
**RAWLS'S PRINCIPLES OF JUSTICE AND NONIDEAL
CASES OF RELIGIOUS PRACTICE AND CORPORATE PARTICIPATION**

LUKE W. HUNT
UNITED STATES DEPARTMENT OF JUSTICE

I. INTRODUCTION

In the first chapter of *A Theory of Justice*, Rawls explains his aim of presenting a conception of justice that “generalizes and carries to a higher level of abstraction the familiar theory of the social contract:”¹

In order to do this we are not to think of the original contract as one to enter a particular society or to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement.²

Somewhat later, Rawls describes the crucial backdrop for the original contract:

I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate the principles solely on the basis of general considerations.³

In this paper I examine Rawls’s conception of justice in a different light: I apply his principles of justice in the context of an actual society with actual problems. Like many systematic philosophical theories, Rawls’s conception of justice presents a purely hypothetical starting point that begins a sort of domino effect, culminating in an abstract—or ideal—conception of justice.⁴ The principles agreed upon in the original position control everything that follows the original contract, seemingly making criticism possible only after those principles have been implemented in the context of the original position. From this perspective, it may not be sensible in every case to pick and choose from Rawls’s individual concepts (*e.g.*, first principle, difference principle) and apply them to actual problems in an actual, nonideal society that has not agreed to Rawls’s propositions. However, the hypothetical nature of the original position does permit one to return behind the

¹ JOHN RAWLS, *A THEORY OF JUSTICE* 10 (Harvard University Press 2003) (1971).

² *Id.*

³ *Id.* at 118.

⁴ *See id.* at 215 (“Arranged in...[lexical] order, the principles define then a perfectly just scheme; they belong to ideal theory and set up an aim to guide the course of social reform.”).

veil, so to speak, in an attempt to apply and clarify Rawls's ideal conception of justice in the context of a particular society.

I will examine two specific societal issues under Rawls's principles of justice: freedom of religious practice and corporate political participation and distribution. In the first case I argue that Rawls's first principle of justice opposes a government's restriction of a person wearing conspicuous religious symbols in public places, and in the second case I argue that Rawls's difference principle is in accord with a government's right to restrict corporate expansion. The backdrop for this examination—which may be called a limited examination—is that applying Rawls's principles to these specific societal issues in a non-Rawlsian society is not without problems. Examining Rawls's theory in the limited sense is much different from examining it as a complete, ideal conception, such as inquiring whether the theory as a whole is sounder than utilitarianism. One of the more obvious problems with examining Rawls's principles in the limited sense is that it potentially blurs two ways of conceiving justice: as a theoretically pure ideal and as a system actually embodied in positive law. It is not difficult to imagine a society that considers justice to be stoning a woman (women only, not men) to death for committing adultery, for example. In such a society, describing an instance in which a woman is stoned to death for committing adultery is a perfectly accurate description of justice in the positive law sense. However, such a society can clearly be thought of as unjust when juxtaposed with an ideal institution of justice, and so one must be cognizant that there are at least two ways to conceive of justice and clarify to which conception one is referring.⁵ A related problem in examining Rawls's principles in the limited sense is that it potentially blurs the lines between the normative realm of justice applicable to institutions and the ethical or moral realm applicable to individuals in specific circumstances. These two realms are clearly distinct in Rawls's conception of justice.⁶ Therefore, examining Rawls's principles in the limited sense may risk mistaking his normative guidelines for institutions as applicable to an individual's moral conduct in a particular situation.⁷

⁵ See *id.* at 50, for a discussion of how seemingly unjust institutions assume the role of justice in that they adhere to established principles.

⁶ See *id.* at 47 (“The principles of justice for institutions must not be confused with the principles which apply to individuals and their actions in particular circumstances. These two kinds of principles apply to different subjects and must be discussed separately.”).

⁷ *But see* BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 102-03, (Harvard University Press 1985) (suggesting that contractual theories may structurally fail if individual morality is not the first inquiry when addressing what a person is required to do); Liam B. Murphy, *Institutions and the Demands of Justice*, 27 *PHILOSOPHY AND PUBLIC AFFAIRS* 250, 283 (1998) (“Where people live within the domain of justice they must concern themselves with the substantive political/moral aim expressed in the principles of justice....It is not credible that what fundamentally matters is that the relevant institutions promote equality or well-being, rather than that equality or well-being be promoted.”).

For these reasons, one of the goals of this paper is clarification and description of such ambiguities, not explanation of which conception is right or wrong.

While there are problems involved in applying Rawls's principles in the limited sense, examining his theory (or any systematic philosophical theory) solely as an ideal conception is not without its own problems. As a general matter, examining a theory of justice solely as an ideal conception may impede its applicability because it is given on the front end that the hypothetical institution cannot be implemented as examined. This is the case, of course, because an actual society cannot literally return behind Rawls's veil of ignorance, and, even if it could, it would be irrational for the more advantaged society members to do so. To be sure, the goal of the original position is to examine—hypothetically—what one would do if one were behind the veil. That being said, an ideal institution's failure to apply to the actual reality of any particular society is worth noting inasmuch as general propositions of justice must ultimately succeed or fail based on their actual consequences.⁸ Moreover, it may be questioned whether the original position's abstract state of nature is a viable hypothetical without the context of an actual society as a reference point. Examining Rawls's principles solely as an abstract conception may force one to manipulate the concept of "society" to such an extent that one is no longer examining anything that resembles a society, for instance. As Robert Paul Wolff has noted, there may be "grounds for supposing that human beings *could not* have the sorts of general knowledge Rawls attributes to the parties in the original position, without their also having to be aware of the sorts of particular facts about themselves that are cloaked by the veil of ignorance."⁹ In other words, actual societies are complex human products that inherently involve a certain combination of knowledge among its members, and manipulating that inherent knowledge may create serious epistemological problems. To give just one example from Bruce Ackerman, knowledge of guaranteed well-being has to be arbitrarily granted to the parties in the original position in order for them to accept a law limiting population growth: a self-interested person in the original position would vote in favor of such a law if the person knew he or she would be one of the people who would be born, but "*if I thought I might be deprived of existence by the birth limit, I would have a very different attitude.*"¹⁰ The question follows: On what ground is

⁸ See, e.g., EDMOND N. CAHN, THE SENSE OF INJUSTICE 3-11 (New York University, 1949); Murphy, *supra* note 7, at 278 ("[A]n acceptable theory of justice must have acceptable implications for both ideal and nonideal theory.").

⁹ ROBERT PAUL WOLFF, UNDERSTANDING RAWLS 21-27, 129-32 (Princeton University Press 1977).

¹⁰ BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 222-23 (Yale University Press 1980).

the veil of ignorance rigged to provide knowledge of guaranteed well-being in the case of birth control, but not in other cases?¹¹

It is for these reasons, then, that I examine Rawls's principles in the limited sense—in the context of actual societies struggling with actual issues, namely, questions of freedom of religious practice and corporate political participation and distribution. The modest goal of this paper is therefore to provide an illustrative assessment of Rawls's principles through their application, while remaining cognizant of the difficulties in taking such an approach. The chief benefit of this approach is that it permits an ideal, systematic conception of justice to be compared with empirical examples of justice embodied in positive law. The hope is that such a comparison will provide a more full description of various positive law examples of justice by illustrating the degree to which they differ from an ideal institution of justice.¹²

II. FREEDOM OF RELIGIOUS PRACTICE AND THE FIRST PRINCIPLE

In April 2011, a law in France went into effect that banned women from wearing the niqab (a full-face Muslim veil) in any public place, including while walking down a public street, riding a public bus or subway, watching a movie at the cinema, and visiting the Louvre.¹³ As the *Guardian* reported, the niqab ban “has reopened the long-running debate over how the country with Europe’s biggest Muslim community integrates Islam into its secular republic.”¹⁴ Indeed, France banned simple headscarves (the hijab) and other religious symbols from public schools after an impassioned national debate in 2004.¹⁵ The French government argued that that the 2004 law was necessary to maintain the secular nature of French schools, while critics—including the United States Commission on International Religious Freedom—condemned the law as a violation of the freedom to practice religion, as many Muslims believe wearing modest clothing

¹¹ See RAWLS, *supra* note 1, at 140-41, for a discussion of average utility and why the original contractors would not encourage the population to grow indefinitely because they would want to advance their own interests by keeping average welfare higher.

¹² See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* Lecture V (1832) (“To prove by pertinent reasons that a law is pernicious is highly useful, because such process may lead to the abrogation of the pernicious law.”).

¹³ See Steven Erlanger, *France Enforces Ban on Full-Face Veils in Public*, N.Y. TIMES, April 12, 2011, at A4; Angelique Chrisafis, *Full-face veils outlawed as France spells out controversial niqab ban*, GUARDIAN, March 4, 2011, at 3.

¹⁴ Chrisafis, *supra* note 13, at 3.

¹⁵ See Annual Report of the United States Commission on International Religious Freedom, 53 (May 2004), available at <http://www.uscirf.gov>.

and covering the hair is an Islamic duty.¹⁶ The enactment of the 2004 law was a watershed moment for France, precipitating the current trend of more stringent laws banning the wearing of religious symbols in all public places.¹⁷ The 2004 law is therefore an important example of justice embodied in positive law, allowing for an apt comparison with Rawls's ideal conception of justice.¹⁸

I will begin by examining the 2004 law under Rawls's first principle of justice, which he believed would be accepted in the original position.¹⁹ Later I will examine why Rawls thought the first principle (and the second) would be accepted in the original position, and provide an analysis of that assumption. However, for now I will assume that the first principle has been accepted, which states "each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others."²⁰ This principle secures the following liberties:

- (1) Political liberty (the right to vote and hold public office) and freedom of speech and assembly;
- (2) Liberty of conscience and freedom of thought;
- (3) Freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person);
- (4) The right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the first principle.²¹

Rawls's two principles are lexically ordered, meaning that the second principle cannot be addressed until the first principle is maximized. Nor can the contracting parties take any action that would jeopardize the maximization of the first principle when addressing the second principle.²² The initial inquiry in this case,

¹⁶ See *id.* at 53-54 ("The French government and legislature should be urged to reassess this initiative in light of its international obligations to ensure that every person in France is guaranteed the freedom to manifest his or her religion or belief in public, or not to do so.").

¹⁷ See *id.*, where the United States Commission on International Religious Freedom commented that "there are plans for similar legislation to cover the wearing of religious garb and symbols in other public institutions."

¹⁸ The 2004 law bans dress or symbols that "conspicuously show religious affiliation," and is not limited to the hijab. *Id.* However, it has been widely argued that the 2004 and 2011 laws single out and stigmatize Islam. See Erlanger, *supra* note 13, at A4.

¹⁹ See RAWLS, *supra* note 1, at 52.

²⁰ *Id.* at 53.

²¹ *Id.*

²² *Id.* at 53-54 ("These principles are to be arranged in a serial order with the first principle prior to the second. This ordering means that infringement of the basic liberties protected by the first principle cannot be justified, or compensated for, by greater social and economic advantages").

then, rests squarely on the first principle and the basic liberties secured by the principle. Religious freedom—specifically, the right to wear a religious symbol such as a head scarf in a public school—is not explicitly protected by the basic liberties enumerated above, meaning that some sort of implicit protection has to be sought under the umbrella of another basic liberty. Although it may seem obvious that these liberties would extend to cover a student’s right to wear a head scarf, it is not given that parties in the original position would explicitly protect the freedom of religious practice when they reach the constitutive phase, and so the issue must initially be addressed under the first principle.²³

Several factors support the position that the freedom of religious practice is implicitly protected under the umbrella of other basic rights, and that banning the wearing of head scarves by Muslim students enrolled in French public schools is inconsistent with the first principle of justice. From the outset this position is based on the simple rationale that Rawls’s list of basic liberties is not intended to be exhaustive and does not include every possible worthwhile liberty.²⁴ Rather, the freedom of religious practice would naturally be protected by other enumerated rights such as the liberty of conscience or person, for instance, which exemplifies the Rawlsian scheme’s general commitment to political liberalism. James W. Nickel succinctly puts it this way: “Elements of political liberalism will make it difficult or impossible to pass laws forbidding the wearing of unusual clothing. (Here a legal liberty to do *A* will primarily be the absence of a legal duty to refrain from doing *A*.)”²⁵ While this argument seems, generally, to be correct, Nickel’s argument is based on an example of protecting one’s right to wear a Tarzan suit, which obviously does not directly address issues involving church, state, and secularism. For this reason it is necessary to look beyond structural arguments, focusing instead on what the original contractors would do in the original position behind the veil of ignorance.

The parties in the original position deciding on the first principle are behind the veil of ignorance in order to nullify the benefits of any special circumstances that would entice them to take advantage of such circumstances when deciding on the principles of justice.²⁶ Amartya K. Sen illustrates a similar scenario with a hypothetical situation involving bickering musicians deciding how to allocate

²³ See generally James W. Nickel, *Rethinking Rawls’s Theory of Liberty and Rights*, 69 CHI-KENT L. REV. 763, 766-72 (1994) (arguing that Rawls’s list of basic liberties should be reconstructed such that “liberties of the person” specifically protects freedom of religious practice.).

²⁴ See *id.* (arguing that attempting to list every possible worthwhile liberty would lessen the principle’s impact.)

²⁵ *Id.*

²⁶ See RAWLS, *supra* note 1, at 118.

practice time.²⁷ In Sen's example, a trumpet player is the better situated party in society than a piano player because the trumpet player is not disturbed by the piano player, while the piano player is disturbed by the trumpet player's practice; the trumpet player is thus given much more practice time because he is in a better bargaining position.²⁸ However, considering Sen's scenario from the perspective of those in the original position, trumpet players very likely would not receive such an unfair advantage because the original parties would not know whether they would be trumpet players or piano players, of course. Moreover, what happens when a tuba player is thrown into the mix? The point is that the parties in the original position behind the veil of ignorance would want to design practice-time allocation in a fairer, more just way. In the same way, one might relate this to religious practitioners, *i.e.*, under what circumstance would the original parties want to protect the liberty of religious practitioners who desire to outwardly display their faith in public institutions? At this early stage in the contracting process, then, it does not seem to be a stretch to argue that the contracting parties would at least grant a general freedom of religious practice under the first principle, considering that behind the veil of ignorance they would not know whether they would end up as religious practitioners. While granting a broad right to freedom of religious practice seems rational behind the veil of ignorance, the subsequent stages of the original parties' contracting process must be addressed in order to better examine the specific issue presented by France's 2004 law.

In Section 13.6 of *Justice as Fairness*, Rawls explains that his principles of justice are established and implemented in a four-stage sequence, with the original parties' limitations on knowledge being progressively relaxed in the stages after the veil of ignorance.²⁹ In other words, the original parties' veil of ignorance begins to be lifted as they move toward a constitutional convention and address the principles of their society in greater detail. It is in these middle stages that the original parties know more about the economic system, political culture, and other relevant general facts, *e.g.*, the diversity of society and the percentage of people who are Muslim and wear head scarves. However, the original parties do not know their place in society at this stage, and whether they would want to wear a religious symbol such as a head scarf, for instance. On the surface, then, Rawls believes it would be rational for the original parties to protect such religious freedom in the constitution.³⁰ However, consider that the parties learn (when the veil is partially

²⁷ AMARTYA K. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 121-23 (Holden-Day 1970).

²⁸ *Id.*

²⁹ JOHN RAWLS, *JUSTICE AS FAIRNESS* 48 (Harvard University Press 2003) (2001); *see also* RAWLS, *supra* note 1, at 171-72.

³⁰ *See* RAWLS, *supra* note 1, at 186 ("From the perspective of the constitutional convention these arguments lead to the choice of a regime guaranteeing...religious practice, although these may be regulated as always by the state's interest in public order and security.").

lifted) that a certain small percentage of fanatical religious practitioners are intolerant of groups with differing beliefs and values—say, a certain small percentage of Muslims who believe it is their religious duty to bring about a global theocracy by committing, if necessary, terrorist acts. Such actions by this small group of religious practitioners would be in violation of the first principle, including each of the basic liberties enumerated under that principle. This knowledge might raise the following question for the original parties: To what extent should a society limit the freedom of religious practice of a vast group of law-abiding religious practitioners, when a tiny subset of that group threatens secularism and desires to take action in violation of the first principle?

In addressing this question, the original parties first acknowledge that the inquiry turns on the ordering of the two principles. They have accepted the first principle with its basic liberties and lexical order, prioritizing the maximization of the liberty of conscience and freedom of religious practice in the constitutional phase. In moving to the more narrow question of whether religious practice should be limited because it conflicts with state affairs, Rawls suggests that the original parties could do so only if there was a “reasonable expectation that not doing so will damage the public order which the government should maintain.”³¹ Absent clear evidence that limiting religious practice is necessary to maintain public order and security, the principles of justice simply do not permit the government to do what it—or a majority—wants to do with respect to questions of religious practice.³² Rather, the government is only concerned with maintaining its citizens’ freedom to pursue their religious interests in accordance with the principles of justice to which they agreed in the original position—not whether a religious association conflicts with a state interest.³³ The same is true with respect to intolerant religious sects: A just government does not have the right or duty to limit the freedom of intolerant religious sects without clear evidence that security and the foundational principles of justice are in danger, and the liberty of only the intolerant religious sect is to be limited when security is threatened by them; blanket restrictions over vast groups of religious practitioners who pose no threat to public order and security are precluded.³⁴ Moreover, any imposed restrictions are for the sake of the principles of justice—principles which the intolerant themselves would accept in the original position.³⁵ The resolution to the question at hand is therefore based on Rawls’s priority of liberty, in other words, the lexical

³¹ *Id.* at 186.

³² *Id.* at 186-87

³³ *Id.* at 186.

³⁴ *Id.* at 193.

³⁵ *Id.*

ordering of the two principles such that claims of liberty must be satisfied before moving to other considerations.³⁶

Based on this priority, the French government's ban on the wearing of head scarves by Muslim students is inconsistent with Rawls's first principle of justice, including because there is no reasonable expectation that such a ban is necessary to maintain security and public order. However, this conclusion may be criticized on a number of levels, which include certain fundamental assumptions about the nature of the original parties. As has been discussed, my analysis has been based on Rawls's basic assumption that the original parties would accept the principles of justice while behind the veil of ignorance. This assumption was justified for Rawls because the original parties are equally situated behind the veil of ignorance in the original position, and thus convinced by the same, rational arguments. With this given, Rawls is able to suggest that "if anyone after due reflection prefers a conception of justice to another, then they all do, and a unanimous agreement can be reached."³⁷ However, this assumption still raises the question of whether a conception of justice based on the rational choices of self-interested, equally situated parties is "actually correct."³⁸ In other words, it may be possible that the original contractors make rational choices about the conception of justice they intend to embody in positive law, yet at the same time fail to make the "correct choice" in terms of moral or ethical considerations, whatever those considerations may be.³⁹ Such a scenario may be conceived when considering situations based on Rawls's maximin rule. For example, if there are two bags to draw from that have two possibilities in each, (1) emperor or slave, (2) white collar or blue collar worker, selecting from bag 2 is the only rational choice for Rawls's parties behind the veil of ignorance because it produces a better result for those who would be in the least advantaged position, *i.e.*, one would not want to make a choice behind the veil that could result in being a slave. However, consider that the odds of the choice were better and the original contractors (still behind the veil) determine that accepting Rawls's two principles are not the most rational choice (based on the odds), but rather that a society with a very small number of slaves is the most rational means of achieving justice. Similarly, instead of accepting the two

³⁶ *Id.* at 214; *see also* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 43-44 (Bobbs-Merrill 1965) ("Freedom (independence from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity.").

³⁷ RAWLS, *supra* note 1, at 120.

³⁸ WILLIAMS, *supra* note 7, at 102.

³⁹ *See* CARL G. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION 463-67 (MacMillan 1965) ("The critical appraisal implied by the attribution of rationality is to the effect that, judged in the light of the agent's beliefs, the action he decided upon constituted a *reasonable* or *appropriate* choice of means for achieving his end.").

principles, consider that the original contractors decide, based on the odds of the gamble, that a small amount of racial prejudice or infringement of religious freedom (say, the banning of head scarves) is acceptable. As Bernard Williams noted, “If self-interested rational choice is what is at issue, it is hard to see how the question of probabilities can altogether be avoided, or how, if the probability of ending up as a slave were small enough, it would not be rational for the parties to choose a system involving slavery.”⁴⁰ Therefore, while I argue that the intent of Rawls’s conception of justice is that the original parties would protect the wearing of head scarves in public schools, fundamental questions about probabilities and the nature and rationality of the original parties call into question whether they would necessarily do so.

III. CORPORATE PARTICIPATION AND THE DIFFERENCE PRINCIPLE

As discussed in my introduction, examining Rawls’s individual principles of justice as I have done thus far—in the context of an actual society—risks blurring the lines between an ideal institution of justice and justice embodied in positive law, as well as blurring the lines between the normative realm of justice applicable to institutions and the ethical or moral realm applicable to individuals in specific circumstances. However, examining Rawls’s principles through the lens of an actual society also clarifies these issues by highlighting how they are interconnected. Examining France’s 2004 law in this light illustrates the degree to which it differs from Rawls’s first principle of justice, while also stressing the difficulties of addressing positive law examples of justice under the framework of rational choice marshaled under abstract conditions of ignorance. Of course, the same sort of examination may be conducted of Rawls’s second principle, which accounts for social and economic inequalities (distribution) and includes the difference principle: “Social and economic inequalities are to be arranged so that they are...to the greatest expected benefit of the least advantaged.”⁴¹ I will therefore turn my attention to corporations and how their political participation can impact social and economic inequality.

In February 2011, the City Council of New York City held a hearing to analyze the possible impact Wal-Mart would have on local communities should it succeed in opening its first store in New York City.⁴² Representatives from Wal-Mart skipped

⁴⁰ WILLIAMS, *supra* note 7, at 79.

⁴¹ See RAWLS, *supra* note 1, at 72, for a discussion of the entire second principle, which states: “Social and economic inequalities are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.”

⁴² Elizabeth A. Harris, *Wal-Mart Skips Council Hearing as Impact of Stores is Assailed*, N.Y. TIMES, February 4, 2011, at A18.

the hearing, deciding instead to directly win over the residents in the locations where the stores would be located. The *New York Times* compared Wal-Mart's approach to a political campaign, citing the company's high-tech website promoting their position, purchase of airtime on several radio stations, purchase of advertising space in over thirty local papers, and fliers sent to residents in the relevant City Council districts.⁴³ While many City Council members opposed Wal-Mart's entrance into New York City on grounds that the company would hurt small businesses, Wal-Mart argued that it was being unfairly singled out because other "big-box" stores already existed in New York City.⁴⁴ Wal-Mart's difficulty with local governments has not been limited to New York City. Indeed, Wal-Mart attempted to bypass the Inglewood, California City Council's rejection of its bid for a proposed store in 2004. After Inglewood officials rejected Wal-Mart's proposal, the company spent over one million dollars in support of a ballot initiative that would have permitted construction of a "60-acre Wal-Mart shopping complex exempt from virtually all state and local regulation."⁴⁵ Inglewood residents defeated Wal-Mart's proposal at the polls, but, as the *New York Times* noted, the "vote was closely watched around the nation as a test of Wal-Mart's ability to sway public opinion and influence political bodies."⁴⁶ These events raise the following questions: First, does Rawls's conception of political participation support Wal-Mart's attempt to bypass the Inglewood City Council's rejection of its proposal to build a store? Second, is introducing a corporation like Wal-Mart into Inglewood's economy justified under Rawls's difference principle? I will argue that both questions should be answered in the negative based on (1) Rawls's preference of constitutional democracies emphasizing the fair value of political liberty, and (2) the difference principle's commitment to "chain connection" and "justice as fairness," as opposed to utilitarian principles.

Rawls's notion of political participation is based on the idea that each person in the original position of equality is fairly represented. From this starting point, the objective is to continue fair representation in the constitution and each subsequent stage of justice to the extent that it is practical.⁴⁷ In *Justice as Fairness*, Rawls distinguishes between constitutional and procedural democracies, noting that laws in the former must be consistent with basic rights such as those covered by the first principle, while in the latter regime there is no constitutional limit on the laws that the majority enacts.⁴⁸ Rawls's conception of justice is based on a constitutional democracy (*e.g.*, the constitutional convention is one of the four stages of adopting

⁴³ Elizabeth A. Harris, *Wal-Mart Will Skip Hearing by Council*, N.Y. TIMES, January 11, 2011, at A22.

⁴⁴ Harris, *supra* note 42, at A18.

⁴⁵ Jon M. Broder, *California Voters Reject Wal-Mart Initiative*, N.Y. TIMES, April 7, 2004.

⁴⁶ *Id.*

⁴⁷ See RAWLS, *supra* note 1, at 194-95.

⁴⁸ See RAWLS, *supra* note 29, at 145.

the principles of justice⁴⁹), and this preference does not bode well for Wal-Mart's actions when viewed through the lens of a Rawlsian regime. First, the company did not adhere to established requirements for a public hearing regarding building a new store, and, second, it disregarded the decision of the elected city council. In other words, when compared to a Rawlsian constitutional democracy based on the two principles of justice, Wal-Mart's actions in Inglewood can be seen as attempting to circumvent and nullify the decision of an elected city council by using a simple majority vote. As Rawls sees it, while political participation in a constitutional democracy guarantees certain first principle rights (*e.g.*, political rights), "sporadic and unpredictable tests of public sentiment by plebiscite or other means, or at such times as may suit the convenience...do not suffice for a representative regime."⁵⁰

In a related way, Wal-Mart's course of action can be seen as violating Rawls's precept of "one elector one vote."⁵¹ In other words, through its million dollar campaign, it can be argued that Wal-Mart took the value out of the liberties protected by the principle of participation such that everyone did not have the common status of an equal citizen.⁵² Similar concerns were raised in 2010 in *Citizens United v. Federal Election Commission*, the landmark case in which the U.S. Supreme Court overturned precedent by ruling that the First Amendment's free speech principle prevented the government from regulating the political speech of corporations.⁵³ In contrast to the holding in *Citizens United*, Rawls sought to rectify problems of equal liberties verses their actual worth by including the provision in the first principle that equal political liberties are to be guaranteed their fair *value*.⁵⁴ This means that when the principles of justice are adopted in the original position, it is understood that everyone will have a fair chance to impact elections, regardless of their position in society.⁵⁵ In order to realize this fair value in political institutions, Rawls suggested reforms involving public financing of elections, campaign contribution limits, equal access to public media, and freedom of speech and press regulations that do not involve content.⁵⁶ As was the case in *Citizens United*, such regulations are open to criticism that they infringe on the freedoms of speech and of the press. Rawls's response is that a fair value in political liberty is

⁴⁹ *See id.* at 48.

⁵⁰ *See* RAWLS, *supra* note 1, at 195.

⁵¹ *See id.* at 196.

⁵² *See id.* at 198-99 ("[W]hen parties and elections are financed not by public funds but by private contributions, the political forum is so constrained by the wishes of the dominant interests that the basic measures needed to establish just constitutional rule are seldom properly presented.... In due time they are likely to acquire a preponderant weight in settling social questions.").

⁵³ *See* *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

⁵⁴ *See* RAWLS, *supra* note 29, at 149.

⁵⁵ *Id.*

⁵⁶ *Id.*

no less important than other liberties, and adjusting free speech liberties is necessary to keep the political process “independent of large concentrations of private economic and social power.”⁵⁷ Indeed, a corporation is neither a voter nor a citizen, and, as Felix S. Cohen stated over seventy years ago, one should not “thingify” a corporation as a mortal man:⁵⁸ “[Asking where a corporation is] is, in fact, a question identical in metaphysical status with the question which scholastic theologians are supposed to have argued at great length, ‘How many angels can stand on the point of a needle?’”⁵⁹ Cohen continues, “Nobody has ever seen a corporation. What right have we to believe in corporations if we don’t believe in angels?”⁶⁰ Cohen’s sentiment is similar to that of the dissent in *Citizens United*, namely, that it is an error to treat corporations and corporate speech as humans and human speech.⁶¹ If this is true, maintaining a fair value in political liberties may involve restricting the way in which an influential private entity may act as a sort of abstract super-citizen.

Turning to the question of whether introducing Wal-Mart into Inglewood’s economy is in accord with the difference principle, it helps to first highlight Rawls’s aim of establishing a conception of justice that is a general alternative to utilitarian theories.⁶² As a teleological theory, utilitarianism defines the good independently from the right: Right acts and institutions are the ones that produce the most good.⁶³ As Rawls sees it, the problem with such theories is that they can fail to account for the correct distribution of goods among people, focusing instead on any distribution that results in maximum fulfillment.⁶⁴ Rawls thus assumed that the parties in the original position would reject utilitarianism and instead adopt his principles of justice, which make up a deontological theory (*i.e.*, one that “does not interpret the right as maximizing the good”).⁶⁵ This perspective leads to the rationale behind the second principle, which is based on the proposition that society is not to institute beneficial circumstances for the better situated unless such a state of affairs would benefit the least advantaged, *i.e.*, the goal is to be able to honestly tell the lowest in society, *any other way we set up distribution would leave you worse off*.⁶⁶ Therefore, it is clear how this conception is an alternative to utilitarianism: The distribution of primary social goods is

⁵⁷ *Id.* at 149-50.

⁵⁸ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

⁵⁹ *Id.* at 810-811.

⁶⁰ *Id.* at 811.

⁶¹ See Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES, January 22, 2010, at A1.

⁶² See RAWLS, *supra* note 1, at 20.

⁶³ *Id.* at 22.

⁶⁴ *Id.* at 23.

⁶⁵ *Id.* at 26.

⁶⁶ *Id.* at 65.

restructured in terms of the least advantaged. The basis for this conception of distribution is desert, which, put simply, means that one neither deserves one's initial socio-economic starting position in society, nor does one deserve one's character attributes that allow one to succeed or fail in life—as such character attributes depend on “nature-nurture” factors for which one cannot claim credit.⁶⁷ Thus, desert is not a factor when considering the fairness of the difference principle, at least to the extent one acknowledges that no one deserves to be born a particular way or in a particular place.

Returning to the specific question presented—whether introducing a Supercenter into Inglewood's economy is consistent with the difference principle—Wal-Mart maintained that the Supercenter would bring jobs, additional taxes, and low grocery prices to Inglewood and its residents. On the other hand, Wal-Mart's opponents argued that Wal-Mart's aggressive business practices and strong opposition to union employment would ultimately lead to the loss of jobs and to lower wages for local workers. It is not difficult to see how an initial response to this problem could be that Wal-Mart's arguments are in accord with the difference principle based on a general economic theory of competition, which may allow Wal-Mart to inexpensively enter markets and help the less advantaged obtain consumer goods at lower costs. As proof of the general success of this position, the Wal-Mart advocate might argue that the United States has attained one of the highest standards of living because of the free flow of capital and labor, which helps even those at the bottom of the ladder to have a much better life than people in other countries in the same relative position. In countries in which this is not the case, it may be argued that there is a reduced overall standard of living because there is not a free flow of capital, labor, and competition (because the government has stepped in to try to determine the winners and losers or run things themselves). The Wal-Mart advocate might argue thusly:

The least advantaged in society do not have jobs at all. By building a Supercenter, many of these people would be provided with a low-paying job, but a job nonetheless—in addition to access to affordable groceries. As an added benefit, the most advantaged in society (Wal-Mart executives, Wal-Mart stockholders, the general wealth of Wal-Mart as a corporation, etc.) would greatly increase their wealth by having a bigger market. It is acceptable that some small businesses will be eliminated because they were more advantaged in the first place. Building a Supercenter is therefore in accordance with the difference principle because it would help the least advantaged.

⁶⁷ See RAWLS, *supra* note 1, at 89.

Although such a position may seem viable at first glance, it is fundamentally flawed because, as mentioned, the aim of the difference principle is not merely to help the least advantaged. As Amy Gutmann explains in *Liberal Equality*, the assumption is wrong “that any resulting benefits to the least advantaged can justify allowing the rich to have more. Rather, the difference principle as consistently stated can justify activities with marginal trickle-down effects only if they provide greater benefits to the least advantaged than *any possible* alternate arrangements.”⁶⁸

I will argue that introducing Wal-Mart into local markets does not necessarily meet this requirement. From the outset, I should note that it is far beyond the scope of this paper to conduct a thorough economic analysis of the entrance of a Wal-Mart Supercenter into a local market, and I will therefore take up the more modest goal of considering various hypothetical scenarios that would not be in line with the difference principle. For example, building the Supercenter is potentially contrary to Rawls’s “chain connection,” which is related to the difference principle in that it states that circumstances of the middle-advantaged members of society are to rise anywhere the circumstances of the least advantaged rise.⁶⁹ If it is true (as Wal-Mart’s opponents suggest) that Wal-Mart’s aggressive business practices would ultimately lead to the loss of jobs, then many of those losing jobs would be the middle-advantaged members of society (small, local businesses that would be Wal-Mart’s competition, for example).⁷⁰ Wal-Mart has been accused of developing Supercenters in locations in which it can potentially be the sole supplier of any number of items (including groceries) by lowering prices of those items during the initial years the Supercenter is open to such an extent that all surrounding competition is eliminated. This may be especially the case with companies like Wal-Mart, which offers many products and can continue to make money in certain parts of its store while running deep discounts in other parts. The loss of jobs for the middle-advantaged could have a ripple effect leading to the loss of higher paying jobs; for example, local Inglewood accounting offices and other professionals serving small businesses in the area may suffer as a result of the loss of small, locally-owned businesses. Such possibilities raise the question of whether building a Supercenter may actually increase the size of the least-advantaged class in the long run. In other words, the number of mid-level jobs lost could be more than the number of new low-level jobs offered by Wal-Mart, resulting in an overall

⁶⁸ AMY GUTMANN, *LIBERAL EQUALITY* 131-35 (Cambridge 1980).

⁶⁹ See RAWLS, *supra* note 1, at 70-71.

⁷⁰ See Barry C. Lynn, *Breaking the chain: The antitrust case against Wal-Mart*, HARPER’S, July 2006, for a discussion of how “the ultimate danger of monopsony is that, over time, it tends to destroy the machines and skills on which we rely,” and Barry C. Lynn, *American small businesses needn’t go extinct*, WASHINGTON POST, February 21, 2010, at B1, for a discussion of how “political moves and decision in Washington over the past several decades have made it much easier for the people who control large-scale corporations to displace small proprietors.”

loss of not only higher paying jobs, but of jobs in general. If such a scenario is a real possibility, then the issue becomes whether the Supercenter would fail to properly maximize the benefits to the least advantaged in such a way that other members of society will also benefit. The sentiment is simply that there were valid reasons why the monopolies of old were broken up, which is effectively what Wal-Mart has been accused of becoming in certain markets.⁷¹ In short, although building the Supercenter may result in certain positive gains for Inglewood, it may very well not be an appropriate solution in terms of yielding more comprehensive gains from the perspective of the chain connection and difference principle.

Based on the above scenarios, it may be asked whether Wal-Mart's entrance into Inglewood's economy would primarily benefit the least advantaged via low-paying jobs, or primarily increase corporate wealth with inexpensive labor—regardless of the broader implications to the local economy. If building the Supercenter results in the latter, upward movement by the least advantaged could be stifled. At the same time, however, the rationale of the Supercenter can be seen as utilitarian because overall wealth (including corporate wealth) may be maximized, which is illustrated in the graph in Chapter II, Section 13, Figure 8 of *A Theory of Justice*.⁷² This graph depicts the “contribution curve” (curve OP), which maps the relationship between the most (x-axis) and the least (y-axis) advantaged society members. Rawls labels the peak of the bell-shaped OP curve point “b,” which is the point at which his “justice as fairness” achieves efficient equality via the difference principle, and which therefore should not be passed. However, the best distribution from a utilitarian perspective is farther along the x-axis beyond point “b,” a point at which the bell curve has begun its descent on the y-axis, and thus a point at which the balance of benefits to the least advantaged declines (though the overall sum of benefits continues to increase along the x-axis in favor of the most advantaged).⁷³ Accomplishing a maximization of the OP curve for Rawls is dependent on background institutions securing fair and equal opportunities for citizens to nurture their abilities and obtain socially practical skills.⁷⁴ With such a scheme in place, Rawls argued that the OP curve would quickly reach the maximum such that the difference between the less advantaged and the more advantaged would not seem unjust.⁷⁵

⁷¹ See *Breaking the chain: The antitrust case against Wal-Mart*, *supra* note 70 (“When oligopolies rule unchecked by the state, what is perverted is the free market itself, and our freedom as individuals within the economy and ultimately within our political system as well.”).

⁷² RAWLS, *supra* note 1, at 67.

⁷³ *Id.*

⁷⁴ RAWLS, *supra* note 29, at 68.

⁷⁵ *Id.*

Of course, in our nonideal world, we are not dealing with societies made up of background institutions based on Rawls's principles of justice, which he believed would prevent the more advantaged members from uniting to "exploit their market power to force increases in their income."⁷⁶ Nevertheless, if building a Supercenter is not necessarily the best distributive option when examined under a Rawlsian lens, what sorts of alternatives would better provide citizens with "fair and equal opportunities to develop their native endowments and to acquire socially productive skills"?⁷⁷ Guttman offers one suggestion through her example of the unequal income distribution between doctors and nurses and lawyers and legal secretaries, which she argues would be addressed in a Rawlsian society through "fair equality of opportunity and governmental subsidies for vocational training [and the fact that] doctors would not be able to ensure their scarce supply, and access to medical schools would be less limited as long as medical care was a high social priority."⁷⁸ Although doctors might still earn larger incomes than nurses, the medical profession would be more graded and the priority would shift to giving citizens fair and equal opportunities to develop their native endowments and to acquire socially productive skills—thus better maximizing the OP curve and the position of the less advantaged members.⁷⁹ While the details of Guttman's example may not be specifically apt to the case involving Wal-Mart, the general idea is still relevant: A system of distribution that maximizes the market in favor of a small, advantaged group (whether in terms of corporate wealth or profession) is at odds with the Rawlsian goal of securing fair opportunities through a system that is efficiently centered on the least advantaged. For these reasons, the scenarios I have considered suggest that building a Supercenter may be aligned with utilitarian principles, but is not in line with the difference principle's commitment to chain connection and justice as fairness.

IV. CONCLUSION

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ GUTMANN, *supra* note 68, at 131-35.

⁷⁹ *Id.* Of course, taxation schemes would have to be altered in order to provide such governmental subsidies for vocational training, which Gutmann notes as follows:

Policies that would simultaneously remedy the inefficiencies of the real capital market and effect a more egalitarian distribution of wealth include raising inheritance taxation and closing existing loopholes, raising the tax rate on capital gains, and treating corporations for tax purposes simply as aggregates of individual stockholders. Profits to corporations could be treated as accretion to individual (rather than corporate) wealth, just as profits and savings accruing to salaried employees are now treated. No corporate body would be permitted to absorb and transfer profits into internal savings, and no individuals would be allowed to avoid taxes through the accumulation of unrealized capital gains. *Id.*

In this paper I have examined Rawls's principles of justice in the context of an actual society with actual problems, namely, freedom of religious practice and corporate political participation and distribution. In the first case, I argued that Rawls's first principle of justice opposes a government's restriction of a person wearing conspicuous religious symbols in public places, and in the second case I argued that Rawls's difference principle is in accord with a government's right to restrict corporate expansion. As has been discussed, Rawls's conception of justice presents a purely hypothetical starting point that culminates in an ideal conception of justice that permits some inequality, but not injustice:

[W]e may reject the contention that the ordering of institutions is always defective because the distribution of natural talents and the contingencies of social circumstances are unjust, and this injustice must inevitably carry over to human arrangements. Occasionally this reflection is offered as an excuse for ignoring injustice, as if the refusal to acquiesce in injustice is on a par with being unable to accept death.⁸⁰

To be sure, we do not live in a world without injustice. It is because of this fact that I have examined Rawls's principles of justice in a way that applies them to the nonideal reality of particular societies. I have suggested that such an approach has the benefit of making the original position's abstract state of nature a more viable hypothetical by providing the context of an actual society as a reference point. Remaining cognizant of the difficulties in taking such an approach, my goal has been to provide a more full description of various positive law examples of justice by illustrating the degree to which they differ from an ideal institution of justice.

I have specifically highlighted two difficulties with examining Rawls's theory in the limited sense, that is, applying Rawls's principles to specific societal issues. First, such an examination potentially blurs two ways of conceiving justice: as a theoretically pure abstraction and as positive law. Second, such an examination potentially blurs the lines between the normative realm of justice applicable to institutions and the ethical or moral realm applicable to individuals in specific circumstances. However, I have attempted to make apparent the interconnections among these issues and how theoretical and normative questions are closely related to pressing practical questions that actual societies face regarding justice. To put it another way, I have simply made the unremarkable claim that the role of political theory should involve a good deal of description and clarification of the reality of nonideal institutions, rather than focusing solely on the theoretical framework of ideal institutions. The utility of comparing justice embodied in positive law to ideal conceptions of justice is important inasmuch as providing insight into practical questions is a goal of political theory.

⁸⁰ See RAWLS, *supra* note 1, at 87.

Although I have limited my inquiry to questions regarding freedom of religious practice and corporate political participation and distribution, there is obviously a multitude of pressing practical questions that could be addressed. In February 2011, for example, President Obama and Attorney General Holder determined that the Defense of Marriage Act was unconstitutional and that the Justice Department would stop defending the law in court.⁸¹ Examples such as this highlight the fact that there remain many unanswered questions regarding a society's conception of the fundamental rights of its citizens—in that case, whether same-sex marriage may be discriminated against by the federal government. Similarly, questions that globalization poses for domestic political theories of justice are even less developed. Consider, for instance, Rawls's notion of the "just savings principle," which addresses how much capital each generation should put aside in order to preserve a just institution.⁸² In addressing issues such as the ability of future generations to treat and prevent disease, what principles does a society use in determining how to account for epidemics in other countries that could ultimately affect one's own country? If Rawls's theory is essentially a domestic theory, there may be ambiguities about how to address savings questions involving whether capital should be allotted for treatment on the one hand, or research and prevention on other.⁸³ Such issues could dramatically affect future domestic generations, but also depend largely on circumstances in other countries and societies that may not have the ability to prevent, treat, or contain devastating diseases. As I have suggested, it is these sorts of inquiries that highlight the expansive benefits of examining Rawls's principles of justice in the context of actual societies with actual problems. By treating political theory in this way, theoretical and normative questions may be examined anew and in light of the dynamic and ever-changing needs of nonideal societies.

⁸¹ See Letter From the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, (February 23, 2011), *available at* <http://www.justice.gov>.

⁸² See RAWLS, *supra* note 1, at 251-58.

⁸³ See *id.* at 7 ("The conditions for the law of nations may require different principles arrived at in a somewhat different way. I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies.").