

THE PROPERTY QUESTION

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Abstract

The “property question” is the constitutional question whether a society’s basic resources are to be publicly or privately owned; that is, whether these basic resources are to be available to private owners, perhaps subject to tax and regulation, or whether instead they are to be retained in joint public ownership, and managed by democratic processes. James Madison’s approach represents a case in which prior holdings are taken for granted, and the property question itself is kept off of the political agenda. By contrast, John Rawls approach abstracts from any actual pattern of holdings, while putting the property question on the political agenda, but at a particular place. This paper compares and contrasts the two approaches. Two unpublished lectures by Rawls—one of them directed at Madison—are included as an appendix.

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Introduction

By the expression, “the property question,” I mean the question whether a society’s basic resources are to be publicly or privately owned. More precisely, I mean the question whether these basic resources are to be available to private owners, perhaps subject to tax and regulation, or whether instead they are to be retained in joint public ownership, and managed by some democratic process.

By “society’s basic resources” I mean things like land, mineral deposits, waterways, roads, transportation systems, airspace, the broadcast spectrum, the financial system, major industrial facilities, and so forth —what have been called *the means of production*. The term “the means of production” has to be understood as implicitly qualified. It refers not to every tool or utensil that could be put to productive use—every hammer or paintbrush—but only to those resources that belong to society’s basic structure. What these assets are is subject to contingencies of time and place. Coal mining, for example, was one of the means of production in Great Britain in 1945, but is no longer. The internet did not exist in 1945, but almost everywhere it is a practical necessity for leading a productive life today.²

By “ownership” I mean the usual incidents of property ownership: centrally, the exclusive right to control an asset and the exclusive right to revenues and other accruals of value to that asset. In many cases, the prospects of a monetary return to the owner of an asset will determine whether and how it will be put to use. Privately held assets are typically deployed in the way and on the terms thought likeliest to return the highest profit to the owner. By contrast, publicly held assets are ideally —if not typically— deployed in order to achieve some public purpose.

Reasonable minds can come to different conclusions on the property question, and these conclusions are often invested with some emotion. There are venues where the property question would be tactless to raise. At the Thanksgiving dinner table, for example. Other venues, such as this one, are ideal. But the property question is a political question, and here is a good place to deliberate out loud about how this momentous question should be addressed politically. That is my subject: how and where should the property question come into political discussion in a constitutional democracy.

As with so many topics in political philosophy, it is useful to begin by looking at the extremes. The extreme views are typically the simplest, and often also the clearest, at least initially. One extreme view is that the property question is always apt for the political

² A capitalist class “cannot exist without constantly revolutionizing the instruments of production,” Marx and Engels surmised in *The Communist Manifesto* of 1848.

agenda. On this view, majoritarian decisionmaking about whether the means of production are to be publicly or privately held is always legitimate, if not always wise. The other extreme view is that the property question does not ever belong on the political agenda, at least not as a matter of ordinary legislation. The property question is not only unwise to entrust to democratic decisionmaking, it is illegitimate and unjust to do so.

The contrast I just drew is orthogonal to another. We could pose the property question abstractly, as if there were no antecedent, historically delivered allocation. Or, alternatively, we could pose the question in a historical situation. On the latter approach, the means of production might already be found in private hands or already in public ownership. I simplify the latter case by ignoring the possibility that some kind of mixture of public and private ownership of productive means has established itself. The simplification makes it possible to isolate four basic cases:

	On the political agenda	Off the political agenda
Tabula rasa	Rawls, Rousseau	
Prior holdings		Madison, Locke

Figure 1.

To move the discussion along, I have taken the liberty of populating only two of the four squares, and only provisionally. James Madison’s approach represents a case in which prior holdings are taken for granted, and the property question itself is kept off of the political agenda, as I will explain more fully. By contrast, John Rawls approach —at least initially, in what he calls “ideal theory”— prescinds from any actual pattern of holdings; and Rawls’s approach puts the property question on the political agenda, but at a particular place, which I will also explain more fully. I now take up these two representative figures in turn, before bringing them together —“into conversation” so to speak.

I. Madison

The task that the framers of the US Constitution took up was to draw up a charter of federation for a number of already loosely confederated but sovereign states, the thirteen former colonies of Great Britain. The property question —though not yet ripe—seemed already settled: private ownership was the norm in the several states. Commercial activity had yet to progress much beyond what Marx called “primitive accumulation,” and productive activity on “an industrial scale” was still in its infancy. (I leave aside the great tobacco, indigo, cotton, and rice manufactories of the South.) One question that troubled the framers was

whether the form of government would tend to threaten the pre-existing patterns of ownership.

Although private ownership was the norm, it was controversial whether chattel slavery would be recognized throughout what was proposed to be the United States. Another concern was the sanctity of private debt. Yet another was public acquisition of private assets. The Constitution addressed each of these. The Great Compromise on slavery left that “peculiar institution” in place in the Southern states. The “takings” clause of the fifth amendment provided that “private property [shall not] be taken for public use, without just compensation.” Mere confiscation of the means of production is disallowed. The bare possibility of nationalizing the means of production can only be achieved by putting massive amounts of liquid capital into the hands of private expropriates. The expropriated are encouraged to become creditors, protected at the state level by the “contracts” clause of Article I, which forbids the states to “impair the obligation of contracts.” In *Federalist 10*, Madison gave assurances that a central principle of the design of the federal sovereign was to protect private property from the depredations of popular majorities.

The framers framed a republic and a *res publica* is a public thing. The Constitution provides that certain productive means are to be held publicly: the post office, the navigable waterways,³ and the mint. I cut short the discussion here, since its purpose is merely to illustrate in a broad and inexact way how a theorist of government might work from the assumption of the justice—or even the sanctity—of a pre-existing pattern of private ownership, and so regard the theorist’s task as limited to that of introducing a principle of popular sovereignty in a way that would not instantly unsettle that pattern. Madison is not the best possible example because in his America, at least in theory, socialism is possible—by “socialism” I mean public ownership of the entirety of the means of production most vital to the republic. But what is possible to decide legislatively is also possible to reverse legislatively. Should the means of production fall into public ownership, a reversal is never more than an election away. Madison’s design does not entrench private ownership of productive means quite as deeply as it does the equal representation of the states in the Senate. But nearly so.

One might deny that the Constitution leaves even this small an opening for democratic socialism. It is possible to look to John Locke and the ninth amendment for help in driving it shut. To Locke, for a natural right to acquire and hold private property that is not surrendered at the door to civil society. To the ninth amendment—“The enumeration in the

³ See *Gilman v. Philadelphia* (1866)(interpreting the commerce clause of Art. I as rendering “the navigable waters of the United States. . . . the public property of the nation”). Brad Loveall brought this case to my attention.

Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”—to bolster the position that public ownership of productive means cannot stand in as an all-purpose “public use” under the takings clause. However this view works out, it appears intended to keep public ownership of the means of production off political agenda, once and for all—more firmly so than in Madison’s design.

II. *Rawls*

John Rawls distinguished the theory of justice from the theory of government, and his career was devoted almost entirely to the former. His theory of justice, which he called *justice as fairness*, was an attempt to extend the social contract tradition in a way that makes sparing use of certain fundamental ideas already embedded in our public political culture: society conceived as a fair cooperative productive system for mutual advantage; society well-ordered by a common principles that are a public basis for the justification of political power; citizens conceived as free and equal.

The most distinctive of Rawls’s ideas is that of an original position in which principles are chosen to govern the basic structure of society. In this original position, rational, self-interested parties are deprived of knowledge that would enable them to pick principles designed to favor their own situation, or temperament, or conception of the good. If the choice question is well-posed, what can emerge from behind this veil of ignorance is a set of principles of justice that are capable of well-ordering a society, furnishing a shared, public basis for the use of public power, a basis that offers a justification to each citizen for the restrictions of liberty that social cooperation inevitably requires. This shared, political conception of justice can stabilize a diverse society in conditions of pluralism —no small thing, given that a society so conceived cannot be held together by a shared religion or comprehensive moral view; for, given what he calls the “fact of reasonable pluralism,” no such basis could be maintained without violating the fundamental liberty of conscience.

There are many contrasts we could make between John Rawls’s approach and James Madison’s. I want to focus on only a few. The first has to do with the existing pattern of holdings in society. Madison took this as a given, and the task was to impose a federal political sovereign in a way that was acceptable to those who already held title within that pattern. Rawls’s approach prescind entirely from the existing pattern of entitlements of all kinds: not just of ownership of things but of endowments of all kinds: strength, intelligence, looks, personal virtues, and so on. The question for decision in the original position is, what principled basis for the division of the product of social cooperation would be *fair*—that is, what principled basis would be chosen by rational and reasonable parties if they had no knowledge of what special advantages they might have or gain?

Rawls's answer, in part, was that the parties would choose principles that would give each a right to bodily integrity and a right to acquire and own personal property – including “at least certain forms of real property, such as dwellings and private grounds,” without which a citizen would lack “a sufficient material basis for personal independence and a sense of self-respect” (*JF* 114 n. 36).⁴ But the parties would not be determined to choose either of two “wider” principles. One wider principle would guarantee each a right to acquire and own basic means of production. Another wider principle would guarantee each a right as a joint owner of society's basic means of production. We can call these two proposals, respectively, “wide private property” and “socialism.” Neither would be compelling in the original position because, Rawls says,

These wider conceptions of property are not used because they cannot, I think, be accounted for as necessary for the development and full exercise of the moral powers.

The “two moral powers” of citizens conceived as free and equal are, one, the power to form, revise, and pursue a *conception of the good*, and, two, the power to form and adhere to a *sense of justice*. Although the conception of good may be purely personal, the “sense of justice” Rawls speaks of is a shared possession if it exists at all. Rawls continues:

The merits of these and other conceptions of the right of property are decided at later stages when much more information about a society's circumstances and historical traditions is available. (*PL* 298, and cf. *JF* 114)

So, the property question is on the agenda in the original position, but it is undecidable. The rule of decision is unanimity, and the general knowledge available behind the veil of ignorance is insufficient to determine the question. If the parties choose on the basis of a comprehensive conception of justice, such as Locke's, or Saint-Simon's, then the property question would be determinable and decided in favor of wide private property, for a Lockean, or socialism, for a *Saint-Simoniste*. But the veil of ignorance does not allow access to comprehensive religious, moral, or philosophical conceptions.

What about these “later stages” at which the property question can be and is to be decided? This is a reference to the “four-stage sequence” that takes us from the original position to a second, constitutional stage, to a third, legislative stage, and to a fourth and final

⁴ Citations to Rawls's works are abbreviated: *TJ* = *A Theory of Justice*, 1999 rev. ed.; *PL* = *Political Liberalism*, 1996 paperback ed.; *CP* = *Collected Papers*, Samuel Freeman, ed. 1999; *JF* = *Justice as Fairness: a Restatement*, 2001; *LN* = *Rawls's Philosophy 171 Lecture Notes, Theory of Democracy, Fall 1971* (unpublished, *Lectures XVII and XVIII* are appended).

administrative/adjudicative stage. The idea is that an adequate theory of justice must state principles governing the basic structure, but these principles cannot themselves determine the answer of each question of governance. The veil has to be relaxed even to state the vast bulk of issues that must be settled if social cooperation is to be productive. But deliberation and decision at the later stages are confined within and guided by the two principles that emerge from the original position. The two principles are ordered lexically, meaning that the prior principles cannot be compromised to advance the posterior principles. They are:

First principle: a fully adequate scheme of equal basic liberties, including liberty of conscience, fair-valued equal political liberty, and the right to bodily integrity and personal property.

Second principle: two in sequence: fair equality of opportunity, and the difference principle.

Notice that the most potent egalitarianism of justice as fairness is housed in the first-principle guarantee of fair-valued political liberty, which means a roughly equal political influence at comparable levels of motivation and articulateness. The difference principle permits unlimited inequality so long as all benefit in terms of their absolute holding of primary goods.⁵ The fair-value guarantee assures that material inequality does not translate into unequal political influence, and thus that economic inequality cannot seem so excessive as call into doubt the justice of the basic structure.

Rawls confessed that prior even to the first principle would be a principle guaranteeing a social minimum. This was implicit anyway in the way he set up the original position. But Rawls took specific exception to including a right to workplace democracy in this set (*PL* 6-7).

III. Rawls on the Constitutional Stage

I want to focus on the constitutional stage. Here is where we can imagine Rawls comparing notes with Madison. Rawls speaks more often of natural duties than of natural rights, but it would not be outrageous to imagine Rawls explaining himself to Madison using such language.⁶ Both gentlemen believed that justice requires certain political rights and certain

⁵ “Forty years later, to most nonspecialists ‘Rawlsianism’ is the difference principle,” Fried (2014, 430). The widespread fixation on the difference principle may have had the effect of encouraging trends that Rawls deplored. See Reiff (2012, 119-35).

⁶ Rawls cheerfully says, “justice as fairness has the characteristic marks of a natural rights theory” (*TJ* 443 n. 30).

property rights. Call them natural rights, if only to emphasize that a just constitution has got to protect these rights from majoritarian infringement.

The property question, framed in terms of the basic means of production, would not have been salient in Madison's thinking. The factory system that Marx and Engels responded to had yet to arrive in America. Indeed, in 1789 it had only begun to take hold in the English Midlands. In Rawls's case, the property question could not be avoided. Political philosophy, in his view, is a cumulative undertaking, guided by a sense of *natural piety* that demands attention to the thought of earlier generations and ages. Once the unfolding of history has uncovered the property question, it cannot be set aside unless political philosophy concludes it lacks the resources to give an answer.

In the restatement of his theory of justice as fairness, Rawls put a new task on the agenda of the constitutional convention, the second stage of the four-stage sequence. Rawls defined five ideal regime-types, and called on the constitutional convention to choose between them. The five are:

laissez-faire capitalism,
welfare-state capitalism,
one-party, "command" socialism,
property-owning democracy, and
liberal (democratic) socialism (*JF* 136).

Rawls stated that the constitutional convention would reject each of the first three. Laissez-faire capitalism accepts formal but not fair political equality, and rejects the second principle altogether. One-party socialism rejects fair political equality and liberty of occupation.

The surprise, for many, may be that Rawls expressly rejected welfare-state capitalism as a possible realization of justice as fairness.⁷ Welfare-state capitalism is defined, for this purpose, as a regime in which fair political equality is not guaranteed, and the difference principle is replaced with a social minimum set at a high-enough level to forestall unrest.

⁷ This was hinted at but not stated in the Preface to the 1999 Revised Edition of *Theory* (*TJ* xiv-xvi). Rawls said he regretted not having "distinguished more sharply" between a property-owning democracy and a welfare state, both of which allow private ownership of the means of production. He distinguished the former as having the aim of securing fair value, and noted that the latter "may allow" unequal accumulations of wealth "incompatible with the fair value of the political liberties" (*TJ* xv). That was about all. The Preface is dated 1990, but a draft of what was to emerge as the *Restatement* (the "Guided Tour") had been already circulating as early as 1989. In the draft, Rawls plainly stated that welfare-state capitalism could safely be assumed to be unable to realize justice as fairness. This may be an instance of the "muffled and cramped" style of expression that Burton Dreben chided Rawls about.

The institutions of a welfare-state capitalist society would therefore not be designed to realize the principle of reciprocity underlying fair political equality and the difference principle. Lacking that aim, institutions could not be assumed to be capable of satisfying it through the operation of some invisible hand.

That leaves socialism and what he called property-owning democracy as the only remaining institutional contenders. They differ only in how they answer the property question. Both are designed to realize justice as fairness, but a property-owning democracy leaves the property question on the political agenda of ordinary legislation, the third stage of the four-stage sequence, while democratic socialism does not. A democratic socialist regime will maintain the means of production as a publicly owned asset, and will not entertain legislative proposals to privatize that asset. Note that what has already been ruled out is the alternative of constitutionally *excluding* public ownership of the means of production. The decision between the two ideal regime-types completes his answer to the property question. What is the decision? Rawls says,

When a practical decision is to be made between property-owning democracy and a liberal socialist regime, we look to a society's historical circumstances, to its traditions of political thought and practice, and much else. Justice as fairness does not decide between these regimes but tries to set out guidelines for how the decision can reasonably be approached. (*JF* 139; emphasis added)

The language might be taken to indicate that Rawls concluded that a constitutional convention might reasonably choose either to leave the property question to be decided by ordinary legislation and it might also reasonably choose to take the property question off the agenda of ordinary legislation. Alternatively, it might be taken to indicate that —having looked at historical circumstances, traditions, and “much else”— the guidelines of public reason should lead to a single reasonable resolution.

The structure of Rawls's theory firmly distinguishes ideal and non-ideal theory, and Rawls repeatedly insists on focussing on the former. He also insists that the theory of justice is to be distinguished from what properly belongs to “political sociology” or a “theory of the political system” (*TJ* 199). Nonetheless, the property question seems unavoidable.

It is . . . important to trace out, if only in a rough and ready way, the institutional content of the two principles of justice. We need to do this before we can endorse these principles, *even provisionally*. (*JF* 136; my emphasis)

The constitutional stage is unavoidably one that commingles questions of ideal and non-ideal theory. Once the parties in the original position have settled on principles for the basic

structure, they do not then change their imputed psychology, but they come to know facts about their society's history and situation. This revelation will of course (how could it not?) force upon the parties a knowledge of existing patterns of holdings —though not of their own place in it. Some holdings, such as chattel slavery, must be abolished outright. Historically, feudalism will have departed and industrialization will be about to arrive, or have arrived. The means of production will appear already in the hands of owners —private owners operating under public charter, quite possibly. And the property question will appear not upon tabula rasa but on a historical record that perhaps must be rectified.

It would be ungenerous to depict Rawls as restating the property question only to go on to sweep it under the rug. If, at the constitutional stage, the parties discover the means of production already to be in public hands, I think Rawls's guidelines of public reason would require not only that they remain there, but that privatization be excluded from the legislative agenda. This is especially so for means of production that constitute what are called "natural monopolies," which are such that competition to satisfy demand would be wasteful. A less obvious case is productive land. If land is publicly held it might reasonably be proposed to distribute ownership equitably among citizens as private freeholders, as a means to fortifying that sense of independence and self-worth that justifies the right to acquire and hold real residential property. But what of the incident of alienability? If productive land were privatized and freely alienable, that would create the possibility of its accumulation in few hands.

Suppose, instead, that the parties at the constitutional stage discover that the major means of production already in existence are privately owned. The parties' general knowledge tells them that this pattern entails significant economic inequality whose continuation endangers political equality and fair equality of opportunity. The danger might be met by a legislative strategy of insulating politics from money —but it is probably too late. The problem is one of transition —but to what? Ideal theory must be the guide, but it is as yet incomplete. One path would break up over-large holdings into smaller, less dominant private holdings: the goal being to evenly distribute ownership of productive means across the population. This is the aim of a property-owning democracy. A different path would be to take the means of production into public ownership. This is socialism.

Are the two goals equally eligible, in Rawls's system? They are not, although Rawls was reluctant to say so. Justice as fairness must prefer socialism.⁸ To indicate why, I will start

⁸ Alan Thomas takes the opposite position opposite in Thomas 2017. His case must be answered, but I cannot do justice to it in these pages.

with some interesting remarks Rawls made in his unpublished 1971 lectures on Madison.⁹ Rawls revered the thinkers of the tradition he saw himself as merely continuing, and he lectured on Hobbes, Hume, Locke, Rousseau, Kant, Hegel, Mill, and Marx. He was determined to build a theory of justice on the basis of what we find in our public political culture, especially the Declaration of Independence, the Constitution, and court decisions. But, apart from a few mentions of Madison on the establishment clause (*CP* 602, 620; *PL* liv, 406, 408 n),¹⁰ Rawls published nothing about our nation's most important political thinker. In print, Rawls said not a peep about the Madison of *Federalist 10*: "the dangers to the holders of property can not be disguised, if they are undefended against a majority without property." This odd fact makes these 1971 lectures even more interesting.

Rawls was fascinated by the apparent parallel between efficiency as the goal of economic theory and justice as the goal of political theory. Economic theory had a feature that he found very attractive. In a market economy that satisfies certain assumptions, the goal of efficiency is simply achieved without effort by anyone. The market achieves what Rawls called the "artificial identification of interests" (cf. *TJ* 49 & n.3, 173), by which he meant that the ideally specified market was a case of pure procedural efficiency. Could political theory proceed the same way, as the economic theory of democracy suggested? Rawls believed not. The political process is unlike market in that the political goal, justice, requires a "moral identification of interests." In other words, the political process, however idealized, cannot be a case of perfect procedural justice. At best, a theory of justice might succeed in rendering certain aspects of justice as matters of pure procedural justice; that is, as answers that can be defended simply by reference to the process by which they were derived. There is no independent standard that the outcome of a fair gamble need meet. If the gamble is set up fairly, then the outcome is fair, no matter what. This can't be achieved in the general case for political justice, but Rawls believed it could be achieved in the special case of distributive justice. If the game is set up fairly, no one can complain about the the justice of the resulting distribution. This is what Hayek liked about *A Theory of Justice*.

⁹ Cited here as *LN*. In the John Rawls Archives held at Harvard's Pusey Library, HUM48, Box 24, Folder 8. I am indebted to David Reidy for steering me there; to the library staff for its assistance in locating the material and making a copy; and to Rawls's literary executors, Tim Scanlon and Mardy Rawls, for permission to use them.

¹⁰ The freedom of conscience guaranteed by the principle of toleration marks the first of the three great historical transitions Rawls emphasizes in the *Lectures on the History of Political Philosophy*, the other two being "the establishment of constitutional regimes ... and the winning of the working classes to democracy..." (*LHPP* 11).

IV. *Rawls on Madison*

We view society as a cooperative scheme for mutual advantage, —as a productive enterprise — and we want a theory of how to set it up so that the distribution of its benefits will be accepted as fair, whatever it is. Where does a theory of justice enter in? A theory of justice has of course to serve as a standard for criticizing the operations and output of government; but has two additional tasks. It has to explain why the constitution is complied with, and how it is stable over time. Rawls looks to Madison as an example of how institutions having the goal of doing justice might best be set up. Madison’s design for republican government relied on ambition rather than moral motives as its driving force. By carefully dividing and arranging the organs of government, ambition was to check ambition, and the basic rights of citizens protected. The danger to these rights, in Madison’s view, came from faction, that is, from the combination of like-minded ambitions seeking to advance their aims at, or even at, the expense of the interests and rights of others. This is the genius of many familiar features of our constitutional system: federalism, separation of powers between the legislative, executive, and judicial branches, a bicameral legislature, the presidential veto. But Madison also drew on social theory for further security against faction: the vast geographic extent of the new nation, its numerous population, and the difficulty of a majority coalition of factions and even the organization of a durable minority.

Rawls imputes a certain theory of justice to Madison. “Madison views government as protecting the *inequalities in property and fortune* that develop from the different natural talents of individuals. His is a *system of natural liberty*. (Explain)” (*LN*; emphasis original). The explanation Rawls gave his students would have tracked the discussion of the system of natural liberty in *A Theory of Justice*. Given as an assumption that “the first principle of equal liberty is satisfied¹¹ and . . . the economy is roughly a free market system, although the means of production may or may not be privately owned,” the system of natural liberty holds

that a basic structure satisfying the principle of efficiency and in which positions are open to those able and willing to strive for them will lead to a just distribution . . . whatever this allocation turns out to be. . . . (*TJ* 57)

Notice the attractive element of pure procedural justice in the system of natural liberty.

¹¹ Presumably, without the first-principle guarantee of fair-value of the political liberties. See *TJ* 197-99. If the fair-value guarantee is included in the first principle and, as such, introduced into the system of natural liberty, the practical distance between the system of natural liberty and justice as fairness would be significantly reduced.

In *A Theory of Justice* Rawls faults the system of natural liberty for allowing distributive shares to be influenced by morally arbitrary factors like differences in natural endowments and social starting-points, which have cumulative effects over time.¹² I leave that criticism aside. I want to emphasize what Rawls adds in the unpublished lecture. Note that the system of natural liberty, as Rawls defines it, and as imputed to Madison, is agnostic on the property question. The system of natural liberty “makes no effort to preserve an equality, or similarity, of social conditions, *except so far as this is necessary to preserve the requisite background institutions*” (TJ 62; emphasis mine). So, again, the system of natural liberty—as defined—does not embrace “wide private property”: it does not mandate tolerance of private ownership of the means of production if tolerance would undermine the justice of background institutions. But the system of natural liberty does not—so far as Rawls describes it—concern itself overmuch with the justice of the background institutions.

Now, Rawls recognized that Madison was more committed than this to preserving the existing and evolving unequal distribution of ownership. But holding to this commitment must generate factional conflict. “These inequalities determine the main class divisions and set in motion the *most violent* political conflicts, the most opposed *factions*” (LN). In Rawls’s reading, Madison is committed to controlling the effects rather than addressing the underlying causes of this virulent kind of discord, and committed to this “for the sake of liberty” (LN)—that is, for the sake of the liberty of the advantaged to accrue further advantages. In summary:

Thus the basic Madisonian conception is this: one relies upon (a) the *extent* of the country, the plurality of interests and numbers, and the difficulty of organization *plus*, (b) internal constitutional structures *and* elections to control faction, without any attempt to mitigate the *causes* of faction. (LN)

Rawls notes Robert Dahl’s criticisms of Madison, but thinks there is a deeper problem. Dahl’s point was, essentially, that Madison does not show that his scheme is either necessary or sufficient to avoid tyranny. But Rawls is struck by something else: that Madison’s implicit moral theory of the constitution makes the accumulation of private property as sacrosanct as personal conscience.

¹² The system of natural liberty differs from Rawls’s justice as fairness in that justice as fairness replaces the principle of efficiency with the difference principle and replaces the idea of “careers open to talents” with an interpretation of “equally open” as requiring a correction such that, regardless of other differences of natural and social endowment, individuals having comparable talents and ambitions have roughly equal opportunities.

This is a *startling* oversight. The argument from liberty is very weak. Liberty of thought etc. is surely very different from the liberty over time of unlimited property accumulation under a system of natural liberty. It is the *weakness* of this argument that suggests [that it is a] *rationalization* — Madison’s constitutional theory as ideology ... in special sense of Marx. (LN)

Rawls did not seize this occasion to recapitulate the relative weaknesses of the system of natural liberty in the original position. That is not the point. The point is that Madison’s constitutional system is *unstable*.¹³ The conception of justice that it offers is one that, over time, will not inspire willing compliance with its institutions and laws. Its institutions must rely on coercion rather than on a public conception that reasonable citizens would accept as their own. Instead, it relies on countermajoritarian devices and the difficulties of coordinating an opposition to propertied interests to maintain itself. It might be durable — it *has* been durable— but it is not stable for the right reasons. The right reason for stability is that citizens share a sense of justice, with reference to which they agree to advance their claims. This is his summary:

I believe that Madison’s constitutional system is either

- (a) unstable, given to distributive conflict since *causes* of faction are not controlled, and *moral sentiments* cannot be effective for compliance, or
- (b) It settles down eventually to a façade constitutional state in which the large owners of property do have effective control behind the scenes. This control is made possible because of details of the constitutional structure and social forms. E.g.,
 - i) control of [the] political process via control of campaign funds
 - ii) control of news media
 - iii) control of economic processes, etc. (LN)

The “social forms” Rawls refers to return us to the property question. The property question cannot be deferred because two further tasks are now urgent: “(a) To characterize the conditions of *background* justice of the constitution and economic system” and “(b) To characterize the *content* of the required consensus,” that is, the principled consensus that

¹³ In *Theory* §37, “Limitations on the Principle of Participation,” Rawls discusses the various devices of constitutionalism, but does not mention Madison (*TJ* 200-04). He does reject appeals to the intensity of minority preference as a justification for limiting majority rule, and thus, implicitly, he also rejects Madison’s view as reconstructed by Robert Dahl (2006 [1956]). According to *Theory* §54, “The Status of Majority Rule,” deciding whether constitutional constraints on majority rule “are effective and reasonable devices for strengthening the overall balance of justice” or are rather merely devices “used by entrenched minorities to preserve their illicit advantages” is a matter “of political judgment and does not belong to the theory of justice” (*TJ* 313). In the lectures appended here, Rawls makes it clear that the theory of justice sits in judgment over matters that do not, strictly speaking, “belong” to it.

serves as the public conception of justice.¹⁴ Attention to background justice means that the causes of faction have to be addressed: faction-containment and -management are not enough. Moreover, constitutional theory will have to determine those “certain institutions and policies [that] are not a matter for discussion. E.g. — having a state religion, slavery, etc.” (LN) Here is where the property question must be addressed.

- a) the more stable conception of justice is to be preferred, *ceteris paribus*
- b) this means those generating the *stronger* Sense of Justice when its principles [are] satisfied, or more *effective* Sense of Justice.
- c) This in turn depends on [the] tendency [of a] system to generate interests *opposed* to justice. Here is where regulation of property and envy etc. comes in. And so the importance of *background* conditions (background justice). (LN)

Let me conclude with a brief rehearsal of the reasons why the property question, posed at this stage, has to be answered decisively, and in favor of socialism.

¹⁴ Rawls weighs the objection that capitalism’s laws of development are incompatible with justice, and frames the question of whether socialism is necessary to guarantee liberal background justice, in his unpublished “Outline: Liberalism and the New Politics,” HUM48, Box 24, Folder 8, in the Pusey Library.

Conclusion

The property question can be taken off the table of ordinary legislation in either of two ways. One, private ownership of the means of production can be protected as sacrosanct to the same degree as ownership of one's body, or nearly so. Wholly aside from the question whether justice would forbid, allow, or demand this entrenchment, Rawls has already rejected it as incompatible with stability and a sense of justice. A sense of justice is a shared set of dispositions and motives grounded in a principle of reciprocity: inequalities must benefit all. The system of natural liberty not only tolerates but enshrines inequalities without regard to whether they benefit the less-advantaged.

The second way to take the property question off the table, as far as ordinary legislation goes, is to insist upon public ownership. Just compensation of private owners will be the norm. But in exceptional circumstance, justice does not demand that the expropriated be compensated. Justice as fairness "requires that we move toward just institutions as speedily as the circumstances permit irrespective of existing sentiments. A definite scheme of ideal institutions is embedded in its principles of justice" (*TJ* 396).¹⁵ No one today—I hope it is safe to say—thinks slaveholders in the old Confederacy were ripped off by the emancipation of their slaves.

If the property question is left unanswered, the constitutional system inherits much of the "curious fragility" that Rawls saw in Madison's scheme, aside from its potency as ideology. If public versus private ownership of the means of production is always "a matter for discussion," then what is held publicly will always attract private interests looking to turn it to private profit. Publicly held, and privately held means of production that are taken into public ownership, are forever subject to privatization.¹⁶ The motive for privatizing in a property-owning democracy will sound laudable: we correct an insufficiency of private productive resources at the disposal the under-propriated, at the beginning of this and each "new period." But having to invoke that good motive is a sign that the goal of rendering the distribution of productive resources as a matter of pure procedural justice has gone by the board.

Rawls was conscious that the constitutional framers would be forced to face the property question if other guarantees of background justice were unreliable. In his 1971 lectures

¹⁵ Citing *Theory* §41, "The Concept of Justice in Political Economy."

¹⁶ Settling the property question constitutionally is one thing, but keeping it settled is another. For example, the Portuguese constitution once declared that "all nationalizations effected since 25 April 1974 are the irreversible conquests of the working class." But this settlement came undone when its institutional guarantor (the Council of Revolution) was dissolved. See Finn (2017, 7).

(Lecture XVII) he asked “What devices —conditions— [are] needed for [a] just constitution?” and listed eight. The first six included public subsidies to parties and candidates, campaign spending limitations, political education and support for media discussion, elections by lottery, and the cultivation of a financially independent cadre of administrative professionals. These six can be described as “insulation strategies”: they ignore the property question and consider the actual pattern of distribution of wealth and income as given.

The seventh device goes beyond insulation and attempts to manage distribution.

7. Fragmentation of producer and property interests by progressive inheritance tax (at receiver’s end) and anti-trust laws, rejection of import quotas, etc. *if* private ownership is allowed. (LN)

It is surprising that the characteristic device of “property-owning democracy” is unmentioned. A property-owning democracy, as Rawls described it, pays attention to the distribution of productive assets and strives to make sure that each citizen has enough: “sufficient productive means . . . to be fully cooperating members on a footing of equality” (JF 140). Property-owning democracy is supposed to realize the ambition to treat distributive justice in a constitutional democracy as a matter of *pure* procedural (“background”) justice. (I note that a distribution that is supposed to be seen as just, whatever it is, owing to how it arose, does not seem realizable by a process defined in terms of a portmanteau of sufficiency and equality.) Rawls was later to acknowledge doubts that a property-owning democracy could be administered within the boundaries of public reason. Completing his lecture list was

8. If necessary, limitation or abandonment of private property in [the] means of production. (LN)

It is possible that Rawls thought of property-owning democracy as the “limitation” of private ownership of the means of production and of socialism as the “abandonment.” But it is also possible that the phrase “limitation or abandonment” was intended simply to mark the permanent possibility of some “state of exception” —such as civil war¹⁷ or natural disaster— that might demand a suspension of the constitutional norm.

¹⁷ During the US Civil War, the federal sovereign initiated a massive transfer of public lands to private ownership. All told, an area equivalent in size to California plus twice Texas was privatized. See Allen (forthcoming).

The concept of the means of production is easily integrated into the conception of society as a fair system of productive cooperation for mutual benefit. The concept also has a desirable salience. Most of us can readily agree that we need a common currency, national defense, a transportation network, utilities and sanitation, and so forth, to be productive citizens. If we live in coal country, we need a job in the mines in order to live. If we live in the city, we need internet access and access to social networks and search engines. Public ownership of these major and essential means of living can give an assurance that a principle of reciprocity informs the institutions and laws that we might otherwise reasonably view as coercive impositions. It can also more readily be appreciated as the realization of pure procedural justice.

There is certainly a case to be made that keeping the property question open and in play can have Pareto-superior incentive effects. But, as Rawls insisted, justice is one thing and efficiency is another. Madison's scheme leaves the property question open; but at the same time it places structural obstacles in the way of any serious move away from private ownership. Madison's underlying thought may have been that America was extensive enough to make everyone rich, and anyway the not-so-rich would be unable to organize any very troubling resistance. And if that was his idea, it has been prescient —so far. Rawls thought this scheme "curiously fragile" perhaps because, at some foreseeable point, the left-behinds would begin to notice they and many others were being left behind, and would cease to see their common predicament as contributing to their own and their children's greater well-being.¹⁸ In this, Rawls might prove to be at least as prescient, judging from where we now stand, as Madison was, judging from the standpoint of 1789.

¹⁸ See Przeworski (2018, 99): "perhaps for the first time in 200 years many people believe that their offspring will not lead better lives than they do. Moreover, at least in the United States, this belief is validated by the facts: the proportion of children who at the age of 30 enjoy incomes higher than their parents had at the same age has been falling steadily and precipitously over the past five decades.... the erosion of the belief in intergradational [sic] progress may well be historically unprecedented and its political consequences are ominous."

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APPENDIX: FROM RAWLS'S PHILOSOPHY 171 LECTURES, THEORY OF DEMOCRACY, FALL 1971

[Note: What appears below is my transcription of Rawls's original handwritten lecture notes, which are housed in the Rawls Archive at Harvard's Pusey Library. In 1977, Rawls adopted the habit of distributing typed, mimeographed versions of his lectures to students (*LHMP* xv). But as far as I have been able to determine, Rawls did not type up, "ditto," or mimeograph the two lectures that appear below. Also, so far as I am aware, Rawls did not deliver these or similar lectures again. One likely, but only partial, explanation is that Rawls believed that fairness to writers in our tradition generally requires careful attention to the problems they thought needed to be addressed, which we must not simply assume were identical to the ones we now find or would then have found pressing. Having neither time nor occasion to state Madison's view in its best form, (see *LHPP* xiii) Rawls might have decided not to use Madison again as a foil in presenting justice as fairness.]

LECTURE: XVII — THEORY OF COMPETITIVE PLURALISM (I)

1. *Two Topics: under Theory of Democracy:*

- a) Theory of Competitive Pluralism - Dahl, Schumpeter, Barry
- b) Principle (and value) of participation - Mill - Hegel - Marx

This week do a).

2. *Notion of Invisible Hand: History*

- a) In Adam Smith - to Walras - to Arrow - Hahn Competitive Equilibrium Analysis (note slow development of this history).
- b) In Hume: *Essays on the Science of Politics* - Madison - to Dahl, etc. and *Economic Theory of Democracy* - Schumpeter - Downs, etc.

3. *What is this Idea?*

- a) Special case of the Artificial Identification Interests
- b) Given a certain framework, arranged by the legislator (Bentham), mutually disinterested agents will act (upshot their actions) to achieve social optimum (in some sense by definition), although:
 - i) no central plan
 - ii) not their intention; or even
 - iii) not understood by them; provided that:
 - iv) certain conditions obtain.

4. *General Case:*

- a) social optimum is efficiency
- b) competitive prices provide information

(given certain conditions)

c) no contrast - contra Halevy,- between natural and artificial identification in Bentham.

5. Surprising Result:
 - a) This result is contrary to common sense, which would expect chaos, or
 - b) Need for central, public plan; or command of some central agency.
6. How to treat this result?
 - a) As usual scientific approximation and simplification?

Not best way (Arrow-Hahn)
 - b) As asking this question:
 - i) Could this proposition be true? If so, under what conditions? How much weight can they carry?
 - c) These questions are the point of competitive equilibrium analysis (Arrow Hahn)

Political Case: the Theory of Constitutional Democracy

1. Here the analogous idea is applied to constitutional systems: How to design it so that mutually disinterested political actors are lead [sic] to produce a social optimum,
 - i) no central plan
 - ii) not their intention
 - iii) perhaps the social optimum is not understood by them.
2. Here, let's ask:
 - a) could this proposition be true; and if so, under what conditions?
 - b) how robust are the necessary assumptions; and etc. as before.
3. But here what is the social optimum?
 - a) in the economic case, it is efficiency
 - b) but here, what? Certainly not efficiency? And also
 - c) what sort of procedural justice do we expect here?
4. Three types of procedural justice
 - a) perfect
 - b) imperfect
 - c) pure, each with respect to some optimum

The economic case is: perfect with respect to efficiency.
5. Political case:
 - a) surely with respect to e.g., justice or some other social ideal, *if at all*.

- b) If we say justice, then:
6. The following seems necessary:
- a) We need a *theory of justice* - to say what this end is, and how determined, etc.
 - b) We cannot have better than *imperfect* procedural justice. The constitution is at best a case of this sort. There *exists* no theory of the invisible hand.
 - c) Therefore, the theory of constitutional democracy would ask:
 - i) what devices and conditions are likely to render constitutional democracy *more perfect*?
 - ii) how robust are these devices? And how *stable* are they?
7. In *A Theory of Justice* I suggest
- a) The *stability* and *viability* of constitutional democracy depends to some extent on a sense of justice (public and shared) as well as on certain conditions. This is not a case of *artificial identification* [of interests]!
 - b) No way to do without this - given e.g. Presidential Powers - and this reliance necessarily renders imperfect [procedural justice], given difficulties of applying a conception of justice - versus maximizing profits - plus human failures - injustices, etc.
8. Marx's criticisms of constitutional democracy: There are at least two different sorts:
- a) Marx rejects competitive idea as necessarily involving *alienation*. What is wanted is a publicly known and accepted *central plan*. (Thus [he] rejects competitive socialism too)
 - b) In history, constitutional democracy is actually government in favor of the capitalist class. [It] represents *class* interests.
 - c) About a) we discussed a bit last time. (Repeat here some items from *Friday's class*)
 - d) About b), there is much truth in this, and the theory of constitutional democracy should [?] study what devices [are] *necessary* to prevent this.
9. What devices —conditions— [are] needed for [a] just constitution?
1. Federal government financing [of] political parties, and of political activity. Forbid private contributions.
 2. Federal government financing of general political information: news, television, media, etc. on a continuing basis.
 3. Combination of running for office plus *lottery* is possible.
 4. Public financing and collection etc. of product quality information in lieu of advertising which is forbidden in normal form. Public consumer reports. Aim: to enhance market performance.

5. Public support of “political professionals” so they are not dependent on private interests, or [on] their own wealth; or limited to a special profession —e.g., lawyers, cf. Weber [? Soc] 1447H (vol. III).
6. Congress to have independent monitoring agencies to check performance [of] executive branch agencies.
7. Fragmentation of producer and property interests by progressive inheritance tax (at receiver’s end) and anti-trust laws, rejection of import quotas, etc. *if* private ownership is allowed.
8. If necessary, limitation or abandonment of private property in [the] means of production.

LECTURE XVIII — THEORY OF COMPETITIVE PLURALISM (II)

1. *Introduction*

1. Last time I took up the idea of constitutional systems parallel to the idea of economic systems. I considered the idea that as the latter is a case of *perfect* procedural justice which achieves economic *efficiency*; so the former is a case of *imperfect* procedural justice that is to achieve *just* legislation and social policies.
2. In each case it [is] supposed that the full intellectual understanding of these systems is a very complicated affair. Even in the economic case, studied for the longest time in a rigorous way, it is very incomplete, still. Certainly the political case is even *more* complicated.
3. Today I should like to discuss — in a vague and intuitive way — some problems about the constitutional system, and the theory of it. In particular, I want to consider the role of *a theory of justice* in this constitutional theory: where does it enter in?

2. Theory of Justice Defines the Necessary Criteria

1. Throughout I assume some theory of justice, e.g. Justice as Fairness, will serve best. But there may be a dispute about this. Then substitute some other view — utilitarianism, etc. The point is: we need, I believe, some *ethical theory*.
2. Given this theory of justice, then it defines the need[ed] criteria (parallel to the principle of *Pareto efficiency*). Thus if [we] think of procedure and result, [we] need a theory to define *both*:
 - (a) just *constitutional procedure*; and
 - (b) just *legislative or policy result*.

3. This task is likely to be more complicated than the economic parallel. Justice is a far more complicated notion than efficiency; [it] includes many more aspects.

4. But this way of putting it —emphasizing complexity— is perhaps misleading. And in any case, simply frightens us without saying how best to proceed. It is more helpful to say that we seek a theory of justice that can be *fitted into, conjoined with, social theory*. The moral notions should preferably be expressed in ways that allow them to become a *part* of the social theory, or *one* total theory with that.

5. Thus e.g. the definition of Pareto efficiency fits in nicely with indifference curves etc., and allows one to prove some nice results. No doubt much of its attraction lies here.

6. So [we] want to set up in an analogous way, if we can. Use primary social goods in defining principles, etc. Then perhaps with suitable complications, they can become the moral part of a *constitutional theory*.

B. *Criticism of Madison*

1. Assume [we] need [a] theory [of] justice to define requisite criteria. But what else? At least two things:

- (a) To explain why constitutional rules are complied with
- (b) To explain the stability properties of the constitutional system, or the lack thereof.

Thus so far, 3 purposes [of the] theory of justice.

2. Let's illustrate these points by Madison. Recall some of the main theses as follows

- (a) Justice is the end of government and society
(This uses [the] 1st aim [of the] theory of justice. Madison [is] not precise on its meaning)
- (b) Aim is to secure Republican [*sic*] Government
- (c) Every basic agency [of] government is to have its means of preserving itself.
- (d) Ambition is made to counter ambition.
- (e) Moral motives are weak and unreliable
- (f) Devices supporting competitive political process by controlling faction
 - (i) extent and numbers of the country
 - (ii) Difficulties of knowledge and organization.
 - (iii) Constitutional structures
 - a) representation
 - b) separation [of] powers
 - c) bicameralism

- d) federalism
- (iv) elections

3. Now how is all of this supposed to work?

(Here we ask a question raised by Dahl.) Or, same thing, why are the internal (constitutional) checks effective?

Here I think Madison believes: that:

the *constitutional rules will be followed*.

Thus, vetos (Presidential) will prevent certain legislation etc.

4. But we must ask the question:

a) Why are the rules complied with?

b) and if they are felt as constraints, why aren't they *changed*? Amended by constitutional procedures?

Parallel to the economic case, why do firms comply with the *postulated* rules? Here, I believe some adherence to a political conception is important. (I will come back to this)

5. Let's note that another aspect of Madison's system makes this question especially acute. (This [is] not mentioned by Dahl). Namely the underlying sociology. These theses.

a) Madison views government as protecting the *inequalities* in *property* and *fortune* that develop from the different natural talents of individuals. His is a *system of natural liberty*. (Explain)

b) These inequalities determine the main class divisions and set in motion the *most violent* political conflicts, the most opposed *factions*.

c) Still, for the sake of liberty, one must control not the *causes* but the *effects* of faction.

6. Thus the basic Madisonian conception is this: one relies upon (a) the *extent* of the country, the plurality of interests and numbers, and the difficulty of organization *plus*, (b) internal constitutional structures *and* elections to control faction, without any attempt to mitigate the *causes* of faction.

7. This is a *startling* oversight. The argument from liberty is very weak. Liberty of thought etc. is surely very different from the liberty over time of unlimited property accumulation under a system of natural liberty. It is the *weakness* of this argument that suggests [that it is a] *rationalization* — Madison's constitutional theory as ideology

Note: on meaning of *ideology* in special sense of Marx.

8. I believe that Madison's constitutional system is either

(a) unstable, given to distributive conflict since *causes* of faction are not controlled, and *moral sentiments* cannot be effective for compliance, or

(b) It settles down eventually to a façade constitutional state in which the large owners of property do have effective control behind the scenes. This control is made possible because of details of the constitutional structure and social forms. E.g.,

- i) control of [the] political process via control of campaign funds
- ii) control of news media
- iii) control of economic processes, etc.

9. Thus Madison's scheme brings out these other roles of justice:

- (a) to explain adherence to rules
- (b) to explain stability properties, or lack thereof

D. Two Further Roles of [a] Theory [of] Justice:

1) There are two further roles that deserve mention:

- (a) To characterize the conditions of *background* justice of the constitution and economic system.
- (b) To characterize the *content* of the required consensus.

2. The need for the first is already illustrated by the failure of Madison's constitutional system and the need to control the *causes* of faction. Thus to secure *justice* so that such factions as exist are those that would arise under conditions of *background* justice.

E.g., Equality of Opportunity and the Difference Principle.

3. It is part of *stability* (explain notion of *stability* of *justice*, appended) theory to argue that under these conditions the violence of faction is *less* and the adherence to the rules (from the Sense of Justice) *more* effective. And if possible, sufficiently effective.

4. The need for the second ([reflective] consensus) is that in a *just* constitutional regime certain institutions and policies are *not* a matter for discussion. E.g. — having a state religion, slavery, etc. Here this is not always so. Example of Lincoln-Douglas debates. Need a theory [of] justice to

- (a) characterize this consensus, its underlying principles
- (b) work out its *role* in the constitutional process.

Note on [the] Stability of Justice

1. Equilibrium and stability definitions

- a) Equilibrium of systems
- b) Stability — of equilibrium

2. Stability with respect to justice

- a) applies to equilibria of *just* systems
- b) means: such systems generate their own support
- c) does not mean [that] institutions [are] always unchanged.

3. Re: choosing theories of justice

- a) the more stable conception of justice is to be preferred, *ceteris paribus*
- b) this means those generating the *stronger* Sense of Justice when its principles [are] satisfied, or more *effective* Sense of Justice.
- c) This in turn depends on [the] tendency [of a] system to generate interests *opposed* to justice. Here is where regulation of property and envy etc. comes in. And so the importance of *background* conditions (background justice).

E. Conclusion

Thus I agree with Dahl that Madison's constitutional system is a curiously fragile notion: in that

(a) [Neither the] *necessity* of [the] separation of powers, nor the *sufficiency* of it in *his* framework, to avoid tyranny is shown. [There is an] excessive reliance on *constitutional* devices and structures.

(b) There is a failure to provide the necessary social conditions and background conditions: to

- i) control faction
- ii) ensure effective consensus.

[We] still lack a worked out conception of a *viable* and *just* constitutional system.