalities, which, in turn, hinder citizens' ability to gain the maximal usefulness of the scheme of basic liberties and rights to them.²³ Likewise, the tax pie image represents the distribution of tax revenue toward the provision of non-infrastructure primary goods.

The tax pie represents the amount of resources society is able and willing to allocate toward sponsoring the provision of primary goods. In order to clarify the context and structure of the tax pie, and the sort of allocation restrictions it implies, the pie model includes an income tax scheme that is analogous to Massachusetts's 'Proposition 2½'. Proposition 2½ is the title given to an initiative petition adopted by the majority of voters in Massachusetts in 1980.²⁴ It aims to regulate the amount of property

²² Currently in the USA we have three-tiered political and tax systems: federal, state and local. It would be unnecessarily complicated to explicate the application of the pie model on the three levels simultaneously. However, once the one-level application of the model is completed, it should not be difficult to imagine a multi-level application.

²³ See Chapter 1, Sec. 1.4.b for the distinction between non-infrastructure and infrastructure primary goods, and the reasons for distinguishing between the two kinds.

²⁴ Other states, e.g., California, have also adopted Proposition 2½, but in this work I only refer and use the version that is currently applied in Massachusetts.

taxes a community can raise each year to support spending for schools, public safety and other public services. Since 1980 it had undergone a number of changes. The principle features of Proposition 2½ in its present form contain two main restrictions related to the total amount of property taxes a city or town can raise each year.

(1) The property tax levy ceiling (the amount raised) can never exceed 2½% of the full cash value of all taxable property in the community. A tax rate cannot be higher than \$25 per \$1,000 of valuation. (2) The property tax levy limit cannot be increased more than the 2½% over the prior year's levy limit unless it gets voters' approval to override the cap. The levy limit provision of Proposition 2½ affect the total amount of taxes to be raised by a community. Whether the tax rate for a community increases or decreases from prior year depends upon the levy decided upon by the community. It also depends on whether property values appreciate, depreciate or remain steady in the particular community.

In its *Levy Limits: A Primer on Proposition 2½* (2002) the Massachusetts Department of Revenue (MDOR) states that the annual levy ceiling is calculated by the MDOR as 2.5% of the total full and fair cash value of taxable real and personal property in the community. For example, if the full and fair cash value of property for fiscal year (FY) 2003 is \$100,000,000, then the levy ceiling is \$2,500,000. This figure usually changes yearly "... as properties are added or removed from the tax roll and market values increase or decrease." (Ibid., p. 5)

The levy limit for each community is calculated annually by the MDOR based on the previous year's levy limit. A levy limit can increase from year to year in the following ways: (1) automatic 2.5% increase, (2) new growth, and (3) overrides. The automatic 2.5% increased over the previous year's levy limit is calculated and added to the new levy limit by the MDOR. It does not require any action on the part of officials or voters. For example, if the current year's levy limit is \$1,000,000 (=levy limit base), next year's levy limit is automatically increased to \$1,025,000. New

growth can also increase the levy limit once it is properly assessed and certified by the MDOR. New growth expresses an increase in the tax base due to property development that result in additional public costs. For example, new growth can be certified by the MDOR at \$15,000. This amount is then added to the automatic increase, which raises the levy limit, in our case, to \$1, 040,000. Increase overrides come in several forms: (a) debt exclusions, (b) capital outlay expenditure exclusions, and (c) overrides the community advances in order to enhance various public services. In general all exclusions and overrides are referred to as 'overrides'. All overrides have to be supported by a majority of legislators (of the various communities according to their local laws) and then be placed on the ballot and win the approval of a majority of the electorate. Successful overrides of types (a) and (b) can increase a particular year's levy limit and exceed the levy ceiling, but they have to be presented in dollar terms and must specify a particular objective. As such they are not permanent but temporary increases that are discharged once their objectives have been realized. Overrides of type (c) can increase a particular year's levy limit but must not increase a community's levy limit above the levy ceiling. However, once an override of type (c) is properly approved, it becomes permanent; i.e., it becomes a part of the levy limit base for the following year. For example, if total overrides of types (a) and (b) amount to \$30,000, and overrides of type (c) amount to \$70,000, the total overrides amount is added to the levy limit and, in our case, increases the levy limit to \$1,140,000. However, next year's base levy limit will be only \$1,110,000.

Once the levy limit is established for a particular year (automatic increase + new growth + overrides of type (c)), the community can set its actual levy at any amount up to this limit (plus additional temporary increases caused by overrides of types (a) and (b), if any). "It is important to note that as long as a community levies no more than its levy limit, there is no restriction on the dollar increase or percentage increase in its levy from year to year." (Ibid., p. 13) That is, Proposition 2½ restricts the

increase of the levy limit, not the levy amount. For example, even though in, say, FY2002 the levy limit was \$1,000,000, the community might have set the levy amount at \$900,000 only. Once the community selected the lower amount, the difference is lost forever. However, the levy limit of FY2003 is calculated on the basis of FY2002's levy limit, and not the actual levy. Thus, FY2003 levy limit is \$1,025,000 plus new growth and overrides.

Proposition 2½ enables a community to reduce its levy limit by passing an override. An override must be supported by a majority of the community's legislators, placed on a ballot and approved by the majority of the electorate. Individuals using local initiative procedures can also place overrides on a ballot, which need to rally the majority of the electorate in order to pass. Once an override results in a decrease of the levy limit for a particular year, it becomes a permanent decrease and reduces the levy limit base upon which levy limit is calculated in the following year.²⁵

The pie model utilizes a tax scheme that is analogous to Proposition 2½, but instead of imposing a cap on annual property tax revenue, it imposes a cap on the amount of income tax dollars society can raise and allocate toward the provision of primary goods each year. (By income tax I here refer to all individual gains taxes imposed on income from labor, real estate, investment portfolios, etc.) It is important to keep in mind that what we are talking about here is that portion of the total full and fair cash value of income tax revenue that is annually allocated toward the provision of primary goods. Each citizen's actual and complete tax picture includes various taxes that are used to finance the provision of infrastructure and non-infrastructure primary goods. But the tax dollar distribution I am using here only represents the portion of the citizen's tax dollars that is used to finance the provision of non-infrastructure primary goods. Moreover, it is assumed here that this portion of tax revenue solely

²⁵ For a fuller account of Proposition 2½ see *Levy Limits: A Primer on Proposition 2½*, by the Massachusetts Department of Revenue, 2002.

finances the annual provision of such primary goods. The collection and allocation of this portion of tax revenue are to be regulated by what is called here Distribution 2½ to indicate the analogy to Massachusetts's Proposition 2½.

Distribution 2½ aims at keeping income tax rates and revenue allocation within a reasonable range, which corresponds to what a society can and is willing collectively to spend on the provision of adequate welfare standards. It aims to ensure that a certain portion of tax revenue will continuously be available for the provision of welfare standards. It also aims at ensuring that dramatic changes in social preference do not lead to dramatic tax decreases, increases or confiscatory taxes. In general, when citizens' income increase, tax revenue increase and more resources are allocated toward the provision of primary goods. Correspondingly, when citizens' income decrease, tax revenue decrease and fewer resources are allocated toward the provision of primary goods. Keeping the range of total changes within the one specified by Distribution 2½ makes the application of the model fiscally responsible.

Distribution 2½ contains two principal limitations on the portion of income tax revenue that can be raised and allocated for the provision of primary goods each year. (1) The **allocation ceiling** can never exceed a fixed percentage (established by a referendum) of the total full and fair cash value of all taxable income in a society each year. (2) The **allocation limit** cannot be increased or decreased by more than 2½% over the prior year's upper allocation limit. The allocation limit can exceed the 2½% cap on annual increases only, up to the allocation ceiling level, if such an override gets voters' approval. The allocation limit of Distribution 2½ affects the total amount of tax dollars to be allocated by society toward the provision of primary goods each year. Whether the allocation rate for a society will increase or decrease from the prior year will depend upon the particular allocation established by members of society. It also depends of whether total income tax revenue increase, decrease or remain steady in a particular society. It is presumed here that the pie

model, including Distribution 2½ and its other features and regulating principles, would be adopted by a society, via a referendum, before the first application of the model.

The annual allocation ceiling is determined by agency in charge of the application of the pie model in the following way. Before the first application of the pie model the annual allocation ceiling is fixed as part of the referendum by which the pie model (including Distribution 2½) is adopted by voters. The agency in charge proposes a ceiling rate by calculating the previous year's ratio between total expenditure on primary goods and total income tax revenue. This ratio is understood to be representing what society currently takes to be sufficient spending for the provision of adequate welfare standards. For example, if during the previous fiscal year society spent \$100,000,000 on the provision of primary goods, and this amount was equal to seven percent of its total income tax revenue, then the agency in charge proposes to fix the allocation ceiling rate at 7%. This entails that the yearly allocation ceiling (the amount spent on the provision of primary goods) never exceeds 7% of the full and fair cash value of all taxable income in the society. This rate may vary if the ratio between expenditure and tax revenue is different than the 7% used in this example, or if society prefers a ceiling that is based on an average of ratios from the previous few years, or if the majority of society prefers a different rate that is not directly derived from previous ratios. But, once an allocation ceiling rate is passed, it can only be changed by a new overriding referendum that requires the approval of a strong majority (2/3 of the electorate) of citizens in order to override the initial allocation ceiling rate. Although the allocation ceiling is a fixed percentage of the total income tax revenue, its cash value usually changes each year as incomes are added or removed from the income tax roll and as income rates fluctuate according to market conditions. Because the exact allocation ceiling rate is not known before the application of the pie model, for simplicity and consistency of explication, a 2½% cap on the annual allocation ceiling is here preserved. So, for example, if the full and

fair cash value of all income tax revenue for a fiscal year is estimated by the agency in charge to be \$100,000,000, then the allocation ceiling is \$2,500,000.

According to Distribution 2½ the allocation limit can increase or decrease from year to year in the following ways: (1) automatic 2.5% increase or decrease, (2) overrides. The automatic 2½% increase or decrease of allocation limit above or below the previous year's allocation limit would effectively be a range between **lower and upper allocation limits**. It is important to note that the yearly allocation limit is based on the previous year's upper allocation limit, the **allocation limit base**, and not on the previous year's actual allocation amount. The automatic 2½% increase or decrease is calculated by the agency in charge of the application of the pie model in the following way. Assume that the allocation ceiling rate is fixed at 2½%. Also assume that during the first year of application of the pie model the allocation ceiling is estimated to be \$1,200,000. Since there is no previous year's allocation limit during the first year of application, the allocation ceiling and the upper allocation limit are the same. The lower allocation limit would then be calculated by subtracting 2.5% from the upper limit, which is \$30,000. Thus, the lower limit is set at \$1,170,000. The actual **allocation amount**, between the lower and upper limits, is to be determined each year by a majority of citizens who participate in the application of the pie model. The allocation amount can be any cash value between the upper and lower limits. It is important to note that as long as a society allocates no more or less than its respective allocation limits, there is no restriction on the dollar increase or decrease or the percentage increase or decrease from year to year. So, to continue the ongoing example, during the first year of application the allocation ceiling is \$1,200,000, which is the same as the allocation upper limit. The allocation lower limit is \$1,170,000. And the actual allocation amount is determined by the majority of citizens to be, say, \$1,180,000.

During the second year of application of the pie model the allocation ceiling is determined by the agency in charge by calculating 2.5% of the total full and fair cash value of taxable income in the society for that year. Assume that the allocation ceiling for the second year is \$1,250,000. The automatic 2.5% upper and lower allocation limits of the second year are calculated based on the previous year's upper allocation limit, in our case, \$1,200,000. Thus, for the second year of application of the pie model, the upper allocation limit is \$1,230,000, and the lower limit is \$1,170,000. The majority of participating citizens then determine the actual allocation amount to be, say, \$1,185,000. During the third year, for instance, the estimated allocation ceiling could drop to \$1,100,000 because of, say, an economic slump. The allocation limit (calculated on the basis of the previous year's upper allocation limit by adding and subtracting 2.5% to it) is a range between \$1,260,750 and \$1,199,250. However, Distribution 2½ requires that the amount allocated for the provision of primary goods never exceed the allocation ceiling. In our case both allocation limits are above the allocation ceiling. Therefore, the allocation limit for the third year must be reduced to one single limit that is the same as the allocation ceiling: i.e., \$1,100,000. In this case, citizens' participation is required for deciding where to make the necessary cuts that will bring the allocation limit down to the level of the allocation ceiling. Moreover, this allocation limit will serve as the allocation limit base for calculating the following year's of allocation limits.

All allocation increases and decreases in the supply of primary goods, which result from the automatic 2½% allocation increase or decrease and are supported by a (½ +1) majority of the electorate, are here called **ordinary changes**. Ordinary changes reflect society's general view and preference regarding each citizen's ability to draw the maximal usefulness of the scheme of essential rights and liberties to each by utilizing currently provided standards of welfare. Ordinary changes express a general agreement that although the set of primary goods currently provided is appropriate, the levels of supply or quality, or both, need to be adjusted. The 2½% cap on

increases or decreases in levels of supply of primary goods ensures that yearly changes are not too dramatic and do not involve dramatic budget reallocations. Shifting public budgets steeply on short notice involve problems such as labor dislocations. For instance, a dramatic decrease in education to pay for child support entails firing teachers and hiring social workers, and the former do not actually become the latter. Moreover, such a change might require a dramatic increase in the number of social workers with no prospect of there being such a large number of new social workers within a short period of time. The 2½% limit is sufficiently low to ensure that budget reallocations do not involve problems such as severe labor dislocations. The cap on ordinary changes also ensures that the affects of current events and opinions do not over-determine welfare standards, such that changes of welfare standards, in general, are not dramatic but express objective and gradual shifts of social preferences that are sustainable for some time and through a few applications of the model. For example, if this procedure follows some period of severe criticism of the public education system, the limited degree of ordinary changes acts to prevent a change that reflects an angry backlash rather than a reasonable revision to the provision of this primary good.

Distribution 2½ allows a society to consider allocation of amounts in excess of the automatic 2½% increase (but not decrease) by passing what is referred to under Massachusetts's Proposition 2½ as overrides of type (c).²⁶ Under Distribution 2½ overrides are called **strong changes**. Strong changes express dramatic changes in

²⁶ In this work I will not consider upper allocation limit increases due to 'new growth' and 'overrides' of types (a) and (b) (of Massachusetts's Proposition 2½) because the fluctuation of income tax rolls and income rates are reflected in a society's general progressive income tax scheme and revenue and thus in the annual allocation ceiling, and because debt and capital outlay expenditures can be handled as exclusions in the same way they are handled by Massachusetts's Proposition 2½. Thus in order to keep the explication of the pie model as less complex as possible, I will not further discuss such possible increases in allocation limit and focus only on ordinary and strong changes.

society's view of the proper set of primary goods required by each citizen to achieve the social minimum. There are four types of strong changes. (1) Those that require expenditures that exceed the upper allocation limit (the automatic 2½% increase) because society prefers a dramatic increase in supply of a currently provided primary good or goods. (2) Those that require expenditure that exceed the upper allocation limit (the automatic 2½% increase) because society chooses to introduce a new primary good that is not currently provided. (3) Those that entail the elimination of a currently provided primary good or goods. (4) Those that are introduced by individual, group or agency initiative petitions for modifying features and/or regulative principles of the pie model.²⁷ Since strong changes would entail dramatic budgets reallocation, they are mandated only if they are supported by a strong majority of participating citizens. Such changes would be mandated only if they are approved by a minimum of 2/3 of votes of participating citizens as the customary measure of a strong majority required for mandating extraordinary political measures in democratic systems. For example, in the USA a 2/3 majority, or more, is required to override a presidential veto. A community may take such action as long as it is below its allocation ceiling. Strong changes cannot increase a society's upper allocation limit above the level of its allocation ceiling. When strong changes are passed, the actual allocation for the year is determined by totaling the amount required by these changes. For example, let FY2003 allocation ceiling be estimated at \$2,500,000. Let the allocation base limit (from FY2002) be \$1,000,000 and the allocation amount that results from calculating ordinary changes be \$1,010,000. If strong changes mandate an additional \$150,000 expenditure, this amount is then added to ordinary changes and the actual allocation amount for FY2003 is set at \$1,160,000. If strong changes require an expenditure that exceeds the allocation ceiling, all such strong changes are evenly reduced across the board until the

²⁷ In this work, however, I will mostly discuss the processing of first three types of strong changes. Hereafter, unless otherwise is indicated, when I mention strong changes I refer to changes of the first three types.

allocation amount they entail equals or falls below the allocation ceiling for the year. Finally, strong changes result in a permanent increase in the allocation limit of a society, which serves as the allocation limit base for the following year.

As opposed to ordinary changes, strong changes do not only reflect a wide and extraordinary agreement regarding each citizen's ability to draw the maximal usefulness of the scheme of basic liberties and rights to each by utilizing currently provided primary goods. Mostly, they reflect a general agreement that the total set of primary goods is inadequate to enable each citizen to achieve a decent life. When the public in this way rejects the adequacy of the current social minimum, it means that this set of primary goods is considered by a strong majority of citizens to be incomplete or acutely insufficient. Especially the introduction of new primary goods, or the elimination of primary goods currently distributed, express society's change of preferences regarding the specification of a proper and adequate set of primary goods. For example, the introduction of child-care benefits for children under pre-kindergarten age would need to be supported by the largest overlapping agreement established by the votes of at least $\frac{2}{3}$ of the absolute number of participants.

Strong changes of type (4) aim at allowing society to continuously update the pie model as society's needs and preferences change. The features and principles of the pie model are comprehensive yet incomplete because it is impossible to predict all the intricate details involved in the implementation of such a complex model. It is also impossible and not necessary to predict future social preferences to be handled by various rules and features. Pending further refinements of the pie model, strong changes of type (4) are designed, at least initially, to ensure that the pie model is revisable, and to prevent giving any part of the pie model an absolute status.

Distribution 2½ prohibits society from decreasing the actual allocation amount below the lower allocation limit in any one-year period. This means that in effect the annual

lower allocation limit is the **allocation floor**. For example, if in a given year the allocation limit is a range between \$1,025,000 and \$975,000, the actual allocation amount for the year cannot be driven below \$975,000. In line with Rawls's restatement of the difference principle (Sec. 3.4.g), this feature aims to protect the worst-off group from a majority rule that favors reducing the social minimum level for some general economic benefit. Moreover, since the less advantaged groups depend on the public provision of primary goods more than the better situated, reducing the allocation floor would also diminish their ability to gain the maximal usefulness of the scheme of basic rights and liberties to them.

There are three exceptions to this prohibition. First, as we have seen before, if the allocation ceiling falls below the allocation floor, the provision of primary goods is to be reduced until the allocation floor equals the allocation ceiling. The majority of participating citizens, who are made aware of the situation, determines the rates of reduction of the levels of supply of currently provided primary goods down to the allocation floor level. This reduction then becomes permanent, and the allocation ceiling (which in this case is the same as the allocation floor) becomes next year's allocation limit base.

The second exception says that society cannot eliminate the provision of a currently provided primary good by passing an individual or group initiative petition of a strong change. Rather, the reduction of the provision of such a primary good is to be done incrementally through consistent ordinary reductions over a few years. When the experts who handle the provision of this good report to the agency in charge that any further reduction would, in effect, imply the elimination of the provision of this good, the agency in charge treats any further allocation reduction of the supply of this good as a strong change that requires a strong majority. During the year in which this dramatic change might occur, if a strong majority of citizens approves of a reduction of allocation, the provision of this primary good would be eliminated. If a

strong majority does not approve the reduction, the provision of that primary good is preserved at its current level. Thus, only the last stage on the path to eliminating the provision of a certain primary good constitutes a third type of strong changes.

The third exception allows a society to reduce its allocation limit below the allocation floor when a state of national emergency, such as war or economic collapse, is properly declared. Only under a state of emergency (presumed to be temporary), something like the negative reciprocity implied by Rawls' restated difference principle (Sec. 3.4.g) could result in a strong worsening of the situation of the least advantaged (and, presumably, of every other citizen) by reducing the social minimum of decent life. In cases of national emergency, when the government announces the sort of reduction in the provision of primary goods required to help remedy the emergency, if possible, citizens participate in determining how this reduction would affect the provision of each primary good until the total reduction announced by the government is achieved. An ordinary majority ($\frac{1}{2} + 1$) is sufficient to mandate such changes.

The pie model allows for a situation where some of the well-off gain, pay less taxes, without this benefiting the worse-off, who get less primary goods, because of an ordinary reduction that is supported by the largest overlapping agreement obtaining during a certain fiscal year. This situation may seem to violate of Rawls's difference principle. However, assuming favorable economic conditions and no state of national emergency, under the pie model, such a situation would fall under reciprocity aspects of Rawls's complex formulation of the difference principle. (Sec. 3.4.g) Since the situation would arise because the worse-off might vote for some reductions in the provision of the primary goods they currently get, the worse-off vote, in fact, would express the belief that such reductions would not reduce their ability to gain the maximal usefulness of the scheme of basic liberties and rights to them. Moreover, since only ordinary reductions, down to or above the allocation floor, are

permissible, they do not affect the social minimum, also implied by the reciprocity aspects of Rawls's difference principle in its complex form. (Sec. 34.g) Under the pie model, only strong changes affect the social minimum. In these ways, the application of the pie model conforms rather than violate Rawls's revised difference principle in its complex form.

The application of the pie model, under Distribution 2 ½, depends on citizens' participation to fix the rate of the yearly allocation ceiling and in order to determine the actual annual allocation of funds for the provision of the proper set of primary goods. In order to further understand the features and regulative principles of the pie model, and how they affect the determination of the yearly allocation amount for a given society, consider the following example. Assume that the pie model (including the 2½% cap on the yearly allocation ceiling) has been adopted by a society via a referendum, and that the model has been applied more than twice already. Assume this society consists of five persons, R, S, T, U, and V, and that each member of this society receives the same three primary goods: 'a', 'b' and 'c'. Also, assume that all persons are socio-economically situated the same, that the actual amount each person received in primary goods benefits last year equaled \$1,000, and that this amount was distributed toward the provision of each primary good in the following way: a=\$150, b=\$250, c=\$600 for each person. Since it is highly unlikely that society would maximally use its resources, up to the allocation ceiling, each year, it is reasonable to assume that there is a determinate allocation limit base which is lower than the allocation ceiling. We assume that the agency in charge determines the allocation ceiling to be \$6,000 for the year in question.²⁸ And we assume that last

²⁸ This ceiling would imply that each of the five persons' earns a yearly income of about \$96,000, on the assumption each pays 50% in income tax (which is the maximum one would pay, for example, in New York City nowadays). These numbers are relatively high. If, for instance, the ceiling cap were more than 2½%, we would get more realistic results. Nevertheless, the 2½% ceiling cap is selected here for consistency of explication and simplicity of presentation.

year's upper allocation limit was set at \$5,000 and that it was also the actual allocation amount society spent on the provision of these goods. Thus last year's allocation amount serves as the current year's allocation limit base. This means that the automatic allocation limit ($\pm 2.5\%$ relative to allocation limit base) for the year in question would be a range between \$4,875 and \$5,125, or $\pm \$125$ relative to last year's upper allocation limit. We assume that all members participate in the application of the pie model. This means that each person is presented with a primary goods pie image divided into three slices, 'a', 'b' and 'c', and that the size of each slice is worth \$150, \$250 and \$600, respectively. Each person is also presented with a tax pie image that depicts the distribution of her tax dollars toward the provision of these goods (which in this case is the same for all because they are situated the same: i.e. they earn the same and pay the same income tax). In order to conceptualize how citizens' participation affect the determination of the actual allocation amount for the next fiscal year, we first consider various ordinary changes each of the five persons might make. Each of the five citizens participates by deciding how to distribute the $\pm \$125$ range determined by the upper and lower allocation limits for the year. Since this range, when equally divided among the five participants, results in a range of $\pm \$25$ per capita, we consider how each might redistribute the funds available to her. Each person is allowed to make any ordinary distributional changes she prefers so long as all changes to the provision of the set of primary goods are within the $\pm \$25$ range. Assuming, for now, that all citizens make ordinary changes only, each is required to submit a revised primary goods pie whose cash value cannot exceed \$1,025 or fall below \$975. Ordinary changes can result in the following distribution table.

Table 1: Ordinary changes

Prim. Good → Person ↓	a = \$150	b = \$250	c = \$600	+/- \$25 limits on changes
R	a=\$170 (+\$20)	B=\$230 (-\$20)	c=\$600	\$0
S	a=170 (+20)	b=255 (+5)	c=600	+\$25
T	a=175 (+25)	b=240 (-10)	c=600	+\$15
U	a=170 (+20)	b=240 (-10)	c=580 (-20)	-\$10
V	a=140 (-10)	b=240 (-10)	c=595 (-5)	-\$25
Majority	a=\$170 (+\$20)	b=\$240 (-\$10)	c=\$600	Total=\$10(x 5)

By making ordinary changes, within the allocation limit range for the year, each citizen participates in determining the actual allocation for the year as exemplified by Table 1. According to the pie model, when a majority of participants submits an ordinary change, of those who vote in favor of such a change, a majority determines the size of the change. It is important to note that this rule explicitly expresses the realization of the idea of the largest overlapping agreement obtaining among the citizens who participate in the application of the pie model. Each person changes the allocation amount for each primary goods according to her preferences. In our case a majority of participants (4 out of 5) voted for an increase in the provision of primary good 'a'. Of those who voted for the increase, a majority (3 out of 4) voted for a \$20 increase per person. This largest overlapping agreement fixes the actual allocation amount for the provision of primary good 'a' at \$170 per person for the next year. This computation is repeated for each primary good, and the balance of majority-supported increases and decreases results in the allocation amount required by ordinary changes to fund the revised set of primary goods. The rightmost column serves as a control feature to ensure that the balance of each citizen's ordinary changes falls within the range of the allocation limits. In our case the balance is +\$10 per person. Multiplied by five (the number members of society) we get a total allocation increase of \$50, as presented in the bottom line of Table 1. This amount is

then added to allocation limit base and results in a \$5,050 actual allocation, which is well within the range of allocation limit for the year.

When changes are a mixture of ordinary and strong changes things get more complicated as can be seen in Table 2.

Table 2: Mixed Changes

Prim.Goods→ Persons ↓	*a=\$150	b=\$250	c=\$600	*d=\$0	*e=\$0	-25/+200 Limits
R	*a = \$0 (- \$150)	b = \$240 (- \$10)	c = \$750 (+ \$150)	*d = \$120 (+ 120)	*e = \$0 (+ \$0)	+ \$110
S	*a = 0	b = 225	*c = 750	*d = 120	*e = 80	+ 175
T	*a = 0	b = 240	*c = 770	*d = 0	*e = 100	+ 110
U	*a = 0	b = 240	*c = 750	*d = 120	*e = 0	+ 115
V	*a = 150	b = 260	*c = 620	*d = 50	*e = 80	+ 160
Majority	a = \$0 (- \$150)	b = \$240 (- \$10)	c = \$750 (+ \$150)	d = \$120 (+ \$120)	e = \$0 (+ \$0)	Total \$110(x5)

* An asterisk indicates a strong change.

Table 2 exhibits how the application of the pie model is used to generate the allocation amount for the next fiscal year for our hypothetical society. Both ordinary and strong changes are represented on Table 2, where strong changes are marked with asterisks. Table 2 exhibits three types of strong changes. The vote on 'a' is considered a strong change as the result of information submitted to the agency in charge that any further reduction of funds would entail the elimination of the provision of this primary good. Those who vote in favor of the change, on the assumption that it will pass, are thus justified in redistributing the allocation amount used to finance such a provision in the previous year. Primary goods 'd' and 'e' are newly introduced. Let us suppose that 'd' is introduced by an individual initiative

petition procedure by citizen R. and that an association formed by S and T introduces 'e' by a group initiative petition. Such initiative petitions of strong changes are to be presented to the agency in charge a month or more before the application of the pie model such that the agency can gather the information related to these changes and make this information available to participants.²⁹ The vote on 'c' is automatically treated a strong change since the support of four out of the five participants exceeds the allocation limit for the year. It is a regulative principle of the pie model that once a person submits a change that requires an expenditure that exceeds the allocation limit, such a change is automatically considered a strong change. Again, the rightmost column serves as a control feature to ensure that each citizen makes accumulative changes at or above the yearly allocation floor (-2.5% from allocation limit base, or \$975 for each person) and at or below the allocation ceiling for the year (\$1,200 per person).

Once all revised pies are submitted, the agency in charge processes participants' input in the following way. First, the agency in charge processes ordinary changes. In our case decreasing the amount allocated for the provision of 'b' is the only ordinary change. A majority of those who voted for that decrease preferred a \$10 decrease per person, and thus the new allocation amount per person is \$240 for the year. This means that the allocation amount for the year is \$50 ($\$10 \times 5$ persons) less than the allocation amount base. In our case this means that the allocation amount would be \$4,950, which is above the \$4,875 allocation floor for the year.

Second, the agency in charge processes strong changes. A strong majority of the electorate voted for the elimination of 'a'. Thus the provision of 'a' is permanently eliminated. The introduction of 'e' did not receive a strong majority and is thus

²⁹ Strong changes of type (4) are treated similarly. Imagine that 'e' represent an initial petition to change a feature or a regulative principle of the pie model. Instead of entering an amount, each citizen would enter either '+' for 'yea' and '-' for 'nay'. If the change is supported by a strong majority it passes, or else it is rejected.

rejected. The introduction of 'd' received a strong majority of votes, and of those who voted for 'd', a majority preferred the allocation of \$120 per person for the year. Thus, next year's allocation of \$120 per person, for the provision of 'd,' is fixed. A strong majority voted in favor of dramatically increasing the provision of 'c', and of those who voted for the increase a majority preferred the allocation of \$750 per person for the year. Thus, next year's allocation of \$750 per person, for the provision of 'c', is fixed.

Third, combining the results of ordinary and strong changes, the agency in charge estimates the cost of the provision of the revised set of primary goods. The per person cost of the provision of primary goods is \$240 for 'b' plus \$750 for 'c' plus \$120 for 'd', which amounts to \$1,110. Multiplying this figure by five (the number of persons in society) gives us the actual allocation amount for the year, \$5,550. Before certifying the new budget, the agency in charge verifies that this amount is not below the allocation floor and is not above the allocation ceiling for the year. Since in our case the allocation floor is \$4,875 and the allocation ceiling is \$6,000, the new allocation amount for next year, \$5,550, can be certified because it is well within the cap.

It is possible that after adding strong changes to ordinary changes the allocation amount exceeds the allocation ceiling for the year. For example, if the elimination of 'a' would not have passed, each person would have received extra \$150. This would have resulted in an allocation of \$1,260 per person, and a total allocation of \$6,300, which exceeds the allocation ceiling for the year. It is a regulative principle of the pie model that when the actual allocation amount for the year exceeds the allocation ceiling, the increase of supply of primary goods required by strong changes is to be evenly reduced across the board until the actual allocation amount is equal to or less than the allocation ceiling. In our case this means a \$30 decrease per person of the provision of 'c' and 'd'. Only then, when total allocation is made equal to or less than

the allocation ceiling, can the agency in charge certify the allocation amount for the year. Once the allocation amount is certified, the difference between the actual allocation and the allocation ceiling, if any, is lost forever. After the agency in charge certifies the allocation amount, it is presented to the legislator to be used in calculating and mandating next year's income tax rate. Notice that since in our case the certified allocation amount is less than the allocation ceiling, society's income tax rate is to be adjusted accordingly, which means that the annual income tax rate is lower than what it could have been.

The case at hand presents an abstract example of the workings of the features and regulative principles of the pie model not only because of the size of the society, but also because of the presumption that all members are socio-economically situated the same, which means that each receives the same package of primary goods and each is subject to the same income tax rate. However, the case specifies the role the essential features and principle of the pie model play in its application. It also specifies some additional features and regulative principles of the pie model. And it illustrates how the application of the pie model yields a proper set of primary goods, or adequate welfare standards by establishing the largest overlapping agreement obtaining among citizens of a particular society at a particular point in time. With this understanding we are now in a position to consider the application of the pie model under actual conditions.

To begin with, assume that the pie model has been adopted by a society via a referendum.³⁰ Assume that the model has been applied for a few years such that

³⁰ The adaptation of the pie model by referendum includes the adaptation of Distribution 2½, fixing an allocation amount ceiling (if different than the 2.5% ceiling cap used here) selecting initiative petition procedures, deciding the sort of information the agency in charge should present to citizens, including a time table for information release, and other operational issues that need to be settled before the pie model can be applied.

there is a distinct allocation limit base, which is lower than a determinate allocation ceiling, and that allocation increase and decrease limits for each socio-economic position have been determined.³¹ Assume that favorable economic conditions obtain in this society. Assume that the agency in charge is fully equipped and competent, that all initiative petitions of strong changes have been submitted to the agency, and that the agency provided participants with timely and relevant information regarding issues and features connected with the application of the pie model and the set of primary goods in question. General information is to be made available by the agency all year long, and particular information regarding allocation limits, strong changes and related issues is to be made available to the public at least two weeks before the application of the pie model. (This information release time table is assumed to have been selected at the time the pie model is adopted) The pie model is to be applied during a one-day period before the legislator determines next year's income tax rates. It is important to keep the duration of the application of the pie model short since the pie model is based on a simultaneous direct voting procedure. Since the members of society select the pie model by referendum, the standards of welfare the application of the model yield are binding on the members of the legislator who should develop social policies in line with such results.

At the initial situation, on a particular day, shortly before next year's income tax rates are determined (in the USA), each citizen who can vote is called upon to perform the civic duty of participating in the procedure by which adequate standards of welfare are determined; that is, in modifying the current proper set of primary goods and the levels of their supply. Each citizen is presented with the images of her primary goods and tax pies. The differences of socio-economic situations are reflected in the citizen's primary goods and tax pies; that is the particular set of

³¹ I assume here that the situation of each citizen is determined by income and wealth according to the ten-tiered scheme customary in economics. Thus, the lowest tier represents the worst-off group, and the tiers above represent the better-off groups up to the top tier representing the best-off group respectively.

primary goods she receives and the particular income tax rate she pays are both determined by her socio-economic position, as the norm in current liberal democracies. More specifically, and for simplicity, let us consider the case of a single parent with two school-age children.³² The citizen, using a computer (and probably the Internet) downloads the images of two pies. The primary goods pie represents the package of state-provided primary goods she currently receives. It is divided into slices, where each slice stands for a particular primary good. The size of each slice represents the specific amount society spends on the provision of that good to each citizen situated like her. So, for example, her primary goods pie includes a slice representing education. The size of the slice stands for the amount of money the government allocates toward the educational needs of persons similarly situated as a proportion of the pie. Each citizen can also view the primary goods pies of persons from all other economic tiers.

The tax pie is an image of that portion of her income tax dollars allocated to finance currently provided primary goods. (Hereafter I will refer to that portion simply as income tax dollars or revenue) The tax pie is also divided into slices where the size of each slice represents the amount of her tax dollars allocated towards funding the supply of each primary good she is currently provided with, and those primary goods she currently shares in funding but is not provided with, if any. The tax pie is representative of the distribution of income tax revenue collected from citizens situated like her. For, example, there is a slice representing education, where the size of the slice stands for the amount of her tax dollars the government allocates toward the provision of education.

³² I select the example of a single parent for simplicity. The same process applies to any other form of social cell recognized by current governments for tax purposes. The specifics of the application of the model to such alternatives should not be difficult to imagine. Here, and in other places, I have chosen examples that may not represent all possibilities but those I believe illustrate my point best. It is obvious that many cases are more complex than the examples I employ. I briefly develop this point below.

It is important to notice that those two pies represent a few standards. (1) The image of the primary goods pie of the least advantaged group (the lowest economic tier) represents the current social minimum of supply of primary goods, considered adequate to enable each citizen to achieve a decent life. This primary goods pie is probably the largest of all other primary good pies; i.e., the poor's primary goods pie includes more goods and/or higher levels of supply. The tax pie of the worst-off is probably the smallest, but not necessarily empty, since being poor does not necessarily mean having no taxable takings. (2) The primary goods pie of the better-off gets smaller as their tax pie gets larger, according to their degree of affluence. The primary goods pies of the better-off represent to each citizen (and to those who are similarly situated) what goods she is currently provided with in order to be enabled to obtain the maximal usefulness of the scheme of basic liberties and rights to her at or above the social minimum. (3) The total set of all primary goods, provided to variously situated citizens, delineates a range of realizable conceptions of the good, or reasonable and legitimate life plans that citizens are enabled to pursue by utilizing available primary goods. The largest overlapping agreement that mandates changes to citizens' primary goods pies is expressive of society's change of preferences regarding these three standards.

The images of the two pies are accompanied with a list of strong changes submitted as initiative petitions by individuals, groups or agencies, and with the appropriate allocation limits. Some editing tools that allow each citizen to change the composition of her pies or the size of the pies' slices also accompany the two pie images. The range of permissible changes is limited by the constraints imposed by the features and rules of the pie model. Issues regarding pie changes should be familiar to most citizens who have to make ends meet and/or pay taxes. Such issues are also regularly mentioned in public discussions and debates regarding welfare and taxes. In addition, before the application of the pie model, the agency in charge

releases information regarding the principles and restrictions involved with the application of the pie model, and current issues such as allocation limits, ordinary changes, strong changes, alternative distribution schemes, availability of resources, etc. Citizens are expected to make reasonable and responsible changes in light of the information provided.

Participating citizens can modify the quantity and/or quality of supply of a particular primary good in the following way. In order to keep the pie model simple and two dimensional, both sorts of modifications are conveyed through adjustments of the size of the slice of a particular primary good (rather than adding a depth dimension). This is so because any modification, of quantity or quality or both, implies an adjustment of the amount allocated toward the provision of this good. In brief, when making such modifications, the citizen indicates whether each modification refers to the amount of supply of a primary good or the quality of supply or both. It is possible to increase the involvement of the citizen by having the citizen choose among methods of increasing quality or specifying how aspects of supply need to be enhanced. But such a move is not necessary, and not even wanted, since for simplicity and efficiency, it is better to leave such specifications in the hands of experts who specialize in the supply and quality of particular primary goods.³³ To require citizens to gain such knowledge would be to require too much. Even if citizens could master a sufficient level of knowledge of such matters, the experts' presumed experience would make them better suited for making such detailed specifications. The experts' task is to translate the intentions of the citizens' modifications in the most beneficial and efficient way. Although this account is brief, it should be sufficient generally to explain how issues regarding citizens' preferences about levels and quality of supply are handled. Hereafter, when I mention the adequate provision of primary goods, or adequate standards of welfare, I

³³ This point corresponds to Hayek's third constraint on justified partial planning of the economy. (Sec. 2.2.b, also in Hayek, 1945, reprinted in Machan 1982)

intend to be understood to be also making reference to levels and quality of supply of those goods in the way just outlined.

The citizen uses her editing tools ordinarily or strongly to change the composition of her primary goods pie or the size of its slices. The changes are immediately reflected on the tax pie, representing the tax dollars increase or decrease her changes imply, if the appropriate majority of citizens votes in favor of such changes or similar changes. She can also review public opinion polls, released by the agency in charge, regarding a particular change she has in mind. And she can view how her changes would affect the pies of others who are not similarly situated. These additional pie images and information give her an idea of the likelihood that others will support the changes she considers. That is why, before submitting a particular change (ordinary or strong), each participating citizen should evaluate her proposed change relative to its affects on the pies of others not similarly situated. Thus, the citizen can structure her changes in a way that may increase the prospects of having her final submission be accepted by the agency in charge, supported by the largest overlapping agreement, and mandated into social policy. On the day of the application of the pie model she is required to submit her adjusted pies. If the changes she makes fall within the range of permissible changes imposed by the pie model, the agency in charge accepts her submission. If her changes violate any of the constraints, she gets an error message and is asked to revise and resubmit her changes such that they do not violate any of the constraints. By the end of the day, revised submissions that violate any of constraints are rejected and not processed.

Citizen submissions are processed by the agency in charge according to the features and principles of application of the pie model described earlier in this section. The agency in charge tabulates the largest overlapping agreement established by the submissions of all participating citizens. Each citizen's submission confirms the changes she selects, including the tax commitments they imply. At the end of the day

of the application of the pie model, the agency in charge verifies that all submissions conform to the constraints, calculates the allocation amount for the next year, and certifies those revised primary goods and tax pies that are best supported by the appropriate majority of citizens. (See Sec. 4.4.c below for the possibility and practicality of such calculations) The calculation of citizens' total votes establishes the intersect set of citizens' preferences that represents the largest overlapping agreement obtaining among citizens regarding reasonable and legitimate standards of welfare. The outcomes of the application of the pie model are to be used as directives for the determination of next year's welfare standards, social policies and income tax rates. With some structural modifications, the federal government, state governments and local communities can use the application of the pie model. This process is to be repeated annually, so as to ensure that contingent and actual conditions are reflected in the determination of such standards.

Although this description of the application of the pie model under actual conditions is comprehensive, there are some related aspects and issues that ought to be further clarified. I used the example of a single parent with two school age children for simplicity and convenience. It is clear that many more forms of social cells are involved and can be accommodated by the pie model. For example, two parent families can participate in ways similar to standard tax filing procedures. They can jointly submit their family's adjusted pies, in which case their submission would be counted as two votes for the same changes. Or, they can separately submit (like a married couple can file taxes separately), in which case each submission would count as a single vote, but the size of each pie would be proportionally reduced in half since the package of primary goods is provided to the family as a whole. Such issues can be settled by adopting various customary current practices (such as tax filing) as part of the referendum by which the pie model is adopted. Thus, these issues are not further discussed here.

The relation between the two pies may vary as well. There are those who pay more in taxes than needed to fund the primary goods they actually use. And there are those who pay less in taxes than needed to fund the primary goods they actually use. Those who pay more than what they use, in fact, sponsor the provision of primary goods to others. Normally, they belong to the better-off social groups. Those who use more than what they pay for usually belong to the worse-off social groups. They depend on the sponsorship of the better-off groups for the provision of the set of primary goods they receive. (Nevertheless, all citizens benefit, to different degrees, from the provision of infrastructure primary goods) Moreover, as was mentioned earlier in this section, the tax pie each citizen uses presents a unified and properly proportioned picture of the proportional allocation of her income tax dollars toward funding the various primary goods supplied to her and others (even if no such one to one relation actually exists). This image gives the citizen a clear view of the important relation between the total cost of the provision of primary goods and the total benefits they yield. This viewpoint allows the citizen to gain an overall and objective picture of welfare standards. It increases citizens' awareness of some of the complexities involved in making determinations regarding such standards for themselves and others. Such awareness helps participating citizens make reasonable and fiscally responsible determinations regarding their own future welfare and general well-being as well as the welfare and general well-being of others. Thus, widespread participation in such a unified process enhances political responsibility, social bonds and cooperation. At the same time, wide participation protects and secures the political liberties of those who uphold various comprehensive doctrines and belong special interest groups.

The primary goods pie of the better-off is highly unlikely ever to be empty for the following reasons. The determination of adequate welfare standards would be preceded by public debate and negotiations, where different standards schemes are

considered, some of which, if not all, reflect the interests of the better-off as well.³⁴ Some of the interests of the better-off express conceptions of the good that are more 'refined' or 'enriched' than those considered adequate as social minima. Those conceptions of the good need to be considered and some made legitimate if social cooperation is to involve all members of society, including the better-off. Indeed, the primary goods pie of the better-off may not include some of the primary goods provided to the least advantaged, for example, housing and nutrition. But, it may include such goods that express interest in, say, the arts or sports. For example, the primary goods pie of some of the better-off may include slices representing access to goods such as a National Opera, or sports facilities such as public ski resorts or golf courses. Such primary goods are not available to the worse-off, not because the members of the worst-off group are not allowed into opera houses or ski resorts. They are not practically available to them because they cannot afford the co-pay, the price of admission or use, or the equipment required even if admission is made free. On the other hand, the primary goods pie of the worse-off may also include goods that express interest in the arts and sports. For example, the primary goods pie of the worse-off may include slices representing access to museums and public baseball fields. Thus, all citizens benefit from primary goods that express various levels of interest in, say, the arts and sports. Unless a segment of the population, during the preceding process of negotiation and compromise, forgoes their right to get something out of this process, no primary goods pie should be empty.

Furthermore, it is presumed that each citizen of liberal democracies receives some set of state-funded primary goods. Even if the citizen never directly uses such goods, she is always indirectly provided with some level of supply of some non-infrastructure primary goods. For example, even if she sends her children to private universities, most private universities are partially funded by the state. However, it is possible that

³⁴ In Sec. 4.3.d below I further discuss the sort of information available to participants.

the tax pie of some citizens is empty. The tax pie of those who do not pay income taxes is empty. I propose that citizens who do not pay income tax participate in the process but not be permitted to make changes that imply any increases in tax rates to others. (Other plausible suggestions can be generated and put to vote in the initial referendum) In this way those citizens who do not pay taxes participate in the process and enjoy the benefits of welfare but do not affect the distribution of resources they did not help generate. Thus, non-taxpayers would only be able to decrease current levels of provisions of primary goods, or redistribute such provisions so long as this redistribution does not require any raise in tax revenue. Such a solution is consistent with the Rawlsian framework, and in particular with Rawls's restatement of the difference principle. (Sec. 3.4.g) The restatement implies that since social cooperation among citizens is required for drawing the maximal usefulness of the scheme of essential rights and liberties to each citizen, none should be excluded from participating in the process of public justification by which such controversial issues are settled. Changes that make the social minimum too costly, and changes made for selfish reasons without concern for the burdens they impose on others, could turn out to be wasted suggestions when they do not receive the support of the largest overlapping agreement, even if they are not in violation of any of the features and principles of the model. So long as each citizen lives at or above a social minimum of decent living, and so long as each citizen participates in a reasonable and fiscally responsible way and internalizes the fact that changes that put unbearable burdens on others are not likely to gain the support of the largest overlapping agreement, I believe each citizen should participate in the application of the pie model. Those who do not participate forfeit their capability to affect the determination of next year's welfare standards. That they do not participate does not negatively affect the determinations made by participants. The absence of some potential votes does not affect the legitimacy of the newly established standards. Indeed, the allocation amount and the tax implications entailed, determined by participating citizens, are binding on all citizens of society.

To sum, the pie model provides a formal procedure for establishing a set of primary goods and the levels and quality of their supply according to the largest overlapping agreement obtaining among citizens of a particular society at a particular point in time. It begins with a definite set of primary goods provided to enable each citizen to (1) achieve the social minimum of decent life, (2) attain the maximal usefulness of the scheme of basic liberties and rights to each at or above the social minimum, and (3) pursue reasonable and legitimate life plans. And it ends with a determinate revision of the same standards according to the largest overlapping agreement obtaining among the members of society. Such a procedure accommodates complex, contingent and varying actual conditions in a reasonable and practicable way. The features and regulative principles of the pie model aim at securing the fairness and reasonableness of its actual application. Moreover, the formal constitution of the pie model allows much room for adjustment according to citizens' circumstances and opinions as well as room for a productive process of deliberation and compromise. It is a great advantage, therefore, that this formal model is self-generating and flexible enough in its specification to accommodate those instances anticipated and those that are not envisioned here. In its present formulation, the pie model can be immediately implemented for research purposes or for actual determinations of adequate welfare standards in liberal democracies.

4.3.d: What the model accomplishes

The application of the pie model accomplishes several things. Most important is the establishment of a political procedure by which adequate (i.e., reasonable and legitimate) welfare standards are determined. Beginning with a specific and actual initial situation, the application of the model enables citizens to modify the set of primary goods according to their preferences within their given circumstances. More specifically, the application of the pie model modifies and mandates social policy in the following ways: (1) Ordinary changes require modifying welfare standards. They register a general change in social preference regarding the levels of supply of

currently provided primary goods that should be instituted such that each citizen is better enabled to obtain the maximal usefulness of the scheme of basic rights and liberties to her. (2) Strong changes imply the need to modify current standards of living significantly. They register extraordinary shifts in social preference regarding citizens' legitimate expectations of a social minimum of decent living. Such changes in general preference indicate that the current social minimum includes primary goods whose supply is either acutely insufficient or wasteful. When strong changes mandate the introduction of a new primary good or the elimination of a currently supplied primary good, they represent a general agreement that the provision of such an additional good is necessary, or that the current provision of a good is superfluous, respectively, for enabling nearly every citizen to achieve a decent life. (3) The combination of ordinary and strong changes determines particular and complete new standards. They register the general social preference regarding the proper set of primary goods society, as a whole, is willing to sponsor. These standards are considered necessary to create sufficient space for a range of reasonable and legitimate conceptions of the good citizens of various means and capabilities should be enabled to pursue. The applications of the pie model politically justify and mandate such revisions to welfare standards, at least until the next scheduled application of the model (barring conditions of national emergency).

Based on the modifications made to the Rawlsian framework, the application of the pie model solves the problem of discontinuity between the ideal and implementation levels in Rawls's account of distributive justice in two ways. First, the use of the idea of the largest overlapping agreement achieves the same intent for which Rawls introduces the idea of an overlapping consensus. It performs the same function Rawls's idea of an overlapping consensus fulfils in the public justification of social policies. And, it makes the implementation of justice as fairness more practical by offering a way to recognize that an overlapping consensus, or something like it, has been in fact achieved. However, unlike Rawls's idea of an overlapping consensus

(see Sec. 3.4.i), the idea of the largest overlapping agreement is not vague. The pie model's utilization of a direct voting procedure gives the establishment of the largest overlapping agreement full content and meaning. As such, it is a useful tool in solving controversial social welfare issues in a way all participants are likely to accept, for a limited period of time. Second, the application of the pie model eliminates the discontinuity problem by offering a way by which a social minimum of decent living and a sufficient range of conceptions of the good can be justified and mandated in a particular society at a certain point in time. Thus, given the political sociology and human psychology assumed by justice as fairness, and in addition to its educational role, the implementation of Rawls's distributive justice theory can now be assisted by the pie model in order to reach a partial yet definitive completion.

Moreover, for completeness of presentation, and in order to demonstrate that the pie model passes the test imposed on the distributive models considered in Chapter 3 (Sec. 3.1), I review the ways in which the pie model meets the criteria indicated by that test. In examining Ackerman's, Dworkin's and Rawls's distributive justice models (1) I paid special attention to the counterfactual situations from which ideal principles were derived. Particularly, (2) I considered the sort of information available in these initial situations, since decisions regarding principles, as well as standards of welfare, were made in reference to this information. (3) I evaluated the feasibility of implementing these models and the ability to adjust or revise principles and standards, in case actual conditions warrant changes. (4) I considered the adequacy of the standards derived from these models. I believe that any model of distributive justice has to handle these issues successfully if it is to gain the acceptance and trust of libertarians and welfarists alike. The application of the pie model comes to grips with these issues in the following ways.

(1) Counterfactual initial situations are used for the purpose of deriving general conceptions and principles of distributive justice. These ideal conceptions and

principles, in turn, serve as yardsticks for judging and instituting actual principles and schemes of distributive justice. But, as I demonstrated in Chapter 3 such initial situations involve controversial circumstances and decision-making methods. More importantly, there are problems with implementing principles conceived under counterfactual conditions in actual conditions. Instead, the application of the pie model begins with actual conditions obtaining in a particular place and time. Although this initial situation does not present us with ideal conditions and perfect justice, it does include actual circumstances and prevalent imperfect conceptions and principles of justice. In particular, the model begins with the current standards of welfare. These standards serve as the reference point from which we decide what to do next. If we find them lacking, we are provided with tools to amend them according to the decisions of participants involved. The participants are involved both in determining such standards and in living under the outcome of the decisions they collectively make. Internal inconsistencies are part of this model in the sense that there will be conflicting individual preferences. Using the democratic voting procedure is not a way of abstracting from those conflicts of interest, but an accepted way of accommodating them. That solutions are temporary I take to be an advantage since they reflect the natural shift of needs and preferences in actual societies.

Thus, this initial situation reflects the accepted plausibility of these standards by utilizing conditions in which they are already instituted. The model does not display any normative preference toward liberty or equality, and the balance between the two emerges as the result of the actual needs and beliefs the members of society express in the process of establishing the largest overlapping agreement. The loss of rigid standards is an advantage because it does not require us to argue for distributive justice on the basis of some comprehensive doctrines. What is gained is a rigid demand to establish adequate standards. The model presents a ready at hand set of primary goods and a democratic method of legitimizing changes in standards according to the decisions of those who live by them. This is an imperfect initial

situation that does not attempt to postulate a perfect world from which ideal principles of distributive justice are derived. But it makes for an easy transition from theory to practice. It is an imperfect model for an imperfect democratic society that, nevertheless, has a built-in mechanism for change and adaptation. Where it goes is the responsibility of the participants.

(2) Distributive justice is complex and so is the information needed to make decisions regarding adequate standards of welfare. The complexity of the matter is present in the life of every individual who has to make ends meet. Thus, this complexity is familiar to each individual to varying degrees. The model allows approaching these issues in an organized and manageable way. The model incorporates information, and should be complemented by means to access additional information about primary goods, the levels of their supply, and about various related issues, to varying degrees of penetration. As information related services and techniques advance, it seems only appropriate that these will be incorporated not only into the individual's life but also into common spheres of life such as the standards of welfare.

The limits of information are set by the current set of primary goods, their level of supply, additional information regarding goods, current and forthcoming, and by theoretical possibilities and their effects. Participants would be presented with statistical projections of various ordinary and strong changes together with their anticipated effects and estimations of the likelihood that they rally the support of the largest overlapping agreement. Alternative welfare schemes, for example, would be presented to participants. Such alternative schemes could be the outcomes of negotiations and bargaining, occurring before the application of the pie model, between, e.g., various political parties, special interest groups, research institutions, and interested individuals. Other information, like labor dislocation implications, availability of skilled workers and professionals, projected tax revenue, etc., would

be to be presented as well. What is not presented on the 'main-frame' should be obtainable upon submission of particular queries by the participants. Where information is not available, the agency running the model is obliged to supply the extra information within reasonable limits of time and availability. This reduces the problem of relevancy of information, although it still makes large amounts of information available to participants. Finally, the model absolves the agency from having to solve the incommensurability of individual preferences problem by writing a program that properly reflects individual preferences. The configuration of the model includes the current set of primary goods and the levels of their supply, while amendments are not done by any normative principle but through the direct participation of citizens. In other words, the computer is merely the vehicle of information: the participants are the software, or rather the wetware, that supplies the criteria for processing.

(3) The pie model prescribes annual reapplications, which means that current adequate standards can always be amended in further applications. When examining the models in chapter 3, I routinely criticized the inability to go back to initial situations. Those counterfactual initial situations are used to derive principles and standards of distribution. However, when moving to actual conditions, I pointed out that the principles and standards derived under ideal conditions might not best fit actual circumstances. The inability to go back and change these was presented as a serious problem. Under the pie model, this problem is solved. Although current standards may not be based on one normative conception of justice, and are not the result of some ideal distributive principle, they are presumed to be the current result of something like the historical largest overlapping agreement established by citizens according to their preferences, relative to the resources available to their society. Nevertheless, even though the process is saturated with information, the pie allows a way back to re-evaluate standards and principles and to modify them according to changing needs, beliefs and resources. Such modifications are possible because there

is no rigid commitment to a necessary set of primary goods and necessary levels of supply. Moreover, the model does not imply that once certain principles and standards have been fixed, they are permanently fixed. Under the pie model it is possible to change the regulative principles. It is possible to modify the allocation amount of a primary good, thus changing its level of supply. And, it is possible to add and delete items from the set, although strong changes require larger majorities than ordinary changes.

The possibility of going back to the point of selection allows society to re-evaluate and constantly change its standards of welfare. It also allows the possibility of correcting the mistakes and inadequacies of previous decisions. Since it is done annually, under actual conditions, there is no problem of discrepancy between the standards established and their application to actual conditions. Citizens select what seems most reasonable to them at a certain point, and they have the ability to modify their preferences as their situation and beliefs change.

(4) The adequacy of standards of welfare is primarily a function of their selection by the largest overlapping agreement, during the application of the pie model. Thus, the adequacy of the pie model is crucial. The pie model is adequate in several senses. It is most significant that the model establishes a complete and particular set of primary goods and the levels of supply. We begin with a given set and levels of supply that may not be perfectly justified or adequate. But the primary goods pie depicts reality accurately such that there is no need to postulate a counterfactual situation from which to draw justification for the validity of this particular set or the adjusted set mandated by the largest overlapping agreement. This eliminates vagueness regarding the complete determination of future standards of welfare. Since the yearly evaluation is built into the process, the re-established standards are always subject for farther reevaluation. Moreover, this model is sensitive to cost-effective considerations. It presents what society can presently afford, and what society is

willing to spend in the near future. Despite all the 'political manipulations' that may be associated with the current set of primary goods, this set, it seems to me, is more true to reality than any counterfactual situations that involves 'manna', 'fixed equality of talents' or indeterminate decisions made under a 'veil of ignorance'. That the set is not perfectly justified, and that some may not benefit as others or may not get what they need, is a part of the description of our actual conditions. Rather than abstracting from actual conditions into some ideal sphere in order to justify actual decisions, the model allows those who are part of the complexity to voice their opinions, to decide, and to share in living under those decisions.

Thus, the pie model eliminates the discontinuity between the different levels of Rawls's theory, at least in reference to determining the proper set of primary goods. It yields particular standards of welfare. Such a model can be applied in procedural democracies or constitutional regimes, on the state level (the USA) or in small communities (towns or villages). It has a definite reference point, which can be judged and adjusted. The yearly reapplication of the model reflects changes in actual conditions and social preferences. And its use of democratic practices enhances social cooperation and mutual respect. In addition, the model is sensitive to cost-effective considerations. This may not be a model based on absolute justice or ideal conditions, but it is meant to be operational under social, economic and political conditions that are neither perfectly just nor ideal.

4.3.e: Conclusion

Within the Rawlsian framework there are good reasons to adopt the theory I propose and the model developed since they help eliminate the discontinuity problem and enhance other aspects. The model makes justice as fairness more practicable and implemetable, at least in the sense that it prescribes a way to make complete determinations of some of the most important features of Rawls's view of distributive justice. Moreover, by requiring citizens to bear the responsibility to

continuously establish standards of welfare in their own society the model addresses two additional matters. The first has to do with my previous account of trust (Chapter 2, Sec. 2.1.b), where I suggested that persons trust themselves (and those in the core of their trust sphere,) the most. I also argued that giving a normative priority to either liberty or equality results in mistrust on the part of welfarists and libertarians alike. (Sections 2.2.d – 2.2.f) That the pie model does not give a normative priority to either liberty or equality makes its directives not mistrusted by both. By involving citizens in the welfare standards decision-making process, through direct participation in establishing the largest overlapping agreement, they are equally free to express their preferences and affect the outcome of the process. In addition, the model has features that allow balancing the two principles according to temporal conditions and beliefs, and has built-in mechanisms for change. Second, the model lifts responsibility for making decisions regarding adequate standards of welfare off the shoulders of elected representatives and puts the responsibility squarely on the shoulders of individual citizens. Previously, I argued that people have to trust the model, and the representatives who utilize the model, before they are willing to grant the model or the representatives the responsibility to make welfare determinations. (Sec. 2.1.b) The pie model reverses the order of things. Citizens themselves are responsible for establishing the standards of welfare in their own society. Since they trust themselves the most, I argue that they trust their own decisions the most. And so they are more willing to accept the determinations arrived by this procedure. Consequently, the application of the pie model enhances the meaning and practice of democracy. These features make the pie model trustworthier than, at least, the models I considered in Chapter 3. I thus submit that the pie model for distributive justice overcomes the problems it sets out to solve and is trustworthy and useful to real members of actual liberal democracies.

At this point, however, it is important to emphasize a certain implication involved with the application of the pie model. Throughout this work, especially in section

2.3. I have labored long and hard to motivate libertarians to participate in a negotiation and compromise process like the application of the pie model. The working assumption was that it is the reluctant libertarian, and not the welfarist, that needs to be motivated, since the welfarist was presumed to be prone to compromise. However, given the non-normative character of the pie model, it is important to ensure that welfarists are as motivated to participate in such a process, since some welfarists may end up having to accept and live under standards that fall short of their various egalitarian tendencies. All the features of the model are designed to yield fair outcomes based on the establishment of the largest overlapping agreement. But the effects of actual conditions of scarce resources and shifting popular views may result in standards some welfarists may find hard to accept. Thus, it is important to emphasize that the value of the model is to be found in its fairness and not in the particular doctrinal concerns it promotes. Since it expresses general public preference, temporary and revisable determinations should be accepted and trusted as political, rather than moral or necessary solutions to social and economic controversies. The formal process specified by the pie model does not discriminate between libertarians and welfarists and is expressive of the plurality of doctrines in society while registering actual conditions and issuing practical compromises. Its reversibility feature should motivate welfarists to accept the procedure and its outcomes because they express the general social preference of their own society. Being a member of a society that trusts and annually applies the pie model, welfarist can advance her causes by actively participating and campaigning for the changes she favors. In this way, in the future she can revise outcomes she dislikes but has to accept and adopt now.

Even if the plausibility and feasibility of the pie model appeal to both libertarians and welfarists, it is still an imperfect model that should be refined and adjusted after it is actually implemented. Nevertheless, there are a few additional complications and possible objections I address in the next section.

4.4: Further issues

4.4.a: Introduction

In this section I would like to consider a few problems and answer some objections that may be raised against the pie model, and thus further clarify some remaining issues. An immediate objection that must be met is the charge that the model is too relativistic in that it is not committed to any particular conception or principle of justice. Indeed, radical relativism may deny the validity of any such conception or principles. But when one understands relativism properly, one says that the judgments one makes are relative to something, some conventional yardsticks or prevalent conceptions and principles. I do not believe that the charge of radical relativism can be mounted against the pie model. Rather, the model offers a normative political procedure that accommodates the various conceptions and principles associated with current and established comprehensive doctrines. The pie model takes the current situation as a reference point that is embedded in such contemporary and prevailing comprehensive doctrines. For example, the application of the pie model accepts and accommodates the validity of liberty and equality as the foundational principles of liberal democracies according to which issues regarding standards of living and welfare are determined. It is worth reiterating that Rawls justifies his conception of justice as fairness on the basis of its unanimous selection by an overlapping consensus, rather than logical or moral justifications, in the original position. Indeed, as Raz points out (1994, pp. 45-81, Sec. 1.1.c above), both Rawls and Nagel have avoided a commitment to the logical or moral validity of their conceptions of justice, and instead invoked some notion of universal or unanimous acceptance as their justification. I, on the other hand, am satisfied with the initial accord implied, for example, by current welfare policies in the USA. I take such a current arrangement to be the reference point relative to which the model operates. And I propose that the application of the pie model is not a purely relativistic, but an appropriate democratic political procedure, of determining such standards. I believe

that this way of viewing things may not allow a tight deductive model for distributive justice, yet it better fits actual conditions, as well as employs a valid philosophical standpoint.

4.4.b: The character and usefulness of democratic procedures.

Throughout this work I have used democratic procedures in a way that may give the impression that they are infallible or ideal. So, another sort of objection may be directed against a democratic practice I have used extensively, namely, direct voting. Rawls expresses strong reservations against the wide appeal to voting procedures. (Sec. 3.4.j) But I already replied to those reservations when modifying the Rawlsian framework. (Sec. 4.2.c) Nevertheless, it can be argued that the use of direct voting in determining all government policies is impractical, indeed impossible. I agree that determining each and every political issue through establishing the appropriate largest overlapping agreement, as prescribed by the pie model, is unwanted because it is impractical. However, I maintain that adequate standards of welfare constitute a domain of issues that deserve special treatment such as the one offered by the model. The general plausibility of instituting such standards in liberal democracies, in contrast to the general disagreement regarding their specification, makes the establishment of adequate standards of welfare both important and difficult to resolve. The importance of establishing adequate standards is rooted in the importance of the set of primary goods. It affects the well being of each citizen on a daily basis and influences the ability of each to achieve her preferred life plan throughout her lifetime. Moreover, the scheme of basic liberties and rights is an essential feature of Rawls's conception of justice as fairness, and its full realization by each citizen is thus directly linked to the basic structure of society. Hence, welfare standards are not only important to the life of each citizen, they are also directly connected to the most basic principles of justice and the fundamental institutions that regulate the basic structure of society. These standards, which are typically controversial and highly important in theory and practice, deserve special status. This

special status, I argue, requires special handling, which the pie model offers as it is both theoretically and practically suitable for the task. While the pie model is designed to handle practically any controversial welfare issue, there is nothing in the theory from which it is developed, and nothing in the model itself, that entails its necessary application to all political determinations. I argue, nevertheless, that the importance and usefulness of democratic procedures in liberal democracies surpasses their imperfections, and until better practices are offered, one is justified in using them.

Democratic procedures, such as the pie model, also present adequate means of connecting social with political concerns. In support of this claim I cite Robert Dahl's view as presented in *A Preface To Democratic Theory* (1956). In this book Dahl discusses many of the problems still associated with democratic practices, including issues such as equality, intensities, consensus, diversity and disagreement. I will not review his excellent discussion here, nor will I present his solutions. But I would like to cite Dahl's view of political theory, which conflicts with Rawlsian view: "Whether we are concerned with tyranny by a minority or tyranny by a majority, the theory of polyarchy suggests that the first and crucial variable to which political scientists must direct their attention are social and not constitutional." (Ibid. p. 83)³⁵ Both thinkers agree on the connection between socio-economic conditions and political theory, but they disagree as to where political theory should begin. Rawls argues that constitutional essential need to be fixed prior to any further political activity. And Dahl argues that socio-economic variables need to be considered prior to the construction of political theory. Regardless of which view is

³⁵ Dahl defines 'polyarchy' as "... a function of the political activity of the members" (1956, p. 81), where "At present we know that political activity, at least in the United States, is positively associated to a significant extent with such variables as income, socio-economic status, and education, and that it is also related in complex ways with belief systems, expectations, and personality structures." (Ibid. p. 81)

correct. the pie model offer a way of connecting the two theoretical and practical spheres.

Finally, the model updates the democratic voting practice to the level of current available technology. One reason why we no longer have direct democracies but representative democracies is that, given the size of current societies, direct voting, of the Greek city-state, the Swiss Canton or town-hall meeting styles, is not practical. The pie model utilizes technology that offers a way to return to direct voting regarding issues that deserve special treatment. I am not suggesting here to replace parliaments with virtual city-hall meetings yet. For my purposes, it is sufficient that the pie model makes direct voting not only a desirable practice, but also one that is technically practical. In this way, again, I see the pie model as enhancing the nature of liberal democracies viewed as systems of social cooperation among equally free citizens. This last democracy-enhancing feature of the pie model brings us to the objection based on the technical feasibility of the model, to which I reply next.

4.4.c: Practice

One of the objections I raised against Dworkin's model (Sec. 3.3.e) focused on his suggestion that if enough information were presented to a computer, the computer would deliver the proper income structure and insurance scheme his model requires. I argued that presenting such information is not sufficient because Dworkin failed at least to describe the program necessary to evaluate and compare individual preferences in a way that yields the wanted results. As far as I know, no such program exists. Similarly, one can object to the pie model on the grounds that the sort of data processing it requires is either too complicated or impossible. In fact, the pie model does not require the sort of a program Dworkin's model requires because the decision-making process is done by the participants. All the pie model requires is a combinatorial program that registers individual inputs, of changes to the initial set of primary goods, and delivers a revised proper set that defines revised standards of

welfare. The new standards reflect the changes participants make, in line with the model's features and regulative principles, according to their individual preferences. Such programs exist and perform similar tasks in, for example, banking and exchanges. In order to meet this objection and to illustrate the kinds of processing capability and technology the pie model assumes I will briefly discuss the New York Stock Exchange.

The New York Stock Exchange (NYSE) originated in 1792, when twenty-four New York stockbrokers and merchants signed the Buttonwood Agreement. According to the NYSE's *Fact Book 2001* (2002), for over two centuries the NYSE has evolved into the world's largest and most technologically advanced market place. It performs many transactions similar in kind to those required by the pie model. And it is designed to register individual preferences by continuously recalculating and adjusting the value of particular stocks according to individuals' decisions to sell or buy them. Trading at the NYSE is conducted in auction form where buyers and sellers compete for the best possible stock price with the intention to increase their profits. The NYSE facilitates these trades, but the price of tradable stocks is determined according to supply and demand. For example, in the real market there are bid prices, e.g., 300 stocks at \$42.03; asked prices, 1000 stocks at \$42.10. A buy at market is \$42.10; a negotiated buy is \$42.10 or below. The market maker must meet a bid at market price. So if one buys 2000 stocks at market, the market maker has to sell it at that price even though she has only 1000 stocks now offered at \$42.10. All this happens, usually, within seconds.

Buying and selling stocks is thus a way individual traders express their judgments, intentions and preferences. They are free to trade the stocks they own according to the information they obtain, their preferred strategies and any other opinions and beliefs they have. The NYSE ensures the fairness of trades and the traders are responsible for each transaction they make. There are many internal and external

laws and regulations that control trading in the NYSE. They aim at ensuring that trade is fair, and that transactions are done within a reasonable range that may not result in disasters. I will not discuss these laws and regulations here, but point out that they have similar aims and functions as those set forth by the regulative principles and features of the pie model. Corporate traders, stockbrokers, various kinds of organizations, and individual traders execute transactions in the NYSE. For our purposes, I treat each transaction as if it is done by an individual trader. The NYSE serves to register and facilitate the decisions each trader makes when aiming at maximizing profits. Those profits can then be used for whatever purpose the trader desires. Each individual transaction can be executed automatically within seconds, and immediately affects the value of particular stocks and the 'mood' of the market as well as other traders. In this way individual traders, through the transactions they execute, affect the value of particular stocks and the decisions of others. This brief description is obviously oversimplified and insufficient. A full description of the NYSE cannot be attempted here. Yet this short summary illustrates not only that such a system is practicable and adequate, but also practiced every business day.

To provide a better sense of the magnitude and actual complexity involved in the operation of the NYSE, I cite just a few facts reported in the *NYSE Fact Book 2001*. Despite the economic recession since April 2000, and the economic crisis following the terrorist attack on September 11, 2001.

The NYSE set its tenth consecutive trading-volume record in 2001, with a total of 307.5 billion shares traded, up 17% from the 262.5 billion shares traded in 2000. Average daily share volume was a record 1,240.0 million in 2001, up from the previous record of 1,041.6 million in 2000. The average daily value of trading on the NYSE in 2001 was \$42.3 billion, compared to \$43.9 billion in 2000. The Exchange's 2001 annual volume, expressed in dollar terms, was \$10.5 trillion, compared to a record high of \$11.1 trillion set in 2000. (Ibid., p. 3)

Of course these staggering numbers do not tell the whole story, but the sheer magnitude represents not only a tremendous activity that mirrors actual transactions

made by individual traders, but also the technological capability of performing the calculations required, in real time, in order immediately to register consequent adjustments. For comparison, consider the fact that during the year 2000, when the NYSE's annual volume reached a record high of \$11.1 trillion, the IRS collected a total of \$2 trillion. (www.irs.gov , 2002)

To illustrate the increase in individual trading through the Internet, on-line, the NYSE reports in *Fact Book 2001* that in 1997 there were 4 million on-line brokerage accounts and 61 million off-line traditional brokerage accounts. However, in 1999 the number of off-line accounts decreased to 60 million while the number of on-line accounts grew to 18 million. (Ibid., second Table, p. 60) These numbers suggest that many more people are willing to use technologically advanced direct means to trade. And they are also willing to invest the time and effort it takes to become familiar with the rules of trade and stock-related information in order to make reasonable trading decisions (though not all succeed). This suggestion is also supported by the NYSE report that in March 1997 the average number of daily trades from on-line brokerages accounts totaled at 962,000 but reached a total of 13,710,000 by March 2000. (Ibid., third Table, p. 60)

For the purposes of this work, the most interesting and last fact I cite has to do with the socio-economic background of many of the on-line traders. According to *Fact Book 2001*, " . . . half of stockholders have annual family income of less than \$57,000, while 18 percent have family incomes of more than \$100,000." (p. 55) Given that, according to the US Census Bureau, the average income for a 4-person family in 2001 was around \$56,000, it seems that most of the online traders come from average or less than average socio-economic groups. This fact (allowing for some statistical adjustments and errors) seems most significant because it implies that most traders are not rich people who can afford to lose funds that may be essential for their everyday subsistence. This fact illustrates that most traders belong

to median, or below median economic groups. It also suggests that such traders accept the means and show the will to participate in a process by which they can improve their lot. If so, it is likely that they will also accept the means and show the willingness to participate in the application of the pie model, which can contribute to improving their lot as well.

There is a security problem of which every trader should be aware, and every financial institution, including the NYSE, is well aware. Computer assisted direct involvement is vulnerable to invasions and manipulations. This problem affects the application of the pie model inasmuch as it affects the operation of the NYSE. Nevertheless, devices to ensure privacy and security are being developed and applied continuously, and many people, myself included, express trust in those devices by buying, banking and executing many other transactions on-line. If one trusts electronic means to manage one's money, property, tax reports and many other transactions, one can also trust this technology in participating in the process offered by the pie model. Indeed the facts reported by the NYSE show that the technology and the will to operate and participate in processes that enable persons to attempt to improve their lot, exist and are utilized on a daily basis. It stands to reason that such technology and will can find a place and expression in adopting the pie model.

For simplicity, when explicating the pie model I used the case of a single mother with two school-age children. I also considered the nature of the participation of those citizens who do not pay taxes. Given my explication, I believe it is not difficult to develop mechanisms that accommodate all other possible social positions such that each citizen's mode of participation is specified. Distributive justice is complex and so should be the means by which adequate standards of welfare are determined. In the same way that the NYSE took over two hundred years to evolve into the largest and most technologically advanced economic tool, the pie model, given time

and continuous refinements, can evolve into the most significant tool for determining adequate welfare standards. Thus, I conclude that the practicability objection is met.

4.4.c: Political virtue

According to Rawls, justice as fairness has the educational role of developing the moral powers of citizens such that they understand and adhere to its principles. The more citizens are educated in this way, and the more the principles of justice as fairness regulate the basic structure of society, the less citizens need to participate in public justification in order to resolve controversial legislative or judicial issues. (*JFR*, pp. 125-6) I, however, argued that the educational role of justice as fairness has to be complemented by democratic procedures that involve direct voting, if the discontinuity problem in Rawls's theory is to be eliminated and if justice as fairness is to be practicable. (Sec. 4.2.c) Especially in regard to establishing adequate standards of welfare, I argue that the application of the pie model, or any analogous model, is indispensable. Nevertheless, participation in political life is a political virtue not widely practiced nowadays. In order to overcome this fact of our reality and secure high rates of participation, I suggest that the duty to participate in the periodic application of the pie model be fashioned after the duty to serve as a juror. As such the violation of the duty to participate in the periodical application of the pie model should carry penalties similar to the penalties imposed on the violation of the duty to serve as a juror, and possibly more. This position can be objected to on the grounds that it carries a strong scent of coercion befitting authoritarian rather democratic regimes.

I reply to this objection in two ways. First, I believe that low voters participation rates warrant such an imposition, at least to the degree that jury duty or paying taxes warrant similar burdens. Second, taking a closer look at jury duty can expose some features that enhance rather than damage our democratic way of living.

The scheme of basic liberties and rights can only enable citizens to draw the maximal usefulness of this scheme to them if the proper set of primary goods is completely and adequately determined. This entails (Sections 4.2 and 4.3) that the duty to completely determine adequate standards of welfare, when done via the pie model, falls on the shoulders of citizens. If the high degree of social cooperation, the pluralistic nature of current liberal democracies, and the fair value of political liberties, entailed by the Rawlsian framework, are to be made effective and practicable through the application of something like the pie model, then high rates of citizens' participation must be secured. To do so, relying on the educational role of justice as fairness is insufficient, at least at this time, and stronger measures, like the duty to perform jury duty, must be instituted. According to the Bureau of Census only about 60% of US citizens voted in the 2000 Presidential elections. (Jamieson, 2002, p. 22) This rate of participation is relatively high in the US, especially when compared to voters' participation in many states and local elections. But, this rate is too low to be sufficient to adequately represent the largest overlapping agreement obtaining among voting citizens regarding trustworthy and acceptable standards. For a long time now it has been established that particularly the worse-off groups tend not to participate in general elections and thus effectively take themselves out of the political arena where many decisions that concern their own welfare and well-being are made. As Dahl notes, "We now know that members of the ignorant and unpropertied masses . . . are considerably less active politically than the educated and well-to-do. By their propensity for political passivity the poor and uneducated disfranchise themselves." (1956, p. 81) This view means that of the 40% of voters, for example, that did not participate in the 2000 elections, many belong to the least advantaged groups, and that only relatively small numbers of members of the worse-off groups were part of the 60% of voters that participated. Since the well-off do not acutely depend on state provided primary goods for their well-being, and since the determination of an adequate social minimum is defined by the situation of the worst-off members of society, it is crucial to them that they participate as well.

I believe that the widespread phenomenon of non-participation is rooted in a deep mistrust of the 'system' (the source of which was discussed in Sec. 2.2). Since many citizens feel that elected officials are more concerned with their own agenda rather than with general well-being, (especially in the US bipartisan system) they tend not to turn out at the voting polls. The pie model is designed to enhance trust in the 'system' by requiring that each citizen participate in determining her own welfare. Moreover, society is collectively responsible to protect and secure the maximal usefulness of the scheme of basic rights and liberties to each citizen. Thus, even if not for their own good, citizens need to participate in order to determine adequate provisions of welfare that maximize the usefulness of basic liberties and rights to others. Furthermore, wide participation enhances social cooperation which, in turn, enhances the political nature of the basic structure of society as well as economic growth. If the pie model is to be effective in achieving these aims, its application needs to be accompanied with the institution of the political duty of participation. Given the current prevailing mistrust, and the low rate of citizens' participation, I find no other effective way to uproot the phenomenon of non-participation.

Moreover, taking a closer look at jury duty will show that fashioning the application of the pie model after that of jury duty empowers rather than injures democratic citizens and societies. King John of England first established it, when he signed the Magna Carta in June 15, 1215. Since then, the principle of Common Law Jury or Trial by the Country became the basis of our constitutional system of justice. Each citizen's participation as a juror endows the citizen with a voting power stronger than the one cast on election day. Each juror's vote in criminal trials expresses the citizen's right to evaluate the facts of the matter, and reinterpret, even overturn, the customary interpretation of the relevant laws as instructed by judges. Such power can lead to particular acquittals, when jurors decide not to convict because they find the facts insufficient or the laws unjust or unconstitutional. Moreover, this power can lead to legislative changes and judiciary review of previous court decisions. Indeed,

since jury trials give jurors the power of final veto over current laws, according to Larry Dodge, a founding member of the Fully Informed Jury Association. "... the jury is our final check, the people's last safeguard against unjust law and tyranny." (2002, p. 1) Dodge asserts that this power was reaffirmed as a constitutional right as early as 1794, in the case of the State of Georgia vs. Brailsford (3 Dall 1), when Chief Justice John Jay said: "It is presumed, that juries are the best judges of facts; it is, on the other hand, presumed that courts are the best judges of law. But *still both objects are within your power of decision. . . . you have the right to take it upon yourselves to judge both, and to determine the law as well as the fact in controversy.*" (Ibid., pp. 1-2, author's emphasis.) And such discretion was again reaffirmed as recently as 1972, in US vs. Dougherty, 473 F 2d, 1113, 1139 (1072). (Ibid., p. 2) Indeed, the right to interpret the law and evaluate the facts gives each juror the right to personally determine the outcome of a criminal jury trial. It takes only one vote to 'hang' a jury. And even if the defendant is not acquitted, the defendant cannot be convicted if a guilty decision is not unanimous. When a juror believes the law is unjust or unconstitutional, the juror is always free to refuse to convict a person charged with violating such a law.

This brief account of jury duty aims at showing that the two powers jurors are given, the power to evaluate facts and the power to interpret and possibly modify existing laws, are similar to the powers the pie model gives participating citizens. It is the power to evaluate current standards of welfare, and the power to possibly modify such standards by casting one's vote. Though some jurors reluctantly participate, others report interest and satisfaction in exercising this political virtue. Of course, the burden of participation can be eased up if some compensation is made available to cover losses of income participants incur during the day required for the application of the pie model. Or this day can be considered a federal holiday. However, much consideration must be given the fact that for the application of the pie model to be effective, total votes have to be submitted within a relatively short time.

Correspondingly, failure to participate in the prescribed manner will be punishable, and repeated offenders may be penalized like tax or jury duty evaders. Such choices are to be determined by the referendum by which the pie model is adopted.

The phenomenon of non-participation in political life is widespread not only because citizens do not trust the system or are not virtuous enough, but also because it is allowed. There is no duty to participate in elections, even though each citizen expects to receive all the goods and services the state is obligated to provide. Non-participation in public life is a basic fact of our current social and political environment because it is permitted. Securing participation, as a political (civic) duty or a political virtue, is crucial for the adequate implementation of the pie model because it is necessary for securing the system of social cooperation required for the full implementation of justice as fairness. I would like to think that these reasons, and some campaigning for the model, would motivate citizens to participate without the threat of punishment. But given current conditions I believe some measure of coercion is unavoidable. In order to gain trust and acceptance, the model relies on wide participation, without which it would resemble the process where representative persons decide for the citizenship. It is the same process that results in widespread mistrust and non-participation. It seems reasonable that we have to find a way out of this vicious circle. If the model is to be successful, the right to obtain the maximal usefulness of the scheme of basic liberties and rights to each citizen must imply fulfilling the duty to participate in the process by which adequate standards of welfare are determined. For these reasons I believe that the scent of coercion is outweighed by the benefits the implementation of the model offer, and the objection is effectively met.

CONCLUSION

I believe that a long history of philosophical controversy, the diverse nature of political sociology, simple socio-economic reality, and human psychology, are all culprits in the mistrust and disagreement regarding the establishment of adequate welfare standards. The ability of all citizens to obtain the maximal usefulness of the scheme of basic liberties and rights to them, and the primary goods required for this purpose, are some of the most important and debated issues of our time. Citizens' legitimate expectations to realize the potential of this scheme have been upheld, to different degrees, by almost every comprehensive doctrine, and by most reasonable persons. The plausibility of instituting some adequate standards of welfare is theoretically justified and practically necessary in every civilized society and for each free citizen. On the international level, Western democracies encourage and support countries that respect human rights and improve socio-economic conditions. We criticize those countries that do not do so, and sometime say they are evil. On the national level, as citizens of liberal democracies we demand that our rights and liberties be respected and protected, and that their full realization be obtainable by all. On the individual level, each one of us, by exercising rights and liberties, and by dealing with socio-economic conditions in everyday existence, is familiar with the complexity and importance of the issues involved. This personal life experience gives us the ability to empathize with others, especially those who are worst-off. Those who do not have to be concerned with the complexity of everyday sustenance can learn or imagine what it would be like if they had no means to live a decent life. And even they know how difficult it is to achieve one's life plan.

It is the complexity of the issues involved, and the diversity of opinions on such matters, that turn generally favorable intuitions into disagreement. One would expect that in contemporary liberal democracies, where basic liberties and rights are secure,

we could also secure the means to ensure that each member of our own society is provided with adequate standards of welfare. That this is not the case indicates that the attempt to improve the human condition has not reached its end. To reiterate Nagel's explanation, "It may be a psychological condition of progress that people should become accustomed to the last advance and take it as the natural order of things, before gradually coming to perceive that there is a further advance bearing certain analogies to it which would not be morally consistent to reject." (1991, p. 90; Sec. 2.3.d) Until all citizens of liberal democracies come to accept that adequate standards of welfare are as just and as necessary as political and legal rights, such standards will be considered unnatural or impossible. Thus, in the same way that political and legal rights were instituted after a long theoretical and political struggle, socio-economic rights require their own struggle. I see this work as a small step in the effort to raise awareness and offer practicable ways in which the distribution of socio-economic conditions, to each citizen, can be advanced and realized.

In this work I offer no ideal theory of distributive justice, and no perfect model for determining adequate standards of welfare. I offer a political theory and an imperfect, yet practical, model for determining such standards in societies where resources are scarce and citizens have to share what they produce with others. I offer a dynamic and self-generating procedure for determining temporary standards, justified and legitimized by what most citizens expect and agree to sponsor. I believe that the rules and features of the model match the complexity of the issues involved and allow for individuals to come together in the largest overlapping agreement in a way that can be implemented in the here and now. As such the model should be acceptable to and trusted by libertarians and welfarists alike. With wide participation in this procedure, or procedures like it, we may continuously improve the situation of the less advantaged and enhance the cooperation that is required for the well being of all. On the one hand, most of us share the intuition that in our day and time, all members of our societies should be able to achieve a decent life, and more. On the

other hand, the realization of this intuition is costly, and we have to limit the degree to which our intuition is realized by the amount of resources at our disposal. The pie model offers a procedure that balances the two factors in a way that yields standards most of us can agree on and all of us have to live with, at least until the next time around. We may reach the point where there is no need to balance these two factors. For the time being, and until we get there, I believe the theory and model I offer serve as an adequate tool by which we can temporarily relieve the tension.

I adopted the Rawlsian framework because of its wide familiarity and because I believe, with many others, that it expresses the basic intuitions, principles and institutions that should guide our political life. I also adopted it because it presents a particular problem I attempted to solve. As a solution I presented an account that is consistent with the Rawlsian approach but is more implementable. Indeed, the best way to secure the state provision of the proper set of primary goods is by making it a constitutional right. In this way it will be comparable to voting rights and legal rights, and its satisfaction would necessitate the legislative and legal means, as well as the socio-economic resources, required for its realization. But, such a move would make my argument too strong to be practical. Given the general disagreement regarding such issues, and the difficulty in ratifying constitutional rights, it is more immediately practical to establish temporary and adequate standards in the way prescribed by the pie model. Moreover, I do not want to promote the superiority of constitutional regimes. I believe that procedural democracies are suitable to achieve the same results. And I maintain that the pie model is as useful to procedural democracies as it is to constitutional regimes.

On the back cover of *JFR*, the publisher printed the following,

Rawls is well aware that since the publication of *A Theory of Justice* in 1971, American society has moved farther away from the idea of justice as fairness. Yet his ideas retain their power and relevance to

debates in a pluralistic society about the meaning and theoretical viability of liberalism. This book demonstrates that moral clarity can be achieved even when a collective commitment to justice is uncertain.

I believe that American society moved away from the idea of justice as fairness not only because our collective commitment to justice is uncertain, but also because the political clarity of Rawls's theory needed some practical and implementable completions. Making justice as fairness more practical is the reason Rawls made such an extensive use of the idea of an overlapping consensus in the first three parts of his restatement. This work employs an alternative idea, the idea of largest overlapping agreement, with the intention of making the distributive justice part of justice as fairness more practicable. Doing so may bring American society, and other liberal democracies, closer to Rawls's theory of justice. Even if this work contributes just a small improvement to Rawls's tremendous and heroic effort, it earns its philosophical worth.

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