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Rawls and the Practice of Political Equality

by

Jay Makarenko

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## Abstract

The purpose of this work was to develop a greater understanding of Rawls's liberal-egalitarianism within the context of political participation. In *A Theory of Justice*, his first comprehensive statement of his theory of justice, Rawls introduced the idea of fair opportunity, which holds all citizens are entitled to play an equal role in the political life of their society. In his later works, *Political Liberalism* and *Justice as Fairness: A Restatement*, Rawls made significant changes to this idea. What does Rawls's later notion of political equality entail?

In addressing this question, several conceptions of political equality are developed, which are referred to as liberal non-egalitarian, moderate egalitarian and radical egalitarian. The practical implications of these conceptions are highlighted by examining Canadian and American jurisprudence on freedom of expression and campaign finance laws. These conceptions are used to unpack Rawls's own writings on political equality, as well as secondary literature. This included Norman Daniels's early critique of *A Theory of Justice*, which led Rawls to later clarify his notion of political equality, as well as recent commentary on Rawls's revisions.

This recent commentary presented two sorts of views. The first interpreted Rawls's in a highly ambiguous manner, leaving it unclear whether he supported a moderate or radical form of egalitarianism. The second interpreted Rawls as adopting a very radical notion of political equality in his later works. This work

challenges these interpretations. It is argued that Rawls developed a clear sense of political equality in his later works, which rejected radical egalitarianism in favour of a moderate view of equality in political participation.

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# Chapter One

## Introduction to Work

### **Rawls, Liberalism and Egalitarianism**

John Rawls was one of the most influential political philosophers of the last fifty years. His seminal work, *A Theory of Justice*, sits within the canon not only of contemporary liberal political philosophy, but the history of political thought itself. With this work, Rawls developed a view of liberalism that contrasted significantly with the classical liberal writings of Thomas Hobbes, John Stuart Mill and John Locke. Moreover, Rawls's liberalism takes issue with a number of important philosophical ideas, such as perfectionism, utilitarianism, and natural rights.

Within the realm of contemporary political philosophy, Rawls's liberalism is a central touchstone. His ideas on justice and fairness, liberty and equality, and the individual and society have been extensively studied and critiqued from a wide variety of political perspectives, such as libertarianism, egalitarianism, communitarianism, and feminism. This, in turn, has led to a plethora of responses by philosophers and scholars sympathetic to Rawls's liberal project. Moreover, the importance of Rawls is not limited to simply the fields of politics and political philosophy. Rawls's ideas are also highly influential in the areas of meta-ethics and epistemology. He also represents an important figure in the areas of the

theory and practice of law. As will be discussed in this work, Rawls himself comments on a number of contemporary legal debates and legal scholars often look to his liberalism in guiding the evolution of constitutional jurisprudence.

In general terms, Rawls is a premier example of an important strain of political thought, which may be referred to as liberal-egalitarianism. This sort of liberalism attempts to incorporate two key political ideas. On the one hand, it recognizes the importance of individual choice and liberty. On the other, it also acknowledges the problems associated with social and economic inequalities, not only in regard to persons' abilities to lead a life of their own choosing, but also to the construction of a fair system by which citizens may debate and decide issues that affect all.

This liberal-egalitarianism is clearly evident in Rawls's two principles of justice which set out his basic framework for a just society. Rawls's liberal sentiments are expressed in the first principle, which guarantees all persons an equal and adequate set of basic liberties, understood as freedom from state coercion. This includes a range of political liberties which are intended to provide citizens with the equal legal right to participate in the political process. Rawls's egalitarian sentiments are also expressed in the first principle, with his special proviso guaranteeing the fair value of the equal political liberties, as well as the second principle of justice, which includes such ideas as the principle of fair opportunity and the difference principle.

While Rawls has incorporated egalitarian concerns into his liberal thought, he has not been immune from a host of egalitarian critiques. Key themes include the currency of equality, the scope of equality, and the issue of responsibility. The first centres on the “sense” or “context” in which persons are to be equal. On this front, Rawls has been criticized for emphasizing resources or primary goods, as opposed to a more complex sense of equality, such as capabilities or opportunity of welfare. As such, it is argued, Rawls fails to capture key inequalities important to justice. Another egalitarian challenge focuses on the scope of Rawls’s egalitarianism; that is, the range of social institutions that it is meant to apply to. Egalitarians have been critical of Rawls’s strict focus on the basic institutions or structures of society, arguing that it leaves out important private associations that undercut persons’ equality. Whereas the first challenge argues that Rawls fails to capture key inequalities by focusing on resources as the currency of equality, the second challenge argues that he fails to do so because he limits the sorts of social institutions to which his egalitarian principles apply. A third egalitarian challenge centres on the issue of responsibility and choice. Of particular concern is Rawls’s difference principle, a component of his second principle of justice. Under this critique, it is argued that the difference principle fails to adequately compensate for any unchosen unhappiness or disadvantage persons may suffer.



## **Rawls and Political Equality: The Egalitarian Question**

The purpose of this work is to develop a greater understanding of the nature and practical implications of Rawls's liberal-egalitarianism in the context of political participation. In *A Theory of Justice*, his first comprehensive statement of his theory of justice, Rawls introduces the principle of participation, which holds that all citizens are entitled to play an equal role in the political life of their society. In developing this idea of political equality, Rawls goes on to identify two important conditions: equal political liberties and the fair value or worth of these political liberties. For Rawls, political equality means not only that all enjoy the equal legal entitlement to participate in political life, but also that these legal rights are guaranteed their fair or equal value, taking into account social and economic circumstances.

What exactly does Rawls mean by the fair value of the political liberties? This represents the basic question of this work. Of particular importance is the sort of egalitarianism that Rawls advances with his idea of the fair value of the political liberties. Unlike other liberal approaches, such as libertarianism and liberal free-market views of democracy, Rawls recognizes that political equality requires addressing social and economic inequalities in political life. Nevertheless, how are these social and economic inequalities to be regulated? What sorts of principles underlie Rawls's egalitarianism in political participation?

These questions are important for a number of reasons. In the theoretical literature, there has been wide scholarly debate on Rawls's egalitarianism

generally. Far less attention, however, has been paid to his views on equality in political participation, particularly in regard to his later works. This is striking, considering that Rawls comes to approach the issue of equality in the political realm in a much different manner than in non-political life.

Following the publication of *A Theory of Justice*, this idea of the fair value of the political liberties was critically examined by Norman Daniels. According to Daniels, Rawls, like many other liberals, assumed that political equality could be achieved while still permitting significant social and economic inequalities in citizens' political participation. As Daniels states the issue:

Liberal political theory has traditionally attempted to provide a two-fold justification. On the one hand, liberal theorists have argued for the equality of various political liberties. Of course different theorists were concerned with different sets of equal basic liberties... On the other hand, while justifying some degree of equality in the political sphere, these liberal theorists at the same time accepted and justified significant inequalities in income, wealth, powers, and authority between both individuals and classes... Liberal theorists uniformly assume that political equality is compatible with significant social and economic inequalities, that they can exist together.<sup>1</sup>

Central to Daniels's critique was the assertion that Rawls leans on his difference principle to secure the value or worth of citizens' political liberties. However, as Daniels points out, this principle of distribution does not seek social and economic equality *per se*, but simply seeks to limit the sorts of inequalities that are justifiable in a just society. The effect of the difference principle is to

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<sup>1</sup> Norman Daniels, "Equal Liberty and Unequal Worth of Liberty" in *Reading Rawls* (New York: Basic Books, Inc., 1975), 253.

maximize the absolute stock of social and economic goods possessed by the least advantaged in society. As Daniels argues, however, Rawls must admit that the difference principle would permit significant social and economic inequalities in society. While it may be the case that those at the bottom have more than they otherwise would, there would be others that enjoyed higher levels of social and economic goods. With this in mind, Daniels points out that while all may possess the same political liberties, their value is quite unequal. Some in society will have greater levels of social and economic goods when exercising their political liberties. As a result, these social and economic elites will enjoy greater opportunities to influence the political process than others with lesser levels of social and economic goods.

In his later works, Rawls clarifies his notion of political equality in an attempt to deal with criticisms such as Daniels's. He does so by introducing a special proviso or condition to his first principle of justice, which guarantees persons the fair value of their equal political liberties. Like Daniels, Rawls recognizes that the difference principle is insufficient to ensure the fair value of the political liberties. As such, the special proviso in the first principle is intended to introduce a stricter egalitarianism to buttress the difference principle.

This change in Rawls's view of political equality has, however, been largely under-examined. While it has been clearly established that Rawls differs from non-egalitarian forms of liberalism, both in theory and in practice, the question of what sort of egalitarianism Rawls advances has been under-examined. In some

cases, his notion of political equality has been left in rather vague terms, as requiring “rough” or “approximate” social and economic equality in political participation. Where Rawls’s political equality is discussed in a more concrete manner, it is simply assumed that he is endorsing a radical egalitarian view of political equality.

The conclusion argued here is that Rawls, in the end, settles on a clear and modest notion of political equality. For Rawls, political equality simply seeks to prevent the privileged in society from using their social and economic advantages to exclude others and control the political process. While this moderate egalitarian view distinguishes Rawls from other non-egalitarian liberal views of political equality, it should not be confused with more radical egalitarian views of equality in political participation.

## **Conceptions of Political Equality**

In developing this conclusion, this work makes use of a number of critical distinctions. While these ideas are discussed in more detail throughout this work, it is useful to briefly describe them at the outset.

One approach to political equality holds that all citizens should have an equal or fair opportunity or chance to influence democratic outcomes. In this context, there exists an important debate concerning the nature and requirements of the notion of fair opportunity. A relatively uncontroversial claim is that citizens

require formal or legal liberties to participate. This formal notion of fair opportunity holds that all citizens should be legally permitted to participate in democratic institutions and, as such, should be provided with basic liberties or freedoms from state coercion. This includes the right to vote and run for political office, the freedom to form and join political associations, as well as the freedom to express one's political views to others. Claims for democratic rights made by the property-less, women, and ethnic groups in western democracies during the 1800s and 1900s can be understood as claims to fair opportunity in this formal sense.

Once we move beyond this formal notion, however, the issue of fair opportunity becomes much more controversial. Central is the issue of whether fairness further requires addressing social and economic inequalities in citizens' democratic participation. Should the state, for example, regulate the influence of money in democratic institutions by instituting spending limits for candidates, political parties and other participants? Or should citizens be free to decide for themselves what financial resources to bring to bear in their democratic participation?

One approach, advocated by those with libertarian or liberal free market sympathies, holds that the state should not be used to address economic inequalities. This position stems in large part from a negative view of state interference in citizens' conduct. The best sort of democratic system is one in which citizens are free as much as possible to decide their political conduct for

themselves, free from state interference. It is to be individual citizens, and not the state, which are to decide what resources and energies to bring to bear in democratic institutions. Under this non-egalitarian liberal view, then, fair opportunity is limited to the formal sense. All have a fair chance to influence democratic outcomes if all possess the same political liberties necessary to participate.

Another approach, often advanced by social democrats, Marxists and liberal-egalitarians, holds that the equality in formal liberties, while necessary, are nevertheless insufficient to ensure fair opportunity in democratic institutions. Social and economic inequalities can negatively impact citizens' opportunities to actually influence democratic outcomes. One may have the formal liberty to run for political office; nevertheless, they may not be able to do so as they lack the necessary financial resources. This actual notion of fair opportunity thus advocates state intervention in democratic institutions to address economic inequalities. The state may, for example, place limits on the amount of money that wealthy citizens can spend on their political speech, or provide subsidies to those with lesser financial resources.

Within this idea of actual fair opportunity, two further positions can be identified: moderate egalitarianism and radical egalitarianism. This distinction hinges on the questions of why and how social and economic inequalities should be addressed. For moderate egalitarians, these sorts of inequalities are problematic because they can permit the privileged in society to control or hijack political

institutions by excluding others. The super-rich, for example, can use their economic advantages to monopolize important means of political influence and, in turn, determine the outcome of key political events, such as elections. As such, liberal-egalitarians advocate democratic reforms which prevent the wealthy or socially privileged from using their advantages in these ways.

For radical egalitarians, social and economic inequalities are problematic for a very different reason. While control by social and economic elites is deplorable, the fundamental concern is ensuring that all have an equal influence or weight in deciding political outcomes, regardless of their social or economic situation. It should not be the case, for example, that those with greater wealth can exercise a greater level of influence simply because they can spend more money on their political participation than others. As such, radical egalitarians seek to create a level playing field, in which all can have an equal influence on political outcomes.

Not only do these two views of actual fair opportunity differ on the question of why social and economic inequalities need to be addressed, they also differ on the question of how they should be addressed. For radical egalitarianism, securing political equality in the sense that all have an equal influence or weight often requires minimizing social and economic inequalities as much as possible. In order to ensure the wealthy in society do not have a larger influence on political decision making than others, economic inequalities must be eliminated. Any

deviation from this strict equality would threaten fairness, as some would be able to use their greater resources to exercise a greater level of influence.

For moderate egalitarians, securing political equality does not necessarily demand this sort of strict egalitarianism. The objective is not to ensure that all have the same influence or weight in deciding political outcomes. The objective is to simply prevent the privileged in society from completely controlling outcomes by using their advantage to exclude others. Preventing control and exclusion, however, does not require minimizing economic inequalities as much as possible. All that it requires is preventing inequalities from becoming so large, that those at the top can effectively exclude those at the bottom from the political process.

These basic distinctions are useful in clarifying Rawls's conception of political equality. In sum, this work argues that Rawls can be most clearly understood as advancing a moderate egalitarian position, which acknowledges the importance of actual fair opportunity, but only insofar as is necessary to prevent the privileged in society from controlling political processes by excluding others. As such, Rawls diverges from other liberal views of political equality, such as libertarianism and liberal free-market views of democracy, which tend to reject the idea of the state intervention in order to address social and economic inequalities. Nevertheless, in doing so, Rawls does not adopt the radical egalitarian position that has been ascribed to him in the literature.



## Political Equality, Election Financing and the Courts

Why does it matter if Rawls endorses a moderate or radical egalitarian view of political equality? In addressing this issue, the practical importance of the two views of actual fair opportunity are emphasized. In sum, the distinction between moderate egalitarianism and radical egalitarianism can have significant implications when turning to the question of how the state may address social and economic inequalities.

In developing this conclusion, this work examines non-egalitarian liberalism, moderate egalitarianism and radical egalitarianism within the context of American and Canadian jurisprudence on the issue of election finance legislation. In particular, the cases of *Buckley v. Valeo*<sup>2</sup>, *Libman v. Quebec (A.G.)*<sup>3</sup>, and *Harper v. Canada (A.G.)*<sup>4</sup> are examined. These cases are useful in demonstrating how Rawls's liberal-egalitarianism differs from other liberal views of political equality, as well as the importance of distinguishing between moderate and radical egalitarianism. Interestingly, the two egalitarian views are largely conflated, not only in the literature on Rawls and the courts, but also by the courts themselves.

As will be argued, these egalitarianisms treat the issue of money and political advertising in very different ways. Moderate egalitarianism simply seeks to prevent wealthy groups from using election advertising to control the outcome

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<sup>2</sup> *Buckley v. Valeo* [1976] 424 U.S. 1

<sup>3</sup> *Libman v. Quebec (Attorney General)* [1997] 3 S.C.R. 569

<sup>4</sup> *Harper v. Canada (Attorney General)* [2004] 1 S.C.R. 827

of elections. Radical egalitarianism, by contrast, seeks to minimize financial inequalities between speakers, so that all may enjoy equal access to election advertising as a means of influencing the outcome of electoral processes.

This distinction, in turn, gives rise to alternative views on the Canadian Supreme Court's decisions in *Libman* and *Harper*. In those cases, the Court developed an important position on how governments ought to regulate political advertising. They rejected the idea that governments could impose a complete prohibition on advertising spending by so-called third parties; that is, individuals and groups not directly contesting elections and referendums. In the alternative, the Court suggested an approach based on the idea of upper limits on spending. In asserting their preference, the Court took the position that such limits alone were a sufficient means of promoting political equality.

Importantly, the two approaches to political equality would view the Court's position very differently. The moderate egalitarian approach, which this work ascribes to Rawls, would support the Court's position. As the objective is simply to prevent the wealthy from controlling elections by monopolizing key means of political influence, such as election advertising, a complete prohibition on advertising spending by so-called third parties would not be necessary. Moreover, an upper threshold on spending, which is sufficiently low to prevent the wealthy from monopolizing election advertising, would be sufficient to secure political equality in this sense.

The radical egalitarian view, by contrast, would take a very different perspective of the Court's position. Under this approach to political equality, a complete prohibition on spending by third parties could be understood as an important and necessary means of preventing the wealthy from attaining more weight than others in determining political outcomes, such as elections. This is particularly the case if one views electoral processes as competitions between candidates, political parties and referendum committees, and seeks to ensure financial equality between these competitors.

## **Organization of the Chapters**

This examination of Rawls' conception of political equality is organized into five chapters. Chapter One introduces Rawls' theory of justice, with particular emphasis on his conception of political equality. Rawls derives his conception of political equality through social contract theory. Using a hypothetical social contract model, which he refers to as the original position, Rawls argues that persons would agree to two principles of justice. These two principles are intended to govern the structure of basic social institutions, including the political process. Importantly, these two principles express Rawls' liberal-egalitarianism. The first principle's emphasis on liberty represents the traditional liberal view that persons should be accorded freedom from the state in living the life of their own choosing. The second principle's emphasis on social and economic equality expresses the egalitarian nature of Rawls' theory, and his

recognition that justice requires the regulation of socio-economic inequalities in persons' lives.

This liberal-egalitarianism influences Rawls's approach to political equality. For Rawls, political equality is primarily concerned with procedural fairness in political life, as opposed to equality of outcomes. In sum, citizens are to have a fair opportunity in their political participation. Moreover, this fair opportunity entails not only formal equality, but also some measure of actual fair opportunity, which requires preventing certain social and economic inequalities from degrading citizens' abilities to influence political outcomes. Of particular importance for Rawls is guaranteeing the fair value or worth of citizens' political liberties. The chapter concludes by asking an important question: what does this idea of the fair worth of the political liberties entail?

Chapter Two begins to develop this idea by contrasting it with non-egalitarian liberal approaches, such as libertarianism and the liberal free market view of democracy. Central to this non-egalitarian thought is an emphasis on individual choice and freedom from state interference. In the context of political participation, this implies that citizens are to be equally free from the state to choose what energies and resources to bring to bear in democratic institutions. As such, it is highly critical of attempts by the state to regulate money in political processes. This chapter then contrasts this view of political equality with Rawls's liberal egalitarianism.

The practical importance of this distinction between these two liberal views is discussed by examining American and Canadian jurisprudence on the issue of freedom of political speech and electoral financing laws. Rawls himself enters the debate by criticizing the highly libertarian views of the United States' Supreme Court in *Buckley v. Valeo*. The distinction between Rawls and non-egalitarian liberalism has also been developed in the context of Canadian jurisprudence, with commentators arguing the Canadian Supreme Court endorsed a Rawlsian view of political participation in *Libman v. Quebec (A.G.)*.

Chapter Three turns to the critical issue of this work: what sort of egalitarianism does Rawls endorse in his conception of political equality? In doing so, the Canadian Supreme Court's decisions in *Libman* and *Harper* are examined from the perspective of moderate and radical egalitarianism. It is argued that these two views represent important practical positions on how the state should address social and economic inequalities. In doing so, this chapter examines the Canadian Supreme Court's position regarding the sorts of regulations governments can impose on third party spending during elections and referendums. From this examination, it is argued that the moderate and radical egalitarian approaches would view the Court's position in very different ways. The question is then posed: what sort of egalitarianism does Rawls endorse, moderate or radical egalitarianism?

Chapter Four begins to work through Rawls's egalitarianism by examining a number of egalitarian critiques of his early work. Particular attention is paid to

Daniels' radical egalitarian critique, which stresses the inadequacy of Rawls's theory in securing true political equality. As discussed above, Daniels attacks Rawls's distinction between the equal political liberties and the equal worth of those liberties, arguing that his difference principle fails to secure the latter. As a result, Daniels suggests that Rawls should adopt a radical egalitarian view of political equality, which moves beyond the difference principle.

Chapter Five explores Rawls's response to radical egalitarian challenges, such as the one posed by Daniels. Particular attention is given to Rawls's later addition of the special proviso in his first principle of justice and what it might entail for his conception of political equality. The chapter surveys available literature on this change to Rawls's theory, highlighting the fact that there exists very little attention to the issue. Moreover, the limited commentary that does exist tends to ascribe a radical egalitarian view of political equality, similar to the one espoused by Daniels in his early critique. The chapter then goes on to critically assess this interpretation, arguing for an alternative understanding of Rawls, based not on radical egalitarianism, but moderate egalitarianism.

Chapter Six explores a number of key questions for further study. What would Rawls's notion of political equality say to more recent American and Canadian political events regarding election financing? Of concern is the recent US Supreme Court decision in *Citizens United* and its implications for spending by wealthy individuals through Super PACs. Another concern is the Canadian government's decision in 2011 to phase out public subsidies for political parties.

Other questions examined: how would Rawls's notion of political participation deal with the concerns of deliberative democracy? What does Rawls's theory of political equality entail for basic institutions outside of the formal political process? Finally, is Rawls's emphasis on preventing control and monopolization by elites far too narrow?

## **Chapter Two**

### **Justice as Fairness and Political Equality**

#### **Introduction**

John Rawls is a key figure in contemporary political philosophy. In a number of important works, *A Theory of Justice* (1971), *Political Liberalism* (1993) and *Justice as Fairness: A Restatement* (2001), Rawls provided an account of justice which incorporates two important streams of thought: liberalism and egalitarianism. The purpose of this chapter is to provide an introduction to Rawls's theory of justice, with a particular emphasis on his approach to political equality. In doing so, this chapter focuses on Rawls's early discussion of justice and political equality, as found in *A Theory of Justice*.

Rawls derives his liberal theory of justice, which he refers to as "justice as fairness," from social contract theory. This sort of justification holds that the agreement of persons to a set of social arrangements shows that those arrangements have some normative property, such as being legitimate, just or obligating. Using a hypothetical social contract model, which he refers to as the original position, Rawls argues that persons would agree to two principles of justice. These principles, in turn, are intended to govern the structure of basic social institutions, including political equality.



Using his two principles of justice, Rawls incorporates two important strains of thought: liberalism and egalitarianism. With his first principle, Rawls recognizes a basic tenet of liberal political philosophy: individual liberty. With his second principle, Rawls introduces egalitarian concerns about the distribution of economic and social resources in society. Taken as a whole, these two principles form an important philosophical position, liberal-egalitarianism, which stands in sharp contrast with other liberal traditions.

This liberal-egalitarianism, moreover, frames Rawls's general approach to the issue of political equality. For Rawls, political equality is understood in terms of procedural fairness: political institutions and processes are to be structured in such a manner as to provide all with a fair chance or opportunity to influence outcomes. In order to secure this procedural fairness, not only must all citizens enjoy key political liberties, such as the right to vote and run for political office, these liberties must be guaranteed their fair value or worth. This means addressing social and economic inequalities, so that all have a fair chance in their political participation, regardless of their class.

What precisely does Rawls mean by the "fair value" of the political liberties? The remainder of this work focuses on this question. In the next chapter, Rawls's liberal notion of political equality is contrasted with libertarianism. Of particular importance is Rawls's contention that political equality requires more than simply formal fair opportunity or equal legal rights to participate in the

political process. Also important is actual fair opportunity, which takes into account citizens' social and economic circumstances.

## **Social Contractarianism and the Original Position**

In outlining Rawls's liberal-egalitarian theory of justice, it is useful to begin with his social contract theory. Rawls leans heavily on social contract theory to justify his two principles of justice, which, in turn, frame his approach to political equality. What is social contract theory? What sort of social contract model does Rawls employ?

Social contract theory is an influential tradition in western political philosophy, which can trace its roots back to early Greek thought. In Plato's *Crito*, Socrates relied on an argument akin to a social contract to explain why he must remain in prison and accept the death penalty. Social contract theory was given its first full exposition by Thomas Hobbes in 1651 with his influential book *Leviathan*. Other modern political and moral works, such as John Locke's *The Second Treatise on Government* (1690), Jean-Jacques Rousseau's *On the Social Contract* (1762) and Immanuel Kant's *Metaphysical Elements of Justice* (1797), also relied upon social contract theory. More recently, Rawls revived the social contract approach with the publication of *A Theory of Justice* in 1971, and was followed by other contemporary philosophers, such as David Gauthier.

Social contract theory is a particular approach to justifying moral, social and political principles. It holds that the agreement or consent of all persons to a set of social arrangements shows that those arrangements have some normative property, such as being legitimate, just, obligating, etc. Beyond this basic idea, however, social contract theories diverge greatly from one another.<sup>5</sup> They can differ in the type of agreement (historical or hypothetical), their description of the parties to the agreement, and the object of the agreement (moral principles, civil society or political sovereign).

Rawls relies on a hypothetical social contract, which he refers to as the original position. This model is “hypothetical” in the sense that it did not actually occur in history, explicitly or implicitly. As such, Rawls is not claiming that certain social arrangements are just because they resulted from an actual, historical agreement made by persons or citizens. Instead, the original position is intended to operate as a fair and impartial point of view from which to reason about the fundamental principles of justice. Rawls’s claim, therefore, is that certain social arrangements are just because they could be agreed to under this impartial and fair point of view.

The hypothetical original position is constituted by parties who are charged with the task of deliberating about justice and deciding how society is to be ordered. In organizing this deliberation, Rawls places a number of constraints on the parties. Importantly, their deliberation is to take place behind what Rawls

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<sup>5</sup> For an overview of the different traditions in social contract theory, see David Boucher and Paul Joseph Kelly’s “The Social Contract and Its Critics: An Overview”, in ed. Boucher and Kelly, *The Social Contract from Hobbes to Rawls*, (Routledge, 1994).

refers to as a “veil of ignorance.” With this veil, parties must negotiate blindly, as they are unaware of the background situation of those they represent. As Rawls states, “no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like.”<sup>6</sup> Furthermore, “the parties do not know their conceptions of the good or their special psychological propensities.”<sup>7</sup>

According to Rawls, the veil of ignorance ensures that the outcome of the agreement stems from an impartial and fair situation. As none of the parties are aware of their place in society, none will advocate principles of justice which favour one class or segment of society over another. As Rawls states, the veil of ignorance “ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances.”<sup>8</sup> Moreover, “since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain”<sup>9</sup> For Rawls, the original position is “the appropriate initial status quo, and thus the fundamental agreements reached in it are fair.”<sup>10</sup> In sum, as the original position is a fair situation from which to deliberate about justice, its outcome must also be considered fair.

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<sup>6</sup> John Rawls, *A Theory of Justice*, (Cambridge: The Belknap Press of Harvard University Press, 1971), 12.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

It is important to note that while the original position represents the central mechanism for justifying his two principles of justice, Rawls relies on other sorts of justificatory devices to buttress his theory of justice as fairness. In his later work, *Political Liberalism*, Rawls introduces the idea of the overlapping consensus, which is intended to deal with the problem of stability. With this idea, he argues that a stable society can be achieved if all citizens are willing to obey basic laws. For Rawls, however, citizens need not come to this consensus for the same reasons. Instead, different individuals and groups in society may have their own reasons for supporting the basic laws of society, which are internal to their own conceptions of the good life. Rawls argues that justice as fairness is capable of forming just this sort of overlapping consensus; most in society, regardless of their particular views of the good life, can willingly obey laws which are consistent with the two principles of justice.

## **The Two Principles of Justice**

From the impartial and fair situation of the original position, Rawls argues that parties would agree to two principles of justice. In *A Theory of Justice*, Rawls summarizes the principles as follows:

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

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.<sup>11</sup>

The first principle is to be used for specifying the political constitution of a society, while the second principle is intended to apply primarily to social and economic institutions. As will be discussed throughout this work, however, the second principle can have important implications for the legal rights specified in the first principle.

Under the first principle, each person is to have an equal right to the most extensive basic *liberty*. The term "liberty" is used by Rawls to denote a specific sense or dimension of freedom; namely, freedom from external coercion in one's life.<sup>12</sup> At the root of this sense of liberty is the idea of negative freedom, which holds that persons are "free" or "at liberty" to the extent that they are free from external interferences. Of particular concern to the first principle is freedom from state coercion, such as legal prohibitions and compulsions. This includes laws instituted by legislatures, backed by sanctions, which prohibit persons from doing (or not doing) something. In sum, then, the first principle is meant to guarantee for all the most extensive basic freedom from state coercion. According to Rawls, this includes "political liberty (the right to vote and to be eligible for public office)

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<sup>11</sup> Ibid, 60. Since *A Theory of Justice*, Rawls has made significant revisions of his two principles of justice. These revisions are discussed in Chapter Four.

<sup>12</sup> A detailed discussion of the idea of "negative freedom" can be found in Isaiah Berlin, *Four Essays on Liberty* (London: Oxford University Press, 2002). In developing the concept of "formal liberty", the idea of freedom as a triadic relation is relied upon, as found in Gerald MacCallum, "Negative and Positive Freedom" *Philosophic Review* 76 (1967) , as well as the idea of coercions, as found in Joel Fienberg, *Social Philosophy*, (Prentice Hall, 1973).

together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.”<sup>13</sup>

The second principle of justice applies to the distribution of social and economic goods or resources in society, as well as the design of basic social institutions that exercise authority. The first stipulation, referred to as the difference principle, holds that social and economic inequalities are to be arranged so that they may be reasonably expected to be to everyone’s advantage. As will be discussed in later chapters, the difference principle does not necessarily require an equal distribution of social and economic resources. It simply holds that inequalities may only be justified on the grounds that they are to the benefit of the least well off.<sup>14</sup> The second stipulation, referred to as the principle of fair equality of opportunity, holds that positions and offices of power in basic social institutions are to be open to all under conditions of fair equality of opportunity. For Rawls, positions are to be organized under conditions of procedural fairness, in which all have a fair chance to attain them.<sup>15</sup>

According to Rawls, parties in the original position would agree to arrange the two principles in serial order, with the first being prior to the second. This serial ordering expresses a justificatory hierarchy between the various principles, which prohibits departures from the higher principle being justified by advances in the lower principle. As such, “a departure from the institutions of equal liberty

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<sup>13</sup> Ibid, 61.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

required by the first principle cannot be justified by, or compensated for, by greater social and economic advantages.”<sup>16</sup>

This serial ordering, however, does not imply that the state may never limit citizens’ liberties. All that it suggests is that departures from the first principle cannot be justified on a specific ground; namely, greater social or economic advantage. Limits on liberty may only be permitted for the sake of liberty itself.<sup>17</sup> In understanding this ground, it is important to remember that the first principle provides persons with an entitlement to an equal and most extensive system of liberty. With this in mind, Rawls asserts two cases in which the first principle may be justly deviated from.<sup>18</sup> First, a less extensive liberty must strengthen the total system of liberty shared by all. Second, a less than equal liberty must be acceptable to those citizens with the lesser liberty.

The two principles of justice, taken as a whole, express an important view of government and society, which is liberal in its basic nature, but also incorporates egalitarian themes. Rawls’s first principle clearly expresses the liberal commitment to individual liberty, understood in terms of persons being free from external coercion in their lives; particularly, legal or state coercion. Persons are to be free from legal constraints to practice the religion of their choice, to develop and express their own thoughts, and to participate in society’s political institutions. Conversely, the state is to respect this individual liberty and,

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<sup>16</sup> Ibid, 60.

<sup>17</sup> Ibid, 244.

<sup>18</sup> Ibid.



as much as possible, should not impose laws which restrict persons' choices in these areas.

While the first principle clearly expresses the liberal value of individual liberty, Rawls's second principle incorporates an egalitarian value: a fair or just society is one in which social and economic inequalities are addressed. As will be discussed in the next chapter, the egalitarian nature of the second principle sharply distinguishes Rawls from other liberal views, particularly those commonly associated with libertarianism. While libertarians argue that social and economic inequalities are fair, so long as they are the result of free choice, Rawls disagrees. For him, social and economic inequalities can be highly detrimental to a just society. The second principle of justice, with the difference principle and idea of fair opportunity, is intended to secure this broader notion of fairness.

### **Political Equality and Procedural Fairness**

Using social contract theory, Rawls derives two principles of justice, which set out a particular view of government and society. This view is liberal in its basic nature, but also incorporates egalitarian values. Furthermore, the two principles are intended to apply to what Rawls refers to as the basic structure of society or "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social

cooperation.”<sup>19</sup> While Rawls does not provide an exhaustive list of these major social institutions, he does put forth some examples, such as the “political constitution and the principal economic and social arrangements”, including “the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family”.<sup>20</sup>

Another major social institution recognized by Rawls is the political institutions and process by which citizens determine the laws under which they live. This includes a broad range of subjects, such as the type of government, the operation of legislatures, the role of courts, the electoral process, and the forums by which citizens express and debate their political views. The two principles of justice are intended to organize the structure of these political institutions and citizens’ participation in them. More specifically, for Rawls, the two principles of justice should ensure political equality for all, understood as fair opportunity in political participation.

What precisely does Rawls’s political equality as fair opportunity entail? While this represents the basic question of this work, it is useful to introduce a number of basic ideas at the outset. First, Rawls approaches the issue of political equality primarily from the perspective of procedural fairness. Second, in order for citizens to enjoy political equality in this procedural sense, not only must citizens possess an equal set of basic political liberties, these political liberties

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<sup>19</sup> Ibid, 7.

<sup>20</sup> Ibid.

must be guaranteed their fair or equal worth. Third, in assessing the fair worth of the political liberties, one must take into account citizens' social and economic context.

To begin, Rawls conceives of political equality primarily in terms of procedural fairness. This is evident with his contention that political equality is to be understood as securing for all fair opportunity in their political participation. In discussing the concept of "fair opportunity" generally, Rawls states that the "intuitive idea is to design the social system so that the outcome is just whatever it happens to be, at least so long as it is within a certain range."<sup>21</sup> In this context, fair opportunity is intended to "insure that the system of cooperation is one of pure procedural justice."<sup>22</sup>

What does this idea of pure procedural justice entail? Rawls contrasts three different conceptions of procedural justice: perfect, imperfect, and pure.<sup>23</sup> Perfect procedural justice is based upon two characteristics. First, there is an independent criterion for what is a fair distribution of outcomes, which is defined separately from and prior to the procedure which is to be followed to achieve those outcomes. Second, there exists a way to devise a procedure that is sure to give the desired outcome. For example, Rawls introduces the case of equally dividing a cake amongst a number of persons. One solution is to have one person divide the cake and receive the last piece, while the others are permitted to select a piece before him. The result is that the person should cut equal pieces, so as to

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<sup>21</sup> Ibid, 85.

<sup>22</sup> Ibid, 87.

<sup>23</sup> Ibid, 85-87.

ensure he/she receives their fair share. Such a case exemplifies perfect procedural justice. There is an independent criterion for a fair distribution of outcomes; each person should receive an equal piece of the cake. Moreover, there exists a procedure to ensure the desired outcome; one person cuts the cake and receives the last piece.

The second conception of procedural justice, imperfect procedural justice, differs from the perfect model. While there may be an independent criterion for what is a fair distribution of outcomes, there is no feasible procedure to ensure this result. In this context, Rawls introduces the example of a criminal trial. The desired outcome of such a trial is to find the defendant guilty of the charges if, and only if, he/she has committed the offense. Moreover, while trials are structured in such a manner to search for the truth, it is not always the case that the correct outcome is achieved. Even though the law is followed and the trial is conducted in a procedurally correct manner, it may still reach the wrong outcome. An innocent person may be wrongly convicted of an offence or a guilty individual may be found innocent. As such, criminal trials are examples of imperfect justice in so far as there is an independent criterion for assessing the appropriate outcome, but no perfect procedure by which to attain it.

In contrast to both imperfect and perfect procedural justice, Rawls posits pure procedural justice. Central to this model is the lack of an independent criterion for assessing the right result or outcome. As such, assessments of justice focus on the procedures governing the process or institution. So long as the

procedures are considered fair, and are properly followed, then the outcome or result is to be considered just. Rawls relies on the case of gambling as an example of pure procedural justice. In the context of gambling, there is no independent criterion for assessing the right result of the game, which is separate from and prior to the procedures. Judgments of fairness, instead, are based on whether the outcome has been the result of a series of fair bets. If the rules for betting are considered fair, and are properly followed during the course of the game, then the final outcome is judged to be the correct one.

According to Rawls, the notion of fair opportunity is intended to bring about this pure procedural justice in society. So long as it is the case that all have a fair opportunity, then the final distribution of power and benefits is to be considered just, whatever it may be. In developing this idea further, it is useful to examine the issue of gender and employment. In many modern western economies, women are under-represented in the workforce, particularly in regard to holding high-paying executive positions. Under perfect procedural justice, one might argue that women should hold half of all executive positions, as they represent half of the population and workforce. The objective, therefore, would be to design hiring practices which would bring about this outcome, such as instituting hiring quotas for women.

Rawls's notion of fair opportunity takes a very different approach. As it is grounded in pure procedural justice, there is no independent criterion by which to judge right outcomes. As such, the fact that women are under-represented in

executive positions would not, in-of-itself, render the employment market unjust. Instead, one would have to look to the practices by which executives are hired and ask whether they are fair to all candidates, regardless of their sex. It may be the case, for example, that women are commonly discriminated against due to an unfounded belief that they possess inferior business leadership skills. Under Rawls's view, this discrimination in hiring practices would render the outcome unjust. The issue, however, is not that women are denied their equal share of executive positions. The concern, instead, is that the outcomes were based on hiring practices that were unfair to women.

What about in the context of political participation? Many democracies throughout history have exhibited great inequality in the distribution of elected offices amongst gender, racial and religious groups. The 2008 Canadian federal election set records both in terms of the number of women elected to the House, as well as their percentage of all MPs. Out of the 308 elected MPs, however, only 69 were women, representing only 22 percent of all MPs.<sup>24</sup> Visible minorities also have limited presence in the House. In the 2004 election, this group only accounted for seven percent of all MPs elected, while comprising an estimated 15 percent of the Canadian population.<sup>25</sup>

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<sup>24</sup> Andrew Heard, *Women and Elections*, Elections, <http://www.sfu.ca/~aheard/elections/women.html> (September 13, 2010).

<sup>25</sup> Black & Hicks. *Visible Minorities and Underrepresentation: The Views of Candidates*, Elections Canada, [http://www.elections.ca/eca/eim/article\\_search/article.asp?id=145&lang=e&frmPageSize=&textonly=false](http://www.elections.ca/eca/eim/article_search/article.asp?id=145&lang=e&frmPageSize=&textonly=false) (December 2006).

On the equality of outcomes view, one would find this under-representation unjust as it fails to accord with an independent criterion concerning proper outcomes. One might argue, for example, that political equality demands that representation in the House should be distributed equally or proportionally amongst social groups in society. As women represent half of the Canadian population, they are entitled to half of the seats in the House. Similarly, visible minorities should be accorded a share of seats which approximates their represented in the larger population. The task is thus to design procedures which will ensure this equality of outcome. One possible avenue would be the introduction of quotas, in which seats in the House were reserved only for candidates with a particular gender, racial or religious background.

Again, Rawls's notion of fair opportunity approaches the problem in a much different way. At issue are the procedures by which persons contest for election to the House and whether all have a fair opportunity to become an MP, regardless of their sex or ethnicity. The fact that women and visible minorities are under-represented would not necessarily imply that elections are unjust. If, however, fair opportunity was denied to women or visible minorities, then the outcome would be called into question. One example would be a law that prohibited women or other segments of society from running for political office. Such a law would clearly represent an unfair procedure insofar as it completely denies women the opportunity to become an MP. It is, however, the existence of this unfair procedure, and not the under-representation in outcomes, which points to the injustice of the electoral system.

## **Inequality and Fair Opportunity in Political Participation**

For Rawls, then, political equality is understood primarily in terms of procedures, as opposed to outcomes. This raises another important question: what sorts of conditions would render persons' opportunities in political participation unfair?

Underlying this question is the issue of inequality and the political advantages that can result from inequalities between persons. Some in society possess greater levels of natural skills and talents. Some enjoy higher levels of education and training. Some enjoy greater levels of income and wealth. Others enjoy higher social status, whether it is due to their profession, family background, gender, ethnicity or even physical appearance. All of these factors can provide individuals with advantages in political participation. An electoral candidate with strong public speaking skills may have an advantage over a candidate who struggles with public speaking. Similarly, a candidate who has a similar ethnic or religious background to the majority of voters may have a better chance of being elected than a candidate who is a visible minority, or who practices a different religion. Still further, a wealthy candidate who can afford to spend millions of dollars on their campaign may have a better chance of winning than a poor candidate that must run their campaign on very small budget.



For Rawls, then, what sorts of inequalities would render persons' opportunities in political participation unfair? In addressing this question, it is useful to examine Rawls's principle of participation, which is intended to apply to political life in a society. According to Rawls, this principle holds that "all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply."<sup>26</sup> In defining what this "equal right" entails, Rawls goes on to introduce two key ideas: the 1) equal political liberties and 2) the fair value or worth of the political liberties.

With the first idea, Rawls prohibits inequalities in citizens' legal entitlements to participate. All citizens are to enjoy the same set of basic political liberties, including the right to vote, run for public office, freedom of speech and assembly, and the liberty to form political associations. It should not be the case that some have the right to vote in elections, while others do not. Nor should some be legally allowed to run for public office, while others are denied the right. Fair opportunity in political participation, instead, requires all citizens to be equally entitled to participate in the political life of their society, at least in the legal sense.

What about other sorts of inequalities, such as inequality in wealth or social status? Do these sorts of conditions also render political participation unfair? In this context, it is important to examine the second element of Rawls's principle of participation: the equal worth or value of the political liberties. With

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<sup>26</sup> John Rawls, *A Theory of Justice*, (Cambridge: The Belknap Press of Harvard University Press, 1971), 221.

this condition, Rawls asserts that the constitution “must take steps to enhance the value of the equal rights of participation for all members.”<sup>27</sup> Moreover, “ideally, those similarly endowed and motivated should have roughly the same chance of attaining positions of political authority irrespective of their economic and social class.”<sup>28</sup> For Rawls, then, it is not simply enough to ensure that all enjoy the legal right to participation, understood as all possessing an equal set of political liberties. Also important is ensuring that those political liberties have value or worth for persons, taking into account their social and economic circumstances.

This raises a number of questions. Why might social and economic inequalities impact the value or worth of a political liberty? How are these inequalities to be addressed? What are the practical implications of this position? These questions are dealt with in detail in subsequent chapters. For the moment, it is sufficient to simply note that Rawls is making an important distinction between the legal possession of political liberty and its actual value or usefulness to persons. For Rawls, it may be that all possess the legal right to participate in the political process. All have the right to vote, run for political office, express their political views, and form political associations. Nevertheless, for Rawls, the actual value or usefulness of this right depends in large part on one’s social and economic circumstances. In most western democracies, all citizens enjoy the legal right to run for political office. There exist no laws barring them from doing so.

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<sup>27</sup> Ibid, 224.

<sup>28</sup> Ibid, 225.

Nevertheless, for many, the right carries with it no actual value, as they lack the financial resources to mount a successful campaign.

For Rawls, then, not only would legal inequalities render political participation unfair, social and economic inequalities can also be problematic. This is particularly the case when these sorts of inequalities cause the political liberties of some in society to be worthless or useless in actuality.

## **Conclusion**

Rawls provides an account of justice which incorporates two important streams of thought: liberalism and egalitarianism. In doing so, Rawls grounds his approach to justice in social contract theory. Using a hypothetical social contract model, which he refers to as the original position, Rawls argues that persons would agree to two principles of justice. These principles, in turn, are intended to govern the structure of basic social institutions, including political equality.

Rawls's liberal-egalitarianism is evident in his two principles of justice. The first principle reflects the liberal commitments to individual liberty. The second principle, by contrast, incorporates important egalitarian concerns about the distribution of economic and social resources in society. This liberal-egalitarianism frames Rawls's notion of political equality. For Rawls, political equality is to be understood in terms of procedural fairness. Citizens are to be guaranteed a fair chance or opportunity to influence political outcomes.

Moreover, Rawls posits two important criteria for ensuring this procedural fairness. On the one hand, all are to possess an equal set of political liberties. On the other, these political liberties are to be guaranteed their fair value or worth.

The latter stipulation is significant, as it entails that steps should be taken to address social and economic inequalities in citizens' political participation. For Rawls, political equality is more than simply formal fair opportunity. Also important is that citizens are guaranteed some measure of actual fair opportunity in their political life. Citizens of similar natural talents and motivations should have a relatively similar chance in their political participation, regardless of their social and economic class of origin.

What precisely does Rawls mean by the "fair value" of the political liberties? The next chapter begins to unpack this idea by contrasting Rawls's liberal-egalitarian notion of political equality to other, non-egalitarian, liberal views. Particularly important is Rawls's commitment to actual fair opportunity and his recognition that steps should be taken to address social and economic inequalities in the political realm.

## **Chapter Three**

### **Rawls, Liberalism, and Political Equality**

#### **Introduction**

Rawls advances a liberal-egalitarian notion of political equality, understood as fair opportunity in political participation. This notion of political equality is grounded on the idea of procedural fairness: all are to have a fair chance when participating in the political process. Not only must all enjoy the same political liberties, steps must also be taken to ensure that social and economic inequalities do not negatively impact the value of the political liberties for all.

Why must steps be taken to address social and economic inequalities?

What are the practical implications of this position? This chapter begins to deal with these important questions by contrasting Rawls's notion of political equality to other strains of liberalism; in particular, libertarianism and free-market liberalism. These non-egalitarian liberal views favour a minimalist state and reject the idea that the state should be used to address social and economic inequalities. Rawls's liberal-egalitarianism, by contrast, supports such actions by the state. This is due to his recognition that fairness requires more than simply formal equality. Also important is that persons' basic liberties, such as those associated with political participation, be guaranteed their fair value or worth.

Importantly, Rawls himself enters into this debate, criticizing early American jurisprudence; in particular, the United State Supreme Court's decisions in *Buckley v. Valoe*.<sup>29</sup> According to Rawls and other legal commentators, the U.S. Court endorsed a non-egalitarian liberal view, rejecting the idea that the state should be permitted to address economic inequalities in elections by restricting the amount of money citizens can spend on their political participation. Adopting a more egalitarian stance, Rawls argued the American Court failed to recognize the importance of securing the fair value of the political liberties and the need for the state to regulate money in elections. Since Rawls's death, these issues have again come to the forefront. In the recent *Citizens United* decision, a majority of the US Supreme Court struck down legislation that limited electoral spending by unions and corporations. The majority relied upon reasons similar to those found in *Buckley*. This has given rise to concern over the ability of wealthy individuals to influence electoral outcomes through Super PACs. This issue is discussed in greater detail in Chapter Six.

The contrast between Rawls and non-egalitarian liberalism has also been developed in the context of Canadian jurisprudence. Citing the cases of *Libman v. Quebec (A.G.)* and *Harper v. Canada (A.G.)*, Canadian legal commentators have ascribed to the Canadian Supreme Court an egalitarian view of electoral finance laws, similar to Rawls' view of political equality. Like Rawls, the Canadian Court acknowledged that fairness required addressing economic inequalities in citizens'

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<sup>29</sup> For Rawls's examination of the *Buckley* case see John Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993), 359-363. Also see John Rawls "The Basic Liberties and Their Priority", *The Tanner Lectures on Human Values, Vol. III* (Salt Lake City: University of Utah Press, 1982).

political participation. Moreover, in order to promote fairness, the state should be permitted to limit citizens' freedom of expression, at least insofar as restricting the amount of money they can spend on their political speech. The issue of money and election financing has again become an important issue in Canadian politics. In 2011 the Canadian government moved to phase out public subsidies for political parties. This issue is explored in greater detail in Chapter Six.

## **Non-Egalitarian Liberalism and Political Equality**

An important position in liberal political thought is a rejection of the idea that the state should be used to address social and economic inequalities, not only within political institutions and processes, but throughout society. This liberal position is most clearly expressed within libertarianism and free market liberalism.

One of the most modern influential works on libertarianism is Robert Nozick's *Anarchy, State, and Utopia*.<sup>30</sup> According to Nozick, the state ought to do nothing more than enforce persons' negative liberty rights and contracts with one another. In arguing this position, Nozick describes individual human beings as inviolable ends-in-themselves and self-owners. The former represents a basic moral principle: that individual human beings, as rational agents endowed with self-awareness, free will, and the possibility of formulating a life plan, cannot be treated as mere things or used against their will. The latter, self-ownership, is the

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<sup>30</sup> Robert Nozick. *Anarchy, State and Utopia*. (New York: Basic Books, 1974)

claim that individuals own themselves; they own their bodies, talents, abilities and labour. Furthermore, not only do they own themselves, they also own their products; that is, the fruits of their talents, abilities and labour.

From this basic view of individuals, Nozick develops a libertarian approach to rights and the state. Of particular importance for Nozick is the idea that persons have a right to their life, liberty and labour, which is to be understood in terms of negative liberty or freedom. Persons have the right to possess and dispose of their bodies, talents, abilities, labour and products as they see fit. Moreover, others are morally obliged not to interfere with this negative right. Others cannot, for example, kill or maim an individual, as this would constitute destroying or damaging the free use of their property. Nor can others force an individual to work against their will, or to appropriate the products of their talents, abilities and labour, as this would involve stealing their property.

This emphasis on self-ownership and negative liberty has important implications for the state. Persons are to be free from the state to decide for themselves how to use and dispose of their bodies and products. This means that the state cannot constrain persons in a wide range of conduct, such as their religious practices, speech and associations. Moreover, according to Nozick, the state cannot appropriate individuals' labour and property to address social and economic inequalities. As such, the welfare state, which seeks to redistribute economic and social goods, represents a kind of forced labour and slavery. Through the welfare state's system of taxation, persons are forced to work for the



state insofar as they must labour in order to pay taxes in support of public social programs. Moreover, as the welfare state creates entitlements to these social programs, it in effect provides others with an entitlement to one's labour and property. The result, for Nozick, is a sort of slavery.

In rejecting the welfare state, Nozick favours a minimal state, or what he refers to as a "night-watchman state." The purpose of this state is to simply enforce individual liberty rights and persons' contracts with one another. The state is thus not directly involved in the distribution of goods. It is instead handled by the fair transfer of goods between individuals, in which everyone is free to exchange with one another. The state simply enforces this free exchange of goods and the contracts between persons that arise. To go beyond this minimal state would, for Nozick, conflict with the basic moral view of human beings as inviolable ends-in-themselves and self-owners.

From this sort of libertarianism, one can develop important implications in the context of political equality and participation. While all are to be legally free to participate in democratic institutions, the state should not be used to address social and economic inequalities. The state should not, for example, place limits on citizens' decisions regarding what resources and labour to bring to bear in their political participation. The state should not restrict how much money persons can contribute to their preferred candidate or political party or how much money candidates, parties and their supporters can spend on campaigning and political advertising. Nor should the state be permitted to use taxation in order to subsidize

the political participation of those with lesser financial resources. Each of these sorts of actions would be inconsistent with the view of persons as self-owners, and the idea that individuals should be free to decide for themselves how to dispose of their labour and property.

In sum, libertarianism would reject the idea that the state should be used to address social and economic inequalities in citizens' political participation. Libertarianism, however, is not the only sort of liberalism to do so. Another non-egalitarian strain of liberalism is the "free-market" or "economic" view of democracy, espoused by political theorists and scientists influenced by the work of Joseph Schumpeter.<sup>31</sup> It is important to note, however, that this sort of liberalism rejects egalitarianism for very different reasons. For libertarians, the redistributive or welfare state conflicts with certain inviolable rights held by individuals. For free-market, economic liberalism, the concern is that such state action will be detrimental to individual sovereignty and the optimal equilibrium in the political market.

This school of democratic theory has been thoroughly discussed elsewhere; in particular, C.B. Macpherson's *The Life and Times of Liberal Democracy* (1977), as well as Carole Pateman's *Participation and Democratic Theory* (1970). Central is a desire to move away from what Schumpeter calls the "classical doctrine" of democracy, which holds that democratic participation is a

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<sup>31</sup> Joseph Schumpeter, *Capitalism, Socialism, and Democracy*. (New York: Routledge, 2006). In *The Life and Times of Liberal Democracy*, C.B. Macpherson refers to the early work of Robert Dahl, as well as Bernard Berelson, Paul Lazarsfeld, William McPhee, Gabriel Almond, and Sidney Verba, as examples of political theorists who took up the basic ideas set out by Schumpeter in *Capitalism, Socialism, and Democracy*.

valuable means of pursuing social or moral ideals.<sup>32</sup> Democracy, instead, is better understood as a political method or type of institutional arrangement for arriving at political decisions. As Macpherson puts the basic claim:

There is no nonsense about democracy as a vehicle for the improvement of mankind. Participation is not a value in itself, nor even an instrumental value for the achievement of a higher, more socially conscious set of human beings. The purpose of democracy is to register the desires of people as they are, not to contribute to what they might be or might wish to be.<sup>33</sup>

This liberal view of democracy is often presented as an empirical and explanatory view of the actual operation of western democratic institutions. Macpherson notes, however, that some strains of this approach move from the realm of strict description to a normative stance, holding (explicitly or not) that democratic institutions ought to be organized in terms of free markets.<sup>34</sup> The realist position, for example, argues that organizing democratic institutions along free market principles is the best system because it reflects the true nature of citizens in western democracies. Citizens do not engage in democratic participation as an essential component of the good life, or to achieve some higher sense of the self. They participate simply to register their preferences for the provision of a particular set of political goods by the state.

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<sup>32</sup> Schumpeter's main target in regard to the "classical" theory of democracy is Rousseau and Bentham. Both Macpherson and Pateman challenge the very notion of such a theory of democracy, as least as it is described by Schumpeter and his derivatives. Pateman refers to the category as a "myth," while Macpherson asserts that it is often confused and constituted by "straw men."

<sup>33</sup> C.B. Macpherson, *The Life and Times of Liberal Democracy*, pp. 78-79

<sup>34</sup> Macpherson seems sympathetic to the claim that Schumpeter's views were mainly descriptive. However, he asserts that the later and more substantial exponents of this approach clearly involved normative claims.

A more substantive normative position asserts that a free market system is preferable because it produces two self-evident goods: citizen sovereignty and optimal political equilibrium.<sup>35</sup> Under this view the democratic sphere is to be organized as an economic free market in which political goods are freely exchanged under conditions of free competition. The notion of “competition,” at least in the narrow sense advanced by Schumpeter, focuses on the contestation between politicians for citizens’ votes. Just as firms freely compete for consumers’ money in the economic market, politicians and political parties are to freely compete for citizens’ votes in the political marketplace. Politicians are understood as “political entrepreneurs,” who seek electoral success by offering batches of political goods in the political market. Average citizens, by contrast, are understood as “political consumers,” who use their votes as currency to purchase their preferred batches of goods from politicians.

This competition, moreover, is to operate under conditions of individual liberty or freedom from state coercions. Politicians are to be free to choose what energies and resources to bring to bear in their competition for electoral support. Average citizens are to be free to choose which political option (and offered package of political goods) they prefer, how much effort to put into voting, as well as what energies and resources they want to expend in support of their political option. Individual citizens should, for example, be free to decide if and how much money to give to a political party.

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<sup>35</sup> Ibid, pp. 84-85.

This free competition in the political marketplace, it is argued, promotes citizen sovereignty and optimum equilibrium between supply and demand. Citizen sovereignty is ensured insofar as citizens have electoral options from which to choose. As Macpherson states the claim, the presence of competing politicians means that citizens are protected from tyranny in that they can replace one government by another. Moreover, “to the extent that there is any difference in the platforms of the parties, or in the general lines of policy to be expected of each party as a government (on the basis of its record), the voters in choosing between parties register their desire for one batch of political goods rather than another.”<sup>36</sup>

The notion of optimum equilibrium holds that a free political marketplace will result in the best possible equilibrium between demand and supply of political goods. As Macpherson summarizes:

In the economic model, entrepreneurs and consumers were assumed to be rational maximizers of their own good, and to be operating in conditions of free competition in which all energies and resources were brought to the market, with the result that the market produced optimum distribution of labour and capital and consumer goods. So in the political model, politicians and voters were assumed to be rational maximizers, and to be operating in conditions of free political competition, with the result that the market-like political system produced the optimum distribution of political energies and political goods. The democratic political market produced an optimum equilibrium of inputs and outputs – of the energies and resources people would put into it and the rewards they would get out of it.<sup>37</sup>

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<sup>36</sup> Ibid, p. 78

<sup>37</sup> Ibid, p. 79

In sum, this free competition is thought to produce a system of incentives, which will encourage politicians (as rational maximizers of their own good) to respond to citizens' demands. Average citizens expend their inputs to secure the set of political goods that best promotes their individual interests. They will exercise their vote (their political currency) in support of their preferred candidate or political party. If they feel strongly enough, they may even contribute money or time in support of a particular electoral option. This, in turn, has important implications for politicians seeking to gain political power. It creates an incentive for politicians to supply those goods demanded by citizens in order to secure enough votes to win elections or to attract financial contributions to run successful campaigns.

Under these free market principles, however, state interferences intended to address economic inequalities are often viewed as disrupting equilibrium between demand and supply. They insert artificial conditions into the political marketplace, which confuse or defeat the incentive of politicians to respond to citizens' demands. What is required is a free market system, in which citizens are free from state coercion to decide for themselves what ends to pursue and what energies and resources to bring to bear.

Several countries, for example, have implemented legislation which requires citizens to vote in an election, or at least turn up at the polls. Australia requires all citizens over the age of 18 to register to vote and attend the polls on voting day (the exceptions being citizens of unsound mind, those convicted of serious crimes,

or those who have a recognized excuse for not being able to attend on polling day).<sup>38</sup> If a citizen fails to do so, they are subject to a fine. Australia introduced compulsory voting in the early 1900s as a means of addressing voter apathy and declining voter participation in elections.

The free market notion of democracy would reject such initiatives, as they represent state interference in citizens' freedom of choice and the proper working of the political market.<sup>39</sup> The assumption is that apathy is "the outcome of a maximizing decision by the individual, balancing the most profitable uses of his time and energy as between political participation and other things."<sup>40</sup> The decision not to vote is an important input which should be registered in the political market and, in turn, influence political behaviour and outcomes. By introducing compulsory voting, however, the state impedes this important influence.

This sort of argument is also relevant in the context of the financial regulation of political parties. Under the *Canada Elections Act*, federal political parties are regulated through a number of restrictions and benefits, such as public subsidies and restrictions on contributions and spending. Overall, this system has closed the gap between political parties in terms of their spending during an

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<sup>38</sup> Evans, T. "Compulsory Voting in Australia." *Australian Electoral Commission*, 2006.

<sup>39</sup> Macpherson further recognizes that some proponents of the free market analogy, such as Berelson, take the position that some level of voter apathy is actually required in so far as greater participation would endanger the stability of the system.

<sup>40</sup> Macpherson, C.B. *The Life and Times of Liberal Democracy*, (New York: Oxford University Press, 1977), 87.

election.<sup>41</sup> A libertarian would take issue with these regulations, in so far as they disrupt free choice and market equilibrium. With greater dependency on public subsidies, as opposed to private contributions, parties do not have as strong of an incentive to provide packages of political goods that would attract the support of citizens. Moreover, it can provide smaller parties with an opportunity for better electoral success than their support would suggest.

These sorts of arguments were raised in 2008 when the Conservative minority government threatened to eliminate direct public subsidies for political parties (the Conservatives eventually followed through with their threat in 2011). Publicly, the government couched the proposal in terms of cutting government costs in a period of economic crisis and rising deficits.<sup>42</sup> Others in the media, however, supported the decision on liberal free market grounds.<sup>43</sup> Public subsidies, it was argued, weakened the Liberal Party because they weakened incentives for the Party to develop policies and programs better suited to the desires of voters. If the Party was forced to rely on private contributions, they would have an incentive to develop a wider following amongst the public. As they can rely on public subsidies to finance large parts of their activities, there is little incentive to do so.

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<sup>41</sup> See Harold Jansen & Lisa Young, *The Impact of Changing Party Finance Laws on Canadian Political Party Competition*. Presented to the Annual Meeting of the Prairie Provinces Political Science Association, Regina, (Saskatchewan, September 27, 2008).

<sup>42</sup> One might suspect that the idea was motivated in large part by partisan tactical reasons. Specifically, the recognition that the elimination of direct subsidies would decimate the finances of the opposition parties, as they were much more dependent than the Conservatives on public funds as an overall percentage of their revenue. This, in turn, would provide the Conservatives with a financial advantage, at least in the short term.

<sup>43</sup> See, for example, Andrew Coynes “Too Far? Sorry, the Tories Did Not Go Far Enough”, *Macleans.ca*. <http://www2.macleans.ca/2009/01/12/too-far-sorry-the-tories-did-not-go-far-enough/> (Retrieved November 02, 2009)



Similarly, the system of public subsidies artificially strengthens the Bloc Québécois by enabling them to run strong campaigns in Quebec with very little in the way of private contributions. Under a truly competitive system, in which the resources of political parties were dictated by free competition and private contributions, the Bloc Québécois would be relegated to a marginal and regional party, which better reflects its actual place in Canadian federal politics.

### **Rawls, Liberal-Egalitarianism and Political Equality**

Rawls's notion of political participation stands in sharp contrast to these libertarian and free-market economic views of political participation. Whereas these others sorts of liberalism reject the idea that the state should be used to address social and economic inequalities in political participation, Rawls's liberalism supports such action. In developing this contrast, it is necessary to discuss Rawls in relation to each.

As discussed in the previous chapter, Rawls relies on social contractarianism to argue that persons would choose two basic principles of justice. Together, these two principles represent a theory of justice which not only values individual liberty or freedom from external interference, but also egalitarianism and the fair distribution of social and economic goods. In the more specific context of political participation, Rawls advances this liberal-egalitarianism through his idea of fair opportunity. All citizens are to possess an

equal set of political liberties, such as the right to vote and run for public office and the freedoms of political speech and association. In addition, all citizens are to enjoy the fair value of these political liberties, taking into consideration social and economic circumstances. For Rawls, steps must be taken to address social and economic inequalities and underwrite fair opportunity for all in democratic institutions.

It is this last stipulation that sets Rawls' apart from libertarian approaches to political participation. Whereas libertarianism views state actions to address social and economic inequalities as infringing on persons' inviolable right to liberty, Rawls views such actions as promoting persons' liberty. How can this be the case? Critical is Rawls's recognition that the value of liberty to a person must not be understood simply in terms of whether or not they possess it in the strictly legal sense; that is, whether or not one has the legal right to vote or to run for public office. The value of liberty must also be understood in terms of whether one can actually make use of the liberty, taking into consideration their social or economic situation. For Rawls, taking liberty seriously means ensuring that social and economic inequalities do not act as a barrier to persons actually exercising their liberties.

Another way of working through this point is with the distinction between formal and actual opportunity in political participation. The term "formal opportunity" refers to citizens' formal or legal ability to participate in the political process. An example of inequality in this formal sense would be early laws, found

in many western democracies, which excluded women from the franchise. Canadian franchise laws in the mid-18<sup>th</sup> century restricted the vote to only male property holders. As such, there existed formal inequality between men and women in terms of their opportunities to participate in political processes. While men had the formal right to influence political processes through the exercise of the vote, women did not. Both libertarianism and Rawls' liberalism would view such circumstances as unfair and, as such, would advocate universal suffrage.

The term "actual opportunity," by contrast, refers to citizens' actual ability to participate in the political process, taking into account personal, social and economic factors. Even though all may be able to participate in the formal sense, the participation of some may be limited due to their level of wealth, their social status or their natural talents. As such, we may say they have been denied an actual opportunity in political life, or their actual chances are far less than others. In many modern democracies, for example, money is often critical to citizens' democratic participation. If one wants to run for public office, not only does one require the legal right to do so, they must also possess the financial capability. In Canada, candidates for the House of Commons spend tens of thousands of dollars on their campaigns. In the United States, the amount of money spent on elections is even higher. In 2004, the average successful candidate for the House of

Representatives spent over \$1 million in their campaign, while the average senator spent over \$7 million.<sup>44</sup>

The importance of money in running for public office suggests that actual opportunities in political life depend not only on the legal ability to participate, but also on the economic context. For those who have access to sufficient funds to run a successful campaign, they enjoy an actual opportunity to do so. For those who lack sufficient funds, they are denied an actual opportunity to run for public office. At the minimum, we could say that their actual chances of being successful are less than those of their wealthy competitors.

It is this sort of issue that Rawls is highlighting when he suggests that the constitution “must take steps to enhance the value of the equal rights of participation for all members.”<sup>45</sup> For Rawls, protecting liberty and fair opportunity requires not only that all possess the formal rights necessary to participate in political processes. It also requires that these formal rights have actual value for all citizens, taking into consideration social and economic factors. Individuals or groups should not be denied a fair chance to attain positions of political power and influence the political process simply because they are economically or socially disadvantaged. Instead, measures should be taken to ensure that all are able to exercise their formal rights and liberties, regardless of their social or economic class.

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<sup>44</sup> Andrew Sidman, “Campaign Spending” in *Encyclopedia of U.S. Campaigns, Elections, and Electoral Behavior*. Ed. Kenneth Warren. (Thousand Oaks, California: Sage Publications, Inc., 2008), 106.

<sup>45</sup> John Rawls, *A Theory of Justice*, (Cambridge: The Belknap Press of Harvard University Press, 1971), 224.

Not only does Rawls reject the libertarian claim that state action necessarily conflicts with persons' liberty, he also takes issue with the basic claim of liberal free-market views of democracy. According to this sort of liberalism, free competition, understood strictly in terms of individual liberty, best ensures equilibrium between supply and demand in democratic institutions. According to Rawls, however, this free-market view fails to take into account the problem of social and economic inequalities and the ability of some in society to use their advantages to control the political process for their own narrow self-interests. As Rawls states in *A Theory of Justice*:

We may take for granted that a democratic regime presupposes freedom of speech and assembly, and liberty of thought and conscience... The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate. For eventually those inequalities will enable those better suited to exercise a larger influence over the development of legislation. In due time they are likely to acquire a preponderant weight in settling social questions, at least in regard to those matters upon which they normally agree, which is to say in regard to those things that support their favored circumstances.<sup>46</sup>

For Rawls, social and economic inequalities can become the deciding factor in citizens' influence over the political process. The wealthy, for example, have greater financial resources at their disposal than the average citizen. As such, they can use their financial advantage to control the outcome of political processes. They can, for example, spend millions of dollars flooding mass media with their political messages, in an attempt to influence voter behavior. They may also

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<sup>46</sup> Ibid, 225.

contribute substantial financial resources to the campaigns of certain politicians, in an attempt to ensure that friendly officials are elected to public office.

In his later works, Rawls further develops the problem of social and economic inequalities by arguing that they could threaten citizens' basic liberties themselves. Commenting on the importance of political participation in *Justice as Fairness: A Restatement*, Rawls argues that his liberal theory of justice shares much with what he refers to as classical republicanism. As he states:

Classical republicanism... is the view that the safety of democratic liberties, including the liberties of nonpolitical life (the liberties of the moderns) requires the active participation of citizens who have the political virtues needed to sustain a constitutional regime. The idea is that unless there is widespread participation in democratic politics by a vigorous and informed citizen body moved in good part by a concern for political justice and public good, even the best-designed political institutions will eventually fall into the hands of those who hunger for power and military glory, or pursue narrow class and economic interests, to the exclusion of almost everything else. If we are to remain free and equal citizens, we cannot afford a general retreat into private life.

Between classical republicanism, so understood, and the liberalism represented by Constant and Berlin, there is no fundamental opposition, for the question is to what degree citizens' engaging in politics is needed for the safety of basic liberties, and how the requisite participation is best achieved...<sup>47</sup>

With this in mind, Rawls provides a brief description of some initiatives that could be taken in order to ensure actual fair opportunity, particularly in regard to

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<sup>47</sup> Rawls, *Justice as Fairness: A Restatement*, (Cambridge: The Belknap Press of Harvard University Press, 2001), 144.

public funding of political parties.<sup>48</sup> In a society allowing private ownership of the means of production, Rawls argues that political parties must be kept independent from private economic interests. Moreover, this can be accomplished by allotting parties sufficient tax revenues to “play their part in the constitutional scheme.”<sup>49</sup> In the absence of such a public financing scheme, political parties will solicit their funds from the more advantaged social and economic interests and, as a result, will be more attentive to the political demands of the advantaged. For Rawls, this situation is even more likely when the less favored members of society, lacking sufficient means to exercise their fair share of political influence, “withdraw into apathy and resentment.”<sup>50</sup>

## **Non-Egalitarian Liberalism and Election Finance Laws**

The previous discussion contrasted Rawls with non-egalitarian forms of liberalism in a rather abstract and conceptual manner. In developing this contrast further, it is useful to work out these basic philosophical points on a more practical level. The following discussion does so by examining these different liberalisms within the context of American and Canadian jurisprudence on freedom of political speech and electoral financing legislation. It will be argued these liberal positions have important implications for whether the state should be permitted to regulate the use of money in electoral processes.

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<sup>48</sup> John Rawls, *A Theory of Justice*, (Cambridge: The Belknap Press of Harvard University Press, 1971), 225-226.

<sup>49</sup> *Ibid.*, 226.

<sup>50</sup> *Ibid.*

Academic and legal scholars commonly identify the U.S. Supreme Court's decision in *Buckley* as an example of a non-egalitarian liberal approach to electoral financing laws. In some instances, commentators have ascribed a liberal free-market approach to the American Court, while in others the decision have been interpreted in a more libertarian light. In either case, the Court has been viewed as emphasizing the importance of individual liberty and minimal state interference in the context of money and political participation.

*Buckley* arose following the introduction of the *Federal Election Campaign Act* in 1971, and its subsequent revision in 1974. The initial 1971 *Act* aimed at cutting rising campaign costs; in particular, with regard to spending on the media. The *Act* placed restrictions on the amount of money candidates could spend on the media during campaigns. This included radio, television, newspapers, magazines, and automated telephone systems in any primary, run-off, special or general election. In addition, the *Act* imposed limits on personal campaign contributions; that is, monies contributed by a candidate or their immediate families to his or her own campaign. Finally, the *Act* imposed disclosure procedures on every candidate or political committee active in a campaign, such as filing quarterly reports of receipts and expenditures and disclosure of contributors.

In 1974, the U.S. Congress significantly strengthened the *Act*, due in part to pressure for reform following the Watergate scandal and reports of financial abuse in the 1972 presidential campaign. While these reforms sought to further



control the cost of campaigns, a key aim was to address issues of corruption in the political process. Investigations into the 1972 campaign of President Richard Nixon had led to allegations that political favours were sold to individuals in return for contributions. The 1974 amendments altered almost all of the provisions of the original 1971 *Act*. It strengthened the disclosure provisions, established broader and more stringent limits on contributions to candidates, replaced the spending limits on media with limits on all spending, created a system of public funding for presidential election, and established the Federal Elections Commission to administer and enforce the law.

In regard to contributions, limits were placed not only on personal contributions by a candidate (or their immediate family) to their own campaign, but also private individual donors and political committees. In addition, the amendment restricted the amount of money individuals, political committees, and national party committees could spend on behalf of a candidate. Under the system of public funding, presidential candidates were eligible for direct and matching funding. Presidential general election candidates of the major political parties could receive the full amount of funding authorized by the spending limits if they agreed not to seek any additional private money. Eligible minor party or independent candidates could receive a share of public monies based on the proportion of the vote they received in the previous election.

The *Act* was constitutionally challenged in 1975 by Senator James Buckley of New York, Eugene McCarthy, presidential candidate and former

Senator from Minnesota, and several others. The constitutional questions were referred to the U.S. Court of Appeals, which upheld almost all of the substantial provisions of the *Act* with respect to contributions, expenditures, disclosure and public funding for the presidential selection process. The decision was appealed to the US Supreme Court, with the argument that the Court of Appeal failed to give the legislation the critical scrutiny demanded by the First Amendment.

A majority of the US Supreme Court concluded that the *Act*'s contribution provisions were constitutional, but the expenditure provisions violated the First Amendment. Limits on contributions were deemed appropriate legislative weapons against the reality or appearance of improper influence stemming from candidates' dependency on large campaign contributions. Of particular concern for the majority was preventing corruption in the form selling political favours for financial contributions. The restrictions on spending, however, were found unnecessary to prevent improper influence, and to represent a severe limitation on the ability of candidates, citizens, and associations to engage in political expression. In this context, the majority clearly rejected the idea that the state should be used to address economic factors and promote the expression of the less fortunate. As the majority declares, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."<sup>51</sup>

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<sup>51</sup> *Buckley v. Valeo* [1976] 424 U.S. 1, 48-49.

Subsequent examinations of the majority decision in *Buckley* have emphasized its highly liberal and non-egalitarian nature. Cass Sunstein, for example, argues that the Supreme Court's decision was firmly grounded in a liberal free market approach to political participation.<sup>52</sup> In particular, Sunstein emphasizes the majority's clear rejection of the notion that the state may restrict the free expression of some in order to promote the speech of others. In this context, Sunstein draws similarities between the majority's reasoning in *Buckley* and the 1905 case of *Lochner v. New York*<sup>53</sup>. In that case, the U.S. Supreme Court invalidated maximum working hour laws, asserting that regulatory adjustments of market arrangements, in which the state took from some for the benefit of others, were constitutionally illegitimate. According to Sunstein, the same sort of reasoning was evident in *Buckley*. As he states:

Just as the due process clause once forbade government "interference" with the outcomes of the economic marketplace, so too the First Amendment [under *Buckley*] now bans government "interference" with the political marketplace, with the term "marketplace" understood [by the Court] quite literally. In this way *Buckley* replicates *Lochner*.<sup>54</sup>

Sunstein notes, however, that the majority in *Buckley* did not assert that the state may never interfere in the political marketplace. The majority clearly recognized that the state may limit citizens' liberties in order to prevent corruption. Often referred to as the anti-corruption rationale or doctrine, this

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<sup>52</sup> Cass Sunstein, "Political Equality and Unintended Consequences" *Columbia Law Review*, Vol. 94, No.4 (May, 1994), 1390-1414.

<sup>53</sup> *Lochner v. New York* [1905] 198 U.S. 45

<sup>54</sup> Cass Sunstein, "Political Equality and Unintended Consequences" *Columbia Law Review*, Vol. 94, No.4 (May, 1994), 1398.

justification was conceived by the majority in *Buckley* specifically in terms of the selling of political favours for cash. However, the majority rejected the idea that the state could go as far as to limit political liberties in order to promote the expression of others. This includes limiting spending on political speech by the wealthy in order to promote the speech of those with lesser financial resources. For the majority, such interferences were contrary to the ideal of a free political market in which individual citizens, and not the state, decided what resources to bring to bear.

As Sunstein points out, the majority used this anti-corruption rationale to distinguish between the constitutionality of limits on contributions versus limits on expenditures. For the majority, the former are permissible on the grounds that they combat corruption in the form of political favours for cash. The reasoning is that the sale of political favours is made less feasible if donors are limited to smaller contributions. Limits on expenditures, however, are not clearly justified by the anti-corruption rationale. For the majority, restricting spending by candidates on their own campaign is not necessary in order to stop the selling of political favours, neither is limiting the independent spending of individuals or groups supporting a particular candidate.

Sunstein notes that the majority recognized that restrictions on expenditures are far more intrusive than limits on contributions in so far as they limited the ability of candidates and citizens to express their political views. In this context, the majority made the basic assumption that money is tied to one's ability to

communicate, in so far as access to forms of media involved financial costs.

Limits on spending, therefore, represented a direct attack on freedom of speech and the First Amendment.

## **Rawls, Egalitarianism, and Buckley**

The non-egalitarian nature of *Buckley* was also recognized, and criticized, by Rawls himself.<sup>55</sup> Of particular concern for Rawls was the majority's failure to recognize that the state should regulate spending in order to secure the fair value of citizens' political liberties. Like Sunstein, Rawls focused on the majority's conclusion that restrictions on the speech of some in order to enhance the relative voice of others were wholly foreign to the First Amendment.

Rawls argued that the majority focused too much on the interest in eliminating corruption and the appearance of corruption. In doing so, Rawls presents an alternative liberal-egalitarian view of electoral financing. According to him, the majority failed "to recognize the essential point that the fair value of the political liberties is required for a just political procedure."<sup>56</sup> In order to ensure this fair value, it is "necessary to prevent those with greater property and wealth, and the greater skills of organization which accompany them, from controlling the

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<sup>55</sup> As noted, since Rawls's death, there have been other important events regarding electoral financing laws in both American and Canada politics. In the recent *Citizens United* decision, a majority of the US Supreme Court struck down laws limiting spending by unions and corporations. This had led to concerns about the rise of Super PACs and the influence of wealthy individuals on electoral outcomes. In Canada, the federal government moved in 2011 to phase out public subsidies for political parties. This has raised concerns over the potential dependency of parties on wealthy contributors. These issues are discussed in greater detail in Chapter 6.

<sup>56</sup> John Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993), 360.

electoral process to their advantage.”<sup>57</sup> For Rawls, this control of the electoral process need not involve bribery, dishonesty and the granting of special favors, as the majority in *Buckley* emphasized. Political control can be the result of shared convictions and aims, in which the wealthy class acting in a self-interested manner, but nevertheless independently, can come to dominate political discussion and debate.

While Rawls did not develop this last point in detail, the suggestion seems to be that the wealthy class need not resort to blatant bribery in order to control elections and political decision making. Wealthy individuals and groups have substantial financial resources at their disposal, much more than the average citizen. As such, these individuals and groups can use their economic advantages to control political debate and the election of public officials. They can attempt to influence voter behavior by flooding the media with their political messages or running parallel campaigns in support of their preferred election candidate. Such a situation can occur even if the wealthy are not directly colluding with one another. Their shared convictions and aims, as a privileged economic class, can lead them to independently push for the same political policies and goods, such as lower levels of taxation. As such, for Rawls, simply preventing acts of bribery and corruption is insufficient to ensure fair opportunity.

By failing to uphold the legislation, Rawls argued that the Court in *Buckley* ran “the risk of endorsing the view that fair representation is

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<sup>57</sup> Ibid.

representation according to the amount of influence effectively exerted.”<sup>58</sup> In doing so, Rawls equated the majority’s view to the free market view of democracy described above, in which citizens are to be free to decide what resources to bring to bear in the competition for political power. As he states:

On this view, democracy is a kind of regulated rivalry between economic classes and interest groups in which the outcome should properly depend on the ability and willingness of each to use its financial resources and skill, admittedly very unequal, to make its desires felt.<sup>59</sup>

With this in mind, Rawls asserted that “what is fundamental is a political procedure which secures for all citizens a full and equally effective voice in a fair scheme of representation.”<sup>60</sup> Moreover, that the aim of achieving this fair scheme “can justify limits on and regulations of political speech in elections.”<sup>61</sup> As such, according to Rawls, the regulations proposed by the legislature, and struck down by the Court, were in fact permissible attempts to promote a fair scheme of representation. A campaign finance regime which not only limited contributions to candidates, but also restricted spending on political speech and provided for public subsidies, would help to ensure the fair value of the political liberties and prevent control by the privileged few.

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<sup>58</sup> Ibid, 361.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid, 361.

<sup>61</sup> Ibid.

## Liberal-Egalitarianism and Election Finance Laws

The debate between non-egalitarianism and liberal-egalitarianism on electoral finance laws is not restricted to just American jurisprudence. The Canadian Supreme Court has also had an opportunity to deal with the issue of freedom of political speech and state-imposed limits on spending, such as the cases of *Libman* and *Harper*.<sup>62</sup> Moreover, an influential perspective, advanced by commentators such as Colin Feasby<sup>63</sup>, Janet Hiebert<sup>64</sup> and Heather MacIvor<sup>65</sup>,

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<sup>62</sup> It is important to note that lower Canadian courts had dealt with the issue of freedom of speech and limits on spending in decisions prior to *Libman* and *Harper*. See, for example, the Alberta Court of Queen's Bench decisions in *National Citizens' Coalition Inc. v. Canada (Attorney General)* and the Alberta Court of Appeal decision in *Somerville v. Canada (Attorney General)*. Interestingly, these lower courts adopted a non-egalitarian view similar to the one adopted by the US Supreme Court in *Buckley*.

<sup>63</sup> Feasby, C. "The Charter and the Administration of the Process of Democracy: *Libman v. Quebec (A.G.)* and the Emerging Egalitarian Model" *McGill Law Journal* 44 (1999): 5-39. Also Feasby, C. "The Supreme Court of Canada's Political Theory and the Constitutionality of the Political Finance Regime" in Keith Ewing & Samuel Issacharoff, eds., *Party Funding and Campaign Financing in International Perspective*. (Oxford: Hart, 2006).

<sup>64</sup> Hiebert, J. "Money and Elections: Can Citizens Participate on Fair Terms Amidst Unrestricted Spending?" *Canadian Journal of Political Science*. Vol. 31. No. 1. (1998, March): 91-111. Also Hiebert, J. "Elections, Democracy and Free Speech: More at Stake than an Unfettered Right to Advertise" ed. Keith Ewing & Samuel Issacharoff, *Party Funding and Campaign Financing in International Perspective*. (Oxford: Hart, 2006).

<sup>65</sup> MacIvor, H. "Judicial Review and Electoral Democracy: The Contested Status of Political Parties Under the Charter" *Windsor Yearbook of Access to Justice*. Vol. 21. (2002): 449-518. Also MacIvor, H. "The Charter of Rights and Party Politics: The Impact of the Supreme Court Ruling in *Figueroa v. Canada (Attorney General)*" (2004) 10:4 *Choices* 2. MacIvor has extended the perspective from section 2(b) and freedom of expression to other *Charter* rights, such as the section 3 rights to vote and run for political office. Like Feasby, MacIvor begins with the basic distinction between libertarianism and egalitarianism, with Rawls as the example of the latter. She argues that the libertarian model dominates American jurisprudence, as well as several rulings from Canadian lower courts, such as the Alberta Court of Appeal decision in *Somerville v. Canada (A.G.)*<sup>65</sup>. The Canadian Supreme Court, by contrast, favours the egalitarian model, which was, according to MacIvor, clearly asserted in the *Libman* decision. She goes on to argue that the Court extended this egalitarianism in their 2003 ruling in *Figueroa v. Canada (A.G.)*. This case dealt with eligibility requirements under the *Canada Elections Act* for political parties to attain certain automatic benefits, such as free broadcasting, ability to issue tax receipts for contributions, and the right to identify their candidates on the ballot. In order to attain gain these automatic benefits, a party was required to run at least 50 candidates in an election. MacIvor argues the Court in



argues that the Canadian Court has rejected an American libertarian view of electoral fairness in favour of an egalitarian model, which is quite similar to Rawls's notion of political equality.<sup>66</sup> This perspective contrasts the Canadian Supreme Court with its American counterpart on the issue of spending limits during elections.

One of the earliest egalitarian interpretations of the Supreme Court was Feasby's analysis of the *Libman* decision. This case arose out of the events surrounding the 1992 Quebec provincial referendum on the Charlottetown Accord, which was conducted according to rules set out by the Quebec *Referendum Act*. Central to this provincial legislation was the imposition of a national committee system, which provided for publicly funded and regulated committees to campaign for specific options in a referendum. In the 1992 referendum on the Charlottetown Accord, for example, the legislation mandated

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*Figueroa* adopted an egalitarian position by finding the 50-candidate threshold to be unconstitutional. She emphasizes the Court's view that smaller political parties were important players in the democratic process, and effective outlets for the participation of individuals whose preferences were not addressed by the major parties. She also highlighted the Court's conclusion that the 50-candidate threshold infringed Section 3 of the *Charter* in so far as it barred candidates of smaller parties, and their potential supporters, from the benefits of the *Canada Elections Act*, and reinforced the competitive advantage of larger parties. The conclusion being that the Court had stressed the need to ensure equality between political parties, regardless of their ideology and relative size.

<sup>66</sup> Scholars such as Christopher Manfredi, Mark Rush, Christopher Brendt, and Markus Kramer, have rejected the Rawlsian egalitarian interpretation of the Supreme Court in favour of a pragmatic approach. Not only does this perspective deny that the Court has adopted an egalitarian theory of electoral fairness, but further asserts that the Court has not endorsed any coherent theoretical framework at all (or is in the process of abandoning the search for a particular theory). The Court is thus viewed as operating within (or moving towards) a pragmatic approach to dealing with *Charter* rights and electoral issues, in which they focus on addressing specific issues, such as broadening the scope of the enfranchisement and preventing incumbent entrenchment. There is no attempt here to engage this debate, as the discussion of the *Libman* and *Harper* decisions, as well as the "egalitarian model" ascribed to them, are meant to simply provide an entry into Rawls' theory of fair opportunity in political participation.

the establishment of two national committees: the YES National Committee, which was established to campaign in support of accepting the Charlottetown Accord, and the Committee of Quebecers for the NO, which campaigned against accepting the Accord.

The *Act* further sought to ensure these committees were the primary participants and did so by severely restricted spending outside of the national committee system. Campaign spending during a referendum was divided into two categories: regulated and unregulated expenses. The former were defined as “the cost of any good or service used during the referendum period to promote or oppose, directly or indirectly, an option submitted to a referendum.”<sup>67</sup> The legislation then went on to set out several exceptions to the definition of regulated spending, which were referred to as unregulated expenses. These included the cost of publishing articles, editorials and other types of documents (so long as they were published without payment); the cost of producing, promoting and distributing a book (if the book had been planned to be put on sale prior to the calling of the referendum); the cost of broadcasting, by radio or television, of a program of public affairs, news or commentary (again, provided that the program is broadcast without payment); reasonable expenses incurred by a person out of his or her own money for meals, lodging and transportation while travelling for referendum purposes; and the costs of holding a meeting for referendum purposes (to a maximum of \$600).<sup>68</sup>

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<sup>67</sup> *Libman v. Quebec (Attorney General)* [1997] 3 S.C.R. 569, para. 11.

<sup>68</sup> *Ibid.*, para. 12.

The *Act* imposed restrictions on the amount of regulated expenses that could be incurred by national committees in a referendum, which were the same for all national committees. As such, one effect of the *Act* was to promote equality between the various referendum options, at least in so far as the amount of money that each national committee could spend in campaigning for their particular option. In addition, the *Act* stipulated that only national committees and their affiliates were permitted to incur regulated expenses. As a result, individuals and groups desiring to engage in their own campaigns, independent of any of the national committees, could only do so through unregulated expenses.

Robert Libman challenged the legislation on the grounds that the referendum finance regime unconstitutionally limited a number of rights under the *Canadian Charter of Rights and Freedoms*, including the right to freedom of expression. Of particular concern for Libman was that the legislation effectively prohibited those that wished to express their political views outside of the committee system from doing so. The Quebec government defended the spending limits on the ground they were necessary in order to address economic inequalities in referendum campaigns. While the Court eventually ruled in favour of Libman, it accepted many of the government's arguments in its decision.

In his examination of the *Libman* decision, Feasby identifies two possible positions on the issue of constitutional rights and the regulation of money in elections: libertarianism and egalitarianism. He attributes the libertarian view to the United States' Supreme Court; particularly, its 1976 decision in *Buckley v.*

*Valeo*. According to Feasby, the *Buckley* decision reflected a basic libertarian ideal that individual citizens ought to be free to exercise “sovereignty” or “control” in democratic institutions. Individual sovereignty, in turn, places great value on individual choice making, liberty and minimal state interference. In the context of voting and political debate, individual voters should decide what information is relevant to their vote. The state should not impede the breadth and flow of information to voters.

Against this libertarian model of electoral fairness, Feasby contrasts egalitarianism. Specifically, he draws from the work of John Rawls in *A Theory of Justice* and *Political Liberalism*. As he states, “the egalitarian model has been expressed in different forms, but the most influential expression of the principles of this model can be found in the work of John Rawls.”<sup>69</sup> According to Feasby, Rawls is concerned with protecting the “fair value” of citizens’ political liberties, which “includes a roughly equal ability to influence the outcome of elections.”<sup>70</sup> In order to ensure this fair value, moreover, Feasby states that Rawls advocates an electoral procedure which would “mitigate the influence of wealth” and provide each citizen with a “relatively equal opportunity to influence an election or ascend to elected office.”<sup>71</sup> An important implication of this Rawlsian egalitarianism is that the state should intervene to address economic inequalities. The state may, for example, provide financial subsidies to the least advantaged or place limits on spending by wealthy speakers.

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<sup>69</sup> Feasby, C. “The Charter and the Administration of the Process of Democracy: *Libman v. Quebec (A.G.)* and the Emerging Egalitarian Model” *McGill Law Journal* 44 (1999), 9.

<sup>70</sup> *Ibid*, 10.

<sup>71</sup> *Ibid*.

According to Feasby, the Canadian Supreme Court endorsed this Rawlsian egalitarianism in *Libman*.<sup>72</sup> In supporting this claim, he highlights the Court's characterization and acceptance of the objective of the provincial *Referendum Act*, which he argues was egalitarian in nature. Quoting from the Court's decision, Feasby states:

[T]he objective of the Act is, first, egalitarian in that it is intended to prevent the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources. What is sought is in a sense of equality of participation and influence between the proponents of each option. Second, from the voters' point of view, the system is designed to permit an informed choice to be made by ensuring that some positions are not buried by others. Finally, as a related point, the system is designed to preserve the confidence of the electorate in a democratic process that it knows will not be dominated by the power of money.<sup>73</sup>

According to the Court, the purpose of the *Act* and its national committee system was egalitarian insofar as it sought to promote a "sense of equality of participation and influence." Promoting this sense of equality, moreover, required preventing wealthy individuals and groups from exerting a "disproportionate influence" on electoral processes. In the context of political speech and debate, equality required ensuring that the views of the wealthy could not "bury" the views of those with lesser resources. In order to promote this equality, the state

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<sup>72</sup> Feasby later extends this claim to the Court's 2004 decision in *Harper v. Canada (A.G.)*. See Colin Feasby "The Supreme Court of Canada's Political Theory and the Constitutionality of the Political Finance Regime", ed. Keith Ewing & Samuel Issacharoff, *Party Funding and Campaign Financing in International Perspective*, (Oxford: Hart, 2006).

<sup>73</sup> Feasby, C. "The Charter and the Administration of the Process of Democracy: *Libman v. Quebec (A.G.)* and the Emerging Egalitarian Model" *McGill Law Journal* 44 (1999), 31.

could legitimately limit citizens' freedom of expression; that is, limit the amount of money they can spend on their political speech.

Feasby argues that this Rawlsian egalitarianism is further evident in the Court's discussion of the nature of electoral fairness. He argues that the Court "firmly anchored the principle of electoral fairness in the *Charter* guarantee of equality".<sup>74</sup> The Court held, "in very Rawlsian terms," that the value of electoral fairness is related to the "very values the *Canadian Charter* seeks to protect, in particular the political equality of citizens that is at the heart of a free and democratic society".<sup>75</sup> This referred to "the right of each voter to have roughly equal influence on the electoral process irrespective each individual's wealth".<sup>76</sup>

In sum, this egalitarian approach to election finance laws, ascribed to Rawls and the Canadian Supreme Court, rejects the idea that electoral fairness should be grounded on the ideas of individual sovereignty and minimal state interference. Instead, it acknowledges egalitarian concerns over economic inequalities. In the context of election advertising and money, the state should be permitted to address economic inequalities by limiting the amount of money that wealthy speakers can spend.

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<sup>74</sup> Ibid.

<sup>75</sup> Ibid, 10.

<sup>76</sup> Ibid, 31.

## Conclusion

Rawls's notion of political equality stands in sharp contrast to other non-egalitarian liberal approaches. Whereas libertarian and liberal free-market views emphasize the importance of individual liberty in the strictly formal or legal sense, Rawls argues that citizens are also entitled to the fair value of their political liberties, taking into account persons' social and economic situations.

In contrast to libertarianism, Rawls rejects the idea that state interferences to address social and economic inequalities necessarily degrade individual liberty. For him, such actions actually promote liberty, at least insofar as it permits the exercise of basic political liberties. In this context, Rawls advocates a notion of fair opportunity which includes not only formal equality of opportunity, but also some measure of actual fair opportunity. These basic themes are also at the heart of Rawls's rejection of liberal free-market views of democracy. For Rawls, free-markets, understood strictly in terms of liberty, do not necessarily result in the best democratic outcomes. Social and economic inequalities in society permit the privileged to use their advantages to control democratic institutions for their own narrow ends. For Rawls, guaranteeing the fair value of the political liberties, and some measure of actual fair opportunity, is vitally important to preventing such domination.

This distinction between Rawls and non-egalitarian liberalism has great practical importance. In the context of freedom of political speech and campaign finance legislation, for example, these sorts of liberalism have very different

implications. As discussed in the context of *Buckley*, the non-egalitarian liberal view rejects the idea that the state can use spending limits to restrict the speech of some and promote the speech of others. Rawls himself criticized this sort of view of electoral financing laws on the grounds that the Court failed to acknowledge the importance of securing the fair value of the political liberties. In the Canadian context, legal commentators have linked the Canadian Supreme Court's decisions in *Libman* and *Harper* with Rawls's liberal-egalitarianism. Instead of emphasizing individual liberty and minimal state interference, the Canadian Court stressed the importance of addressing economic inequalities so that all enjoy a fair opportunity in their political participation.



## Chapter Four

### Egalitarianisms and Electoral Financing Laws

#### Introduction

In the previous chapter, jurisprudence on the issue of freedom of political speech and electoral financing laws was used to show some practical implications of Rawls's liberal-egalitarianism, at least when comparing it to other liberal, non-egalitarian approaches to political equality. This discussion, however, raises another important issue. In examining the issue of money in electoral processes, a critical issue is not simply *whether* the state should impose financial regulations, but *how* it should do so. In other words, what sorts of regulations on money are necessary in order to ensure political equality and actual fair opportunity?

In this regard, two important positions can be identified: moderate and radical egalitarianism. The former is the view that social and economic inequalities are problematic insofar as they can permit the privileged in society to control the political process by excluding others. Radical egalitarianism, by contrast, is the view that social and economic inequalities are problematic because they allow some to have a greater weight or influence in deciding political outcomes.

Importantly, these alternative forms of egalitarianism differ significantly on how social and economic inequalities should be addressed. Radical

egalitarianism tends to advocate regulations which minimize social and economic inequalities as much as possible. If all are to enjoy equal weight or influence, and if one's level of influence depends on their relative level of social and economic resources, then inequalities need to be eliminated as much as possible. Moderate egalitarianism, by contrast, does not go so far. All that is required is preventing inequalities from becoming so large that those at the top can exclude those at the bottom from the political process.

While commentary on Rawls and electoral financing laws clearly distinguishes him on the question of whether the state should regulate social and economic inequalities, they do not address the question of what sort of egalitarianism he is actually advancing. The egalitarian model advanced by Colin Feasby, for example, simply conflates the moderate and radical views into a single egalitarian model, which is then ascribed to Rawls. A central argument of this work, however, is that the distinction between these two views is also critical to understanding the practical implications of Rawls's conception of political equality.

The purpose of this chapter is to demonstrate the importance of separating out the moderate and radical egalitarian views. In doing so, this chapter revisits the Canadian cases of *Libman* and *Harper*. In those decisions, the Canadian Supreme Court drew an important line. They rejected the idea that governments could impose a complete prohibition on advertising spending by individuals and groups. In the alternative, the Court suggested an upper limit on spending.

Moreover, in asserting this alternative, the Court took the position that such limits alone were a sufficient means of promoting political equality.

Such a position would be highly consistent with moderate egalitarianism. A complete prohibition on advertising spending is not necessary in order to prevent the wealthy from using their economic advantages to control the outcome of an election. Upper limits on spending should be enough. Radical egalitarianism, by contrast, would take issue with the Court. Under this view, complete prohibition on spending would represent an important means of preventing the wealthy from exercising more weight or influence in an election. Furthermore, simply imposing an upper threshold on spending would fall far short of securing political equality in this sense.

In regard to Rawls's theory of political equality, therefore, one can ask: what sort of egalitarianism does he advance? Does Rawls adopt a moderate egalitarian view of political equality, in which social and economic inequalities need only to be addressed insofar as to prevent the privileged few from excluding others? Or does he advance a radical egalitarian view, in which social and economic inequalities must be minimized as much as possible, so that all may have equal weight or influence in deciding political outcomes? These questions are explored in detail in subsequent chapters.

## Money, Electoral Advertising and Political Influence

In developing the importance of separating out moderate and radical egalitarianism, it is useful to return to the Canadian Supreme Court's decisions in *Libman* and *Harper*. As outlined in the last chapter, the 1997 *Libman* case dealt with the Quebec *Referendum Act*, which was provincial legislation governing the operation of referendum in the province of Quebec.

Robert Libman challenged the legislation on the grounds that the referendum finance regime unconstitutionally limited a number of *Charter* rights, including the right to freedom of expression. Of particular concern for Libman was that the legislation effectively prohibited those that wished to express their political views outside of the committee system from doing so, as they were prohibited from spending money on advertising. The Quebec government defended the spending limits on the ground they were necessary in order to address economic inequalities in referendums, in which wealthy speakers were able to spend considerably more money on political advertising than others. In a single, unanimous decision, rendered in 1997, the Supreme Court of Canada agreed with Libman.

In 2004, the Supreme Court revisited the issue. *Harper* dealt with amendments made to the federal *Canada Elections Act* in 2000. The federal government re-introduced spending limits on advertising by third parties during federal elections. The term "third parties" included all individuals and groups other than candidates and political parties. This encompassed a wide range of

speakers, including individual citizens, as well as advocacy and interest groups. The *Act* imposed a ceiling on the amount of money that these individuals and groups could spend during an election: \$3,000 in any given electoral district and \$150,000 in total nationally (adjusted for inflation). The legislation was challenged by Stephen Harper, then president of the National Citizens' Coalition, on the grounds that it violated the right to freedom of expression, freedom of association, and the right to vote under sections 2(b), 2(d), and 3 respectively of the *Charter*. The Canadian government defended the restrictions as an important means of addressing economic inequalities between wealthy and other speakers. In a split decision, a majority of the Supreme Court upheld the spending limits.

Before examining the Court's decisions, it is necessary to discuss an important element of these cases: the link between money, electoral advertising and political influence. In both cases, the Court recognized that individuals and groups use political advertising in order to exercise influence on the outcome of a referendum or election. In *Harper*, for example, the majority asserted that speakers may engage in election advertising "to influence the outcome of an election by commenting on the merits and faults of a particular candidate or political party."<sup>77</sup> Implicit is the idea that individuals and groups use political advertising in order to influence voter behavior. A business organization, for example, may prefer a candidate that advocates policies that are "business-friendly." Moreover, this organization may use political advertising in order to persuade voters to support that candidate. They may, for example, run a television

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<sup>77</sup> *Harper v. Canada (A.G.)* [2004] 1 S.C.R. 827, para. 55.

advertisement praising the candidate's personal characteristics or political views. Similarly, they may run ads which attack the personal characteristics or positions of their candidate's opponents. The critical point is that political advertising is an instrument by which persons can exercise influence over voters and, in turn, the outcome of an electoral process.

This view of political advertising as an instrument of political influence does, of course, make an important assumption: political advertising is an effective means of influencing an electoral process. Voters are actually influenced by the political messages that individuals and groups communicate through the mass media. Moreover, voters are influenced in the way that speakers intend. If a business organization runs ads promoting a particular candidate, these ads will actually have the effect of persuading voters to cast their ballot in favour of that candidate. On the question of effectiveness, the majority in *Harper* acknowledged that the social science evidence was inconclusive. Nevertheless, the justices proceeded on the assumption that election advertising does have intended impacts on voters. As they stated, "candidates, interest groups and corporations for that matter would not spend a significant amount of money on advertising if it was ineffective."<sup>78</sup> For our purposes here, the issue of whether political advertising actually influences voters is side-stepped. Like the Court, it is simply assumed that political advertising is an effective means of political influence.

This leads to the next important point: money is a significant factor in exercising influence through political advertising. In democracies such as Canada,

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<sup>78</sup> Ibid, para. 106.

access to mediums of political advertising requires money. In order for an individual or group to communicate its political message, they must pay for the cost of telemarketing, the production and distribution of pamphlets, advertising space in newspapers or magazines, or advertising time on television, radio or internet. Without money, speakers cannot make use of political advertising in order to influence electoral outcomes.

The importance of money, however, is not limited to simply “getting the message out.” Money can also have an important impact on the effectiveness of one’s political message. If, for example, one desires to reach a wide audience, not only in terms of numbers but also geographical scope, then one must engage in more expensive forms of political advertising. Running a short ad on a local station in the middle of the night will not do. One needs to undertake a national advertising campaign, be it through the national media or through multiple regional media. Running national campaigns, however, entails greater financial cost.

The effectiveness of one’s political message can also depend on the number of times it is heard by the listener. Running a short advertisement once may not impact the listener’s views and behavior. A much more effective means of influencing voters may be to inundate them multiples times with the same message. The effectiveness of one’s political advertising may also depend on its production value. A lawn sign which says “Vote NDP,” may have less of an impact on voters than a well produced television ad which uses sounds and

graphics to emotionally impact the listener. Again, however, running multiple ads and producing slick advertising spots entail higher financial costs.

In sum, for our purposes here, it is assumed that political advertising represents an important means of influencing political outcomes. Through political advertising, speakers can attempt to shape voter preferences and views, influencing them to vote in a particular way. Money, moreover, is an important factor in using political advertising. In order to make use of political advertising, one must produce advertisements and purchase access to mediums of communication. Money can also be an important factor in the effectiveness of one's political advertising, determining the breadth of one's audience, the number of times the message is communicated, and the production value of that message.

### **Electoral Advertising: Moderate and Radical Views**

How would the moderate and radical egalitarian views of political equality treat the issue of money, electoral advertising and political influence? Both would reject the libertarian or free market liberal position that citizens should be free to spend whatever they want on electoral advertising. Nevertheless, they would do so for very different reasons.

For the moderate egalitarian, political equality means that the wealthy are prevented from controlling the outcome of an election or referendum by using their economic advantages to push out or exclude the influence of others. In the



specific context of election advertising, this concept can be restated: the wealthy are to be prevented from using election advertising in such a manner that they are able to push out or exclude the influence of others. How might this be the case? One situation would be wealthy groups using their financial advantages to monopolize advertising and exclude others from using this important means of political influence. Wealthy groups could, for example, purchase all of the available advertising space in key media outlets, thus preventing others from expressing their views through political advertising. The wealthy could then use their monopoly in election advertising to shape voter preferences and determine the outcome of an election.

The concern need not be limited to a complete monopoly by wealthy groups. It may be that others are able to make use of election advertising and get their views out to the voters. Nevertheless, the wealthy are able to use election advertising in such a manner that they can effectively undercut or marginalize these other political messages. Supporters of one candidate may purchase a modest level of television and radio advertising spots, praising the views of their candidate. A wealthy group opposed to the candidate might attempt to undercut this advertising by running a highly expensive and negative ad, attacking the integrity of the candidate. In doing so, the wealthy group uses particularly unflattering music and graphics in depicting the candidate. Moreover, this group runs the ad across the electoral district multiple times every night until the election. While voters may have seen the positive ad put out by the candidate's

supporters, their view of the candidate is, in the end, shaped largely by the highly repetitive and negative ad campaign.

For the moderate egalitarian, then, regulations on political advertising spending are important means of preventing these sorts of situations. The objective of any regulatory scheme, however, is to simply prevent wealthy groups from using election advertising to control the outcome of an electoral process by pushing out or excluding the influence of others. Importantly, the liberal-egalitarian view does not necessarily require minimizing economic inequalities between speakers as much as possible. One could prevent the monopolization of election advertising or the flooding of the media with negative ads while still permitting significant differences in spending by speakers. All that is required is limiting the spending of wealthy groups so that they are unable to engage in these sorts of activities.

For the radical egalitarian, by contrast, the objective is quite different. Political equality means more than simply preventing the wealthy from excluding others from the political process. It means preventing the wealthy from having greater weight or influence than others, simply because they can spend more money. In the context of election advertising, the concern is that wealthy speakers may be able to engage in greater levels of elections advertising, or more effective forms of advertising, and thus have a larger impact on voter behaviour and the final outcome of the electoral process. Wealthy speakers, for example, may be able to engage in expensive forms of advertising, such as national primetime

television and radio ads. As such, they are able to express their views to a very large, national audience. Those with less financial resources may be forced to express their political views through much cheaper forms of communication, such as lawn signs and billboards. As such, their influence on an election would be far more limited, at least insofar as they could only reach a very small and geographically localized group of voters.

Like the moderate egalitarian, the radical egalitarian would also advocate regulating spending on political advertising. Nevertheless, they would support schemes which equalized access to advertising. This, in turn, would require minimizing economic inequalities between speakers. One possible avenue would be the creation of an election advertising scheme in which only the state was permitted to purchase advertising space and time. The state could then distribute this advertising equally amongst different groups in society. In the alternative, the state could set limits on the amount of money that speakers can spend on election advertising and then provide assistance to those with lesser financial so that they could spend up to the limit. In either case, the basic approach is the same. In order to ensure that the wealthy do not enjoy a greater level of influence than others, economic inequalities need to be eliminated as much as possible.

## **Conflating Moderate and Radical Egalitarianism**

The moderate and radical egalitarian views would both support the regulation of election advertising, albeit for very different reasons. Interestingly, these two sorts of egalitarianism are conflated, not only in the scholarly commentary on Rawls and the courts, but also by the Court themselves.

As discussed in the last chapter, the egalitarian model of electoral fairness, advanced by Colin Feasby and others, clearly distinguishes Rawls and the Canadian Supreme Court from its American counterpart on the issue of election advertising and spending limits. According to this view, the American Supreme Court in *Buckley* adopted a libertarian view of political equality, which rejected the idea that the state could limit the expression of wealthy speakers in order to promote the political speech of those with lesser resources. The Canadian Supreme Court, by contrast, adopted an egalitarian model, consistent with Rawls's notion of political equality. This model permits the state to promote political equality by addressing economic inequalities between citizens.

In developing the egalitarian position of Rawls and the Canadian Supreme Court, however, Feasby runs together the moderate and radical strains. At some points, the egalitarian model is characterized in very moderate terms. Referring to Rawls, for example, Feasby asserts that a fair electoral process requires that the “wealthy be prevented from controlling the electoral process to the detriment of

others with less economic power.”<sup>79</sup> The egalitarian model simply seeks to prevent the wealthy from using their financial advantage to control the electoral process.

In discussing this model of elections further, however, Feasby casts a much more radical light. Feasby asserts that both Rawls and the Court are endorsing the ideal of one person-one vote. The suggestion is that political equality means citizens are to have the same ability to influence political outcomes, just as the ideal of one person-one vote ensures that all are equal in their voting power. In this context, the goal of the egalitarian model is ensure that the wealthy do not exert a “disproportionate influence”<sup>80</sup> on electoral outcomes. Instead, all citizens are to enjoy an “equality of participation and influence.”<sup>81</sup> This involves ensuring that all have “equal opportunity” to “participate in the political life of the State”<sup>82</sup>, in which the ideal electoral procedure is one in which each citizen enjoys “a relatively equal opportunity to influence an election or ascend to elected office.”<sup>83</sup>

Not only are these two views conflated in the scholarly literature on Rawls and the courts; they are also run together by the Canadian Supreme Court itself, at least in the *Libman* and *Harper* decisions. This is evident in the Court’s discussions of the objectives of the legislative schemes in both cases. The Court

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<sup>79</sup> Feasby, C. “The Charter and the Administration of the Process of Democracy: *Libman v. Quebec (A.G.)* and the Emerging Egalitarian Model” *McGill Law Journal* 44 (1999), 8.

<sup>80</sup> *Ibid.*, 31.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, 9-10.

<sup>83</sup> *Ibid.*

acknowledged that the objective was to promote fairness and equality in the electoral process by addressing economic inequalities between speakers. Moreover, they recognized this objective as being sufficiently important to limit *Charter* rights and freedoms. Nevertheless, in discussing what this objective entailed, the Court ran together the two egalitarianisms into a single view of political equality.

In *Libman*, for example, the Court asserted that the purpose of the legislation was to ensure equality by “preventing the most affluent members of society from dominating the referendum debate through access to greater resources.”<sup>84</sup> From the point of view of voters, the objective was to promote informed voting by “ensuring that some positions are not buried by others.”<sup>85</sup> Finally, in order to maintain confidence in the electoral system, steps must be taken to ensure that the democratic process is “not dominated by the power of money.”<sup>86</sup> Here the objective of the financial scheme is characterized in more moderate egalitarian terms. Limits on spending are necessary in order to prevent the wealthy from using their economic advantage to dominate the referendum debate and bury the positions of others.

At other points in *Libman* the Court described electoral fairness in much more radical terms. According to them, the legislation was intended to “guarantee the democratic nature of referendums by promoting equality between the options

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<sup>84</sup> *Libman v. Quebec (Attorney General)* [1997] 3 S.C.R. 569, para. 40.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

submitted by the government.”<sup>87</sup> This equality meant that speakers were to enjoy “equality of access” to media of expression and that the various sides of an election or referenda were to have “reasonable equal opportunity to present their case to voters.”<sup>88</sup> For the Court, what was sought was “an equality of participation and influence between the proponents of each [referendum] option.”<sup>89</sup> In these statements, electoral fairness is no longer simply about preventing the wealthy from using their economic advantages to exclude others. Electoral fairness, instead, means preventing the wealthy from using their financial advantage to exercise a greater level of influence than others. Supporters of each referendum option are to enjoy equality of access to media of expression so that there will be an equality of participation and influence.

This running together of the moderate and radical views into a single egalitarian model was also evident in *Harper*, particularly in the majority’s decision.<sup>90</sup> In discussing the basic view laid out in *Libman*, the majority asserted that the Court adopted a conception of fairness that was consistent with an “egalitarian model of elections.”<sup>91</sup> For the majority, this egalitarian model sought to “ensure that one person’s exercise of the freedom to spend does not hinder the

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<sup>87</sup> *Ibid.*.

<sup>88</sup> *Ibid.*, para. 41.

<sup>89</sup> *Ibid.*.

<sup>90</sup> The minority decision in *Harper* does not conflate the two egalitarian views of political equality to the same extent. Like the majority, the minority clearly recognized that the state could limit freedom of expression in order to address economic inequalities. In doing so, the minority clearly and consistently frames the issue in liberal-egalitarian terms. For them, the legislative objective was to “prevent those with greater means from dominating electoral debate” and to “ensure that some positions are not drowned out by others.” Furthermore, the harm that the Government must show in order limit freedom of expression was that “wealthy Canadians – alone or in concert – will dominate political debate during the electoral period absent limits.”

<sup>91</sup> *Harper v. Canada (Attorney General)* [2004] 1 S.C.R. 827, para. 62.

communications opportunities of others.”<sup>92</sup> More specifically, it seeks to “prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard.”<sup>93</sup> For the majority, an egalitarian model of elections “promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power.”<sup>94</sup>

At other points, the Court presents the egalitarian model in more radical terms. Its overarching objective was to promote fairness by “creating equality in the political discourse” and ensuring the “equal dissemination of points of view.”<sup>95</sup> Moreover, the objective of the legislative regime was to “create a level playing field for those who wish to engage in the electoral discourse.”<sup>96</sup> Again, no longer is electoral fairness simply about preventing the wealthy from using their financial advantage to exclude other views. The objective, instead, is to prevent the wealthy from enjoying greater influence by advertising their views to a greater extent than others. For the Court, there is to be equality in the political discourse, in which all views are to be disseminated equally to voters.

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<sup>92</sup> Ibid, para. 61.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid, para. 62.

<sup>95</sup> Ibid, para. 63

<sup>96</sup> Ibid, para. 62.



## Political Equality and Advertising Spending Regimes

This brings us to the critical issue: why is it important to separate out these alternative egalitarian views? Regardless of whether the Court recognized the moderate or radical egalitarian view of political equality, the outcome is the same. The state should be permitted to address economic inequalities in citizens' political participation by limiting the amount of money that speakers can spend on election advertising. What difference does it make if the objective is simply to prevent the wealthy from excluding the views of others completely or to ensure that views are equally disseminated?

The importance of distinguishing the moderate and radical approaches is evident when turning to a critical practical question: how should the state regulate political advertising? In both *Libman* and *Harper*, the Court took a particular position on this question. While not going as far as to dictate the precise scheme that governments should adopt, they nevertheless drew important lines between what was permissible and what was not. On the one hand, the Court rejected the scheme adopted by the Quebec government in *Libman*, which included a complete prohibition on advertising spending by individuals and groups. On the other hand, the Court supported, at least in principle, the scheme adopted by the federal government in *Harper*, which simply imposed an upper threshold on spending. Furthermore, in asserting their preference for an upper threshold on spending, the Court did not also require governments to provide public funding to individuals and groups wishing to make use of election advertising. Instead, they

took the position that upper limits on spending alone were a sufficient means of promoting political equality.

In taking this position, the Court concluded that upper limits on spending secured electoral fairness while limiting freedom of expression to a lesser extent. In *Libman*, for example, the Court focused on speakers who supported neither of the referendum options and, as such, could not join any of the national committees. According to the Court, these sorts of speakers were denied an opportunity to express their political views during an election. As they stated, “groups and individuals who cannot join or affiliate themselves directly with the national committees are allotted no money whatsoever to spend as they see fit in order to make their positions known.”<sup>97</sup> Therefore, it is impossible “for them to pay to have flyers, pamphlets or posters printed that present their points of view.”<sup>98</sup> In their view, “this example suffices to illustrate the seriousness of the restriction imposed... on individuals and groups who can neither join nor affiliate themselves with the national committees.”<sup>99</sup>

With this in mind, the Court recommended an upper limit on spending, which was sufficiently high to allow independent speakers to express their views in an effective manner, but sufficiently low to maintain fairness in the electoral process. Prohibitions on pooling resources should also be put into place to ensure that groups could not combine to overcome the spending limit. As they stated, “this alternative would result in a more acceptable balance between absolute

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<sup>97</sup> *Libman v. Quebec (Attorney General)* [1997] 3 S.C.R. 569. 74.

<sup>98</sup> *Ibid.*, para. 76.

<sup>99</sup> *Ibid.*

individual freedom of expression and equality of expression between proponents of the various options.”<sup>100</sup> The Government of Quebec did not need to go so far as to completely prohibit spending outside of the national committee system. The Government could secure political equality while still allowing for some independent spending.

In *Harper*, the Court again recognized upper limits on spending as an appropriate means of securing political equality. In concluding that the limits on spending imposed by the federal government were constitutional, the majority stated that an “upper limit on the amount that third parties can dedicate to political advertising curtails their [the wealthy] ability to dominate the electoral debate.”<sup>101</sup> As such, “third party advertising expense limits are rationally connected to promoting equality in the political discourse.”<sup>102</sup> Moreover, even though the minority in *Harper* rejected the particular spending limits under review, they recognized the importance of the idea of spending limits generally. As they stated, “this Court in *Libman* has recognized that they [spending limits] are an acceptable, even desirable, tool to ensure fairness and faith in the electoral process.”<sup>103</sup>

It is at this point that separating out the moderate and radical egalitarian views of political equality is of practical importance. If one views political equality in the moderate egalitarian sense, then one would agree with the Court

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<sup>100</sup> Ibid, para. 81.

<sup>101</sup> *Harper v. Canada (Attorney General)* [2004] 1 S.C.R. 827, para. 107.

<sup>102</sup> Ibid.

<sup>103</sup> *Harper v. Canada (Attorney General)* [2004] 1 S.C.R. 827, para. 39.

and clearly reject a complete ban on spending in favour of an upper threshold on spending. If, however, one values political equality in the radical sense, then one would take issue with the Court's position. A complete prohibition on advertising would be an important means of preventing wealthy groups from having a greater influence on electoral outcomes. Moreover, simply instituting an upper threshold on spending would fall far short of securing political equality in this sense.

As discussed above, the moderate egalitarian view simply seeks to prevent the wealthy from controlling the political process by using their economic advantages to exclude others. In the context of political advertising, the concern is that wealthy speakers will be able to use mass media to control electoral outcomes in this way. From this perspective, one need not completely eliminate third party spending. One need only limit the amount they can spend so as to prevent them from monopolizing election advertising or marginalizing the political speech of others by flooding the media with negative advertising campaigns.

In *Libman*, for example, the Quebec government had instituted a national committee system. Under this regime, there were publicly funded committees, which were responsible for campaigning for each referendum option. It could be possible for wealthy groups to control the outcome of a referendum if there were no restrictions on spending outside of the national committee system, particularly if it were the case that the economic elite tended to prefer one option over another. Wealthy groups could attempt to monopolize mass media advertising, pushing out the views of those who supported other referendum options. In order to prevent

this situation, one could permit spending outside of the national committee system, so long as levels of spending were kept low enough that wealthy groups could not use election advertising to control the outcome of the election. One could, for example, permit individuals and groups to spend \$10,000 on political advertising. Such a sum would be sufficiently low to prevent monopolization of election advertising and the inundation of voters with negative ad campaigns.

Upper thresholds on spending would also promote political equality in the context of *Harper*, where the issue was third party spending during federal elections. Again, it could be possible for the wealthy to control the outcome of an election if there were no restrictions on spending. Wealthy speakers could combine to monopolize mass media advertising in order to ensure their preferred candidate or political party was successful. One need not, however, go as far as completely prohibit advertising spending by these sorts of speakers. One could, as the federal government did, place an upper limit on spending: \$3,000 per electoral district and \$150,000 nationally. Such a limit would clearly be low enough to prevent wealthy speakers from purchasing all of the advertising space and time during an election or flooding the media with highly negative ads.

From the perspective of moderate egalitarianism, then, the Court's position in *Libman* and *Harper* secures political equality. As the objective is simply to prevent the wealthy from using their economic advantage to control elections, there is no need to completely prohibit third party spending. Political equality can be secured by simply instituting thresholds on spending. Can the

same be said of a radical egalitarian view? Would a radical egalitarian also reject a complete prohibition on spending in favour of an upper limit? The concern here is quite different: preventing the wealthy from using their economic advantages to exercise greater influence than others. As they enjoy greater financial resources, they are able to purchase more expensive advertising campaigns, express their views to a wider audience, and make use of more persuasive forms of political advertising.

Under this view of political equality, a complete prohibition on spending by third parties could be viewed as a necessary means of promoting political equality. In regard to the national committee system in *Libman*, the objective could be understood as securing political equality between supporters of each referendum option. In doing so, it is not sufficient to simply prevent supporters of one option from monopolizing media of political communication. Each group should be afforded the same amount of advertising time and space, so that their views are equally disseminated to voters. The scheme imposed by the Government of Quebec operated to bring about this sort of political equality. Each committee was financed by public monies and contributions from supporters and limits on spending were imposed to ensure that one committee did not spend more than another. If, however, citizens are permitted to spend money outside of the national committee system, then this financial balance would be threatened. This would particularly be the case if wealthy speakers tended to support one referendum option over the other.

What about the Court's alternative: an upper threshold on spending?

Would this approach to the regulation of money secure political equality in the radical egalitarian sense? While an upper limit would prevent the wealthy from controlling the outcome of the referendum, it could permit a significant financial and advertising imbalance between the referendum options. Again, this would particularly be the case if the economic elite in the province tended to support one of the options over another. These wealthy speakers could make full use of the advertising scheme, spending right up to the limit in support of their preferred referendum option. As a result, one of the sides of the referendum would enjoy a large advantage in campaigning for electoral support, as it received the bulk of independent advertising.

The problem of an upper limit on spending is not restricted just to *Libman*. In *Harper*, the limit of \$3,000 per electoral district and \$150,000 nationally would certainly prevent the wealthy from controlling the outcome of elections by monopolizing the media. Nevertheless, wealthy speakers would be able to spend up to the limit, while others may not be able to spend even a minimal amount on advertising. As such, some in society could have a larger influence on elections than others, simply because they enjoy greater financial resources. Moreover, in the context of the competition between candidates and political parties, this can create significant financial imbalance between competitors, particularly if wealthy speakers tend to support a particular candidate or party.

One might, of course, argue that the spending limits in *Harper* were so low that any advantage gained by the wealthy, or their preferred candidates and parties, would be trivial. At a limit of \$3,000 per electoral district, one can only hope to have a very small impact on voting behavior. As such, the upper limits on spending would have the effect of securing political equality in the radical sense. What if, however, the federal government had introduced much higher limits on spending: \$50,000 per electoral district? From a moderate egalitarian view, such a limit would be perfectly permissible, assuming that the \$50,000 limit was low enough to prevent the wealthy from using election advertising to control the outcome of an election. From a radical egalitarian view, however, such spending limits would permit significant inequality between citizens in the communication of their political views. Those that could spend up to the limit would be able to purchase significant radio and television advertising, while others would be left to use much cheaper forms of communication, such as signs on their lawn or leaflets. Moreover, those candidates or parties that enjoyed support from wealthy speakers would enjoy a considerable advantage relative to their competitors.

This is not to suggest that a radical egalitarian view would never support upper limits on spending; simply that upper limits alone are insufficient to secure political equality in any substantive way, particularly when there is general economic inequality in society. Combined with other initiatives, however, upper limits on spending could be an effective means of ensuring political equality, such as public subsidies which allowed those with lesser resources to spend up to the maximum allowable limit.



With this in mind, a radical egalitarian view would support a very different treatment of the Court's decisions, particularly in the *Libman* case. Instead of denying the Quebec government the option of completely prohibiting spending outside of the national committee system, a radical egalitarian view could be used to allow such an approach. In doing so, one could argue that such a prohibition is necessary in order to ensure political equality between supporters of the different referendum options. In other words, to ensure one side does not enjoy greater weight in influencing the outcome of the referendum simply because they enjoy greater financial resources and, as such, the ability to use media of mass communication more effectively.

Moreover, the radical egalitarian could respond to the Court's concern over abstentionists by simply requiring the Quebec government to alter its national committee system, while still maintaining the prohibition on spending. One could, for example, require the government to allow for the creation of an additional national committee, which would campaign for the rejection of all the referendum options. This national committee would also be eligible for public financial support, as well as regulated by the spending limits imposed on the other committees. Such an approach would ensure that important views, such as those held by abstentionists, were communicated to voters, while still maintaining the strict financial equality between different sides of the referendum.

Interestingly, this radical egalitarian position could also have implications in the context of *Harper*. In that case, the federal government had tailored its

spending restrictions to meet the Court's line of reasoning in *Libman*, simply placing an upper threshold on spending by so-called third parties. Under radical egalitarianism, however, the federal government could have prohibited spending by these individuals and groups altogether, arguing that such limits were necessary in order to protect financial equality between those contesting elections: candidates and political parties. Moreover, it could be argued that third-parties could still express their views by forming their own political parties and contesting elections directly. This radical egalitarian view, of course, would also require a strict financial scheme for candidates and parties, similar to the one introduced by the Government of Quebec in the context of national committees. Candidates and parties would, for example, be regulated by spending limits in their campaigns, and would require access to public subsidies in order to ensure that all could spend up to that level.

## **Conclusion**

In the previous chapter, it was argued that Rawls's advocated a liberal-egalitarian view of political equality, which incorporated egalitarian concerns about actual fair opportunity. Moreover, the practical implications of this position were discussed by contrasting Rawls's position with other liberal theories in the context of jurisprudence on freedom of political speech and electoral financing laws.

The purpose of this chapter was to stress the importance of examining Rawls's conception of political equality from the perspective of what sort of egalitarianism he advocates. In doing so, it was argued that one needs to separate out two important views: moderate and radical egalitarianism. This distinction has practical implications when turning from the question of *whether* social and economic inequalities should be addressed to the question of *how* they should be addressed. Interestingly, these two important views have been conflated, not only in the scholarly literature on Rawls and the courts, but also by the Canadian Court themselves.

Radical egalitarianism seeks to prevent the socially and economically privileged from using their advantages to exercise greater political influence than others. As such, radical egalitarianism seeks to minimize the political impact of socio-economic inequalities as much as possible. Moderate egalitarianism, by contrast, simply seeks to prevent the privileged from using their advantages to exclude others from the political process. Under this view, there is no need to minimize socio-economic inequalities as much as possible. All that is required is to prevent inequalities from becoming so large that those at the top can push out those at the bottom.

This, in turn, has important implications when examining the issue of money and political advertising. In the Canadian constitutional cases of *Libman* and *Harper*, the Court drew important lines on the question of how governments ought to regulate political advertising, rejected the idea that governments could

impose a complete prohibition on advertising spending by individuals and groups, while recommending an upper limit on spending. In assessing this position, much depends on the sort of egalitarianism one supports.

A moderate egalitarian would support the Court, as an upper limit on spending would be sufficient to prevent wealthy groups from using election advertising to exclude others from influencing electoral outcomes. A radical egalitarian, by contrast, would find the position problematic. A complete prohibition on spending represents an important means of ensuring political equality in the radical sense. Moreover, simply imposing an upper threshold on spending would fall far short of securing real political equality.

What sort of egalitarianism is Rawls endorsing? Does Rawls adopt a moderate egalitarian view of political equality, in which social and economic inequalities need only to be addressed insofar as to prevent the privileged few from excluding others? Or does he advance a radical egalitarian view, which seeks to secure equal weight or influence for all by minimizing social and economic inequalities must be minimized as much as possible, so that all may have equal weight or influence in deciding political outcomes?

## Chapter Five

### Early Rawls and the Radical Egalitarian Challenge

#### Introduction

It was argued that Rawls represents an important strain of liberal political thought, which incorporates egalitarian concerns. In terms of his general theory of justice, Rawls's egalitarianism is evident in his second principle of justice, which places limits on the sorts of social and economic inequalities that are permissible in a just society. In the more specific context of political participation and equality, this egalitarianism is evident in his requirement that all citizens not only possess an equal set of political liberties (formal equality), but that the fair value of these political liberties also be secured (actual equality).

What exactly does the fair value of the political liberties entail? Is the usefulness of citizens' political liberties to be understood in the moderate egalitarian sense or the radical sense? The remainder of this work focuses on these questions. In doing so, however, it is important to recognize that Rawls significantly altered or clarified his notion of political equality over time. This was due in large part to early egalitarian criticisms of *A Theory of Justice*, which Rawls attempted to address in his later works. In examining Rawls's form of egalitarianism, therefore, it is useful to begin with these early criticisms.

Of particular importance is Norman Daniels's radical egalitarian critique, in which he attacks Rawls's distinction between the equal liberties and the worth or value of those liberties. With the first principle, Daniels argues that Rawls secures for all an equal set of political rights and liberties. However, with the second principle, specifically, the difference principle, Rawls permits significant inequalities in the worth or value of those liberties. Daniels goes on to argue that it is not clear how Rawls can take this position, particularly when considering his arguments in support for equality in the formal sense. As such, Daniels argues that Rawls should adopt a more radical egalitarianism, which seeks to minimize social and economic inequalities as much as possible.

This radical egalitarian critique led Rawls to make a significant clarification of his notion of political equality in *Political Liberalism* and *Justice as Fairness: A Restatement*. In clarifying his notion of political equality, does Rawls adopt Daniel's radical egalitarian view? Or does Rawls maintain a much more modest egalitarianism in his treatment of political equality and the fair value of the political liberties? These questions are explored in the next chapter.

## **Egalitarian Challenges to Justice as Fairness**

Before turning to Daniels's specific criticism, it is important to canvas the different sorts of egalitarian critiques that have been raised against Rawls. While Rawls incorporates egalitarian concerns into his liberalism, he has nevertheless

been strongly criticized by a broad range of egalitarian theorists.<sup>104</sup> These challenges have taken issue with different aspects of Rawls's theory of justice.

One important challenge centres on Rawls's approach to the issue of the currency of equality or the question of "equality of what?" Central to this debate is the sense in which persons are to be equal, whether it be resources, capabilities, welfare or some other unit of analysis. In this context, some strains of egalitarianism have been critical of Rawls's emphasis on resources or primary goods. Some theorists, such as Amartya Sen<sup>105</sup>, have argued in favour of a capabilities approach, in which the focus is on persons' capabilities or basic functioning. Another view, commonly referred to as the opportunity of welfare approach, stresses the importance of persons' opportunities for well-being or what a person gets insofar as their life goes well for themselves.<sup>106</sup> According to these sort of critiques, Rawls has incorrectly identified in what sense or space persons are to be equal. As Daniels encapsulates the criticism, "by focusing on the wrong space, that is, on resources rather than the capabilities to do or be what one

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<sup>104</sup> For a more in-depth overview of egalitarian critiques of Rawls, see Norman Daniels, "Democratic Equality" Rawls's Complex Egalitarianism" *The Cambridge Companion to Rawls*, ed. Samuel Freeman, (Cambridge: Cambridge University Press, 2003).

<sup>105</sup> See, for example, Amartya Sen, A. 'Equality of What', *The Tanner Lectures on Human Value*, ed. Sterling M. McMurrin (Salt Lake City: University of Utah Press, 1980). For an example of Sen's capabilities theory applied in the democratic context, see James Bohman *Public Deliberation: Pluralism, Complexity and Democracy* (Cambridge, Mass.: MIT Press, 1996).

<sup>106</sup> See, for example, Richard Arneson, "Equality and Equal Opportunity of Welfare." *Philosophical Studies*. Vol. 56. (1989); "Egalitarianism and Responsibility." *Journal of Ethics*. Vol. 3 (1999). Also see Cohen, G.A "On the Currency of Egalitarian Justice." *Ethics* Vol. 99 (1989), 906-944.

chooses, the index [of primary goods] fails to capture inequalities important to justice.”<sup>107</sup>

Another important egalitarian challenge focuses on the scope of Rawls’s principles; in particular, the range of social institutions his theory of justice is meant to apply to. As discussed in Chapter One, Rawls’s principles of justice apply only to basic institutions or structures of society. As such, Rawls leaves many private structures to operate outside of his theory. This narrower scope has been criticized on the grounds that it fails to achieve real equality. G.A. Cohen, for example, argues that the division between basic structures and private associations creates situations in which some find their equality of opportunity severely undercut due to their private relations. “Selfish husbands” can undermine the equal opportunity of their wives and daughters by unfairly dividing domestic chores, with the result being disadvantage in the pursuit of education, careers, etc. This inequality in opportunity, moreover, can persist even if the basic social institutions around the family try to support the equality of women.

A third egalitarian challenge centres on the issue of responsibility and choice. Of particular concern is Rawls’s difference principle, a component of his second principle of justice, which holds that social and economic inequalities are only permissible if they are to the advantage of all, including the worse off. Some egalitarian views, which Daniels refers to as “equal opportunity for advantage,” are critical of the difference principle, arguing that while Rawls “decries the moral

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<sup>107</sup> Norman Daniels, “Democratic Equality” Rawls’s Complex Egalitarianism” *The Cambridge Companion to Rawls*, ed. Samuel Freeman, (Cambridge: Cambridge University Press, 2003), 244.



arbitrariness of social and natural contingencies in defending the second principle of justice”, the difference principle “at best only mitigates and does not correct for their effects.”<sup>108</sup> Moreover, that a “more effective egalitarian principle would require compensation for any unchosen unhappiness or disadvantage we may suffer.”<sup>109</sup>

An example of this sort of challenge is Ronald Dworkin’s idea of “brute luck.”<sup>110</sup> According to Dworkin, Rawls’s difference principle is not egalitarian enough in that it fails to appropriately address the plight of certain groups with unequal natural endowments, such as the persons born with handicaps, ill-health, or low levels of natural talents. Furthermore, the difference principle is not sufficiently sensitive to the issue of responsibility, and fails to pay appropriate attention to ambition in the distribution of resources. In sum, the difference principle assumes a “flat” or “uni-dimensional” analysis of equality, which fails to take into account “differences in ambition, taste, and occupation, or differences in consumption, let alone differences in physical condition or handicap.”<sup>111</sup>

With this in mind, Dworkin proposes an alternative approach to the distribution of resources, which is grounded on the ideas of equal concern and personal responsibility. The former holds that it is equally important to the

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<sup>108</sup> Ibid, 243.

<sup>109</sup> Ibid.

<sup>110</sup> See, for example, Ronald Dworkin, “What is Equality? Part 2: Equality of Resources” *Philosophy and Public Affairs*. Vol. 10. No. 4 (1981), 283-345. In addition to Dworkin, the “equal opportunity for advantage,” “luck egalitarian,” or “equality of fortune” monikers have been attached to a range of other theorists, such as Richard Arneson, Gerald Cohen, John Roemer, and Eric Rakowski.

<sup>111</sup> Ronald Dworkin, “What is Equality? Part 2: Equality of Resources” *Philosophy and Public Affairs*. Vol. 10. No. 4 (1981), 343.

political community that persons' lives should go well, while the second requires that the fate of each person should be sensitive to their own choices. According to Dworkin, these ideas in turn require differentiating between two sorts of situations in the fair distribution of resources. On the one hand, it is fair that one's allotment of resources be sensitive to their choices in life. If it is the case that one prefers a life of leisure over hard work, then it is just for them to be allotted less wealth or income than others. On the other hand, fairness requires addressing conditions which are involuntary, which include what Dworkin refers to as "brute luck." This includes differences between persons in regard to their natural talents and handicaps. According to Dworkin, persons should be held responsible for the outcomes of their own choices and, as such, are not entitled to compensation for resulting inequalities. However, persons should not be held responsible for outcomes due to involuntary circumstances (such as brute luck), and are thus entitled to redress stemming from these inequalities.<sup>112</sup>

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<sup>112</sup> Rawls has been defended by a number of theorists against this challenge from the equal opportunity for advantage approach (also commonly referred to as "luck egalitarianism" or "equality of fortune" theories). In outlining the critique, Daniels himself is critical of theories such as Dworkin's on the grounds that it does not capture the relevant notion of responsibility. According to Daniels, it makes responsibility depend in large part on what others do, as opposed to what we do. Many social democrats and feminist writers, such as Elizabeth Anderson, Ann Phillips and Brian Barry, have also taken issue with equal opportunity for advantage theories. Anderson, for example, defends Rawls, suggesting that theories such as Dworkin's are simply a repackaging of libertarianism and free market liberalism. She argues that the egalitarian ideal would not justify inequality in social conditions on the grounds that some have made poor choices and should be held responsible for them. Central for Anderson is that luck egalitarianism and theories of equality of fortune rely on the notion of market decisions in understanding free choice. So long as it is the case that all had fair shares initially, then there is no need to be concerned with "the suffering and subjection generated by people's voluntary agreements in free markets." According to Anderson, however, free markets should not be viewed as institutions in which a citizen enjoys complete freedom in their choices. While they often provide citizens with a set of options to choose from, the options provided may not be just. Anderson further criticizes equality of fortune theories on the grounds they require and reinforce subjugation and notions of inferiority in society, which is inconsistent with the general egalitarian ideal of equal respect and concern for

## Egalitarianism and the Worth of the Basic Liberties

While the issues of the currency, scope, and responsibility all represent important challenges, the focus here is different. At issue is what Rawls means by the fair value of the political liberties as a notion of actual fair opportunity. Is Rawls suggesting that citizens are entitled to the equal worth of these liberties? Or is he suggesting something much more modest?

This is precisely the sort of issue that Daniels's raises in his early critique of Rawls's *A Theory of Justice*. As Daniels states the problem:

On the one hand, liberal theorists have argued for the equality of various political liberties... On the other hand, while justifying some degree of equality in the political sphere, these liberal theorists at the same time accepted and justified significant inequalities in income, wealth, powers, and authority between both individuals and classes... Despite the highly divergent theoretical frameworks used to justify these political equalities and socio-economic inequalities..., there was always a shared assumption. Liberal theorists uniformly assumed that political equality is compatible with significant social and economic inequalities, that they can exist together.<sup>113</sup>

Daniels's critique highlights an important issue for liberal views of political equality. According to Daniels, Rawls and other liberals hold that citizens should

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all. Such theories require the state to make moral judgments about people when assigning outcomes to brute luck. Anderson goes on to advance what she terms "democratic equality." This notion of equality is grounded on the egalitarian ideal that all persons are of equal moral worth and, as such, are deserving of equal respect and concern.

<sup>113</sup> Norman Daniels, "Equal Liberty and Unequal Worth of Liberty." *Reading Rawls: Critical Studies of A Theory of Justice*. ed. by Norman Daniels, (New York: Basic Books, INC., Publishers, 1975), 253.

be equal in the formal sense; they should possess an equal set of political liberties or freedom from state coercion, such as the right to vote and run for political office and the freedoms of political association and speech. Yet liberals tend to permit significant social and economic inequalities between citizens in their political participation. Daniels thus raises the following question: how can citizens be said to be equal in their political participation if there are significant social and economic inequalities. It would seem that those who possess greater levels of such goods as wealth, income and social status would enjoy greater opportunities for political influence than others. As such, political equality would demand not only equality in the formal sense, but also equality in the social and economic senses.<sup>114</sup>

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<sup>114</sup> This basic concern has also been expressed by other egalitarian thinkers, albeit with a much broader scope. In *Why Social Justice Matters*, for example, Brian Barry, takes issue with a general view in liberal philosophy and practice, which simply seeks to raise-up those at the bottom. Under this sort of egalitarianism, what is problematic is that some in society find themselves in the deplorable conditions, such as poverty, which is detrimental to their opportunities in life. The objective is to redistribute wealth only insofar as is necessary to bring the poor out of this condition. Such an egalitarian view, however, does not demand equality between persons. Society may be characterized by a large middle class and a small super-rich class. What is important, however, is that none have their opportunities in life severely constrained due to a severe lack of economic resources. As Barry argues, however, this sort of egalitarianism misses the point. The concern for equality isn't about simply giving the least advantaged a "hand up" out of deplorable economic, social or political conditions. The concern, instead, is with promoting equality between citizens in their resources as much as possible, so they may have equal opportunities in their lives. A society in which none are poor, but still exhibits great inequalities in income and wealth, is nonetheless an unjust society. The super-rich, for example, enjoy advantages in their lives that those in the middle class do not. This injustice or unfairness does not stem from the fact that those at the bottom are poverty stricken, but from the fact that some in society possess more (and sometimes substantially more) of those resources that are important to living one's life. This stricter egalitarianism, therefore, requires a much deeper redistribution of wealth in order to eradicate structural economic classes altogether.

In regard to Rawls's particular form of liberalism, Daniels develops this critique by focusing on Rawls's distinction between the equal political liberties and the fair or equal value of those liberties. Rawls holds that all citizens are to enjoy formal equality in their political participation, understood as an entitlement to an equal set of political liberties. He further holds that citizens are entitled to the equal or fair value of these political liberties, regardless of their social or economic position. As discussed in Chapter Two, the distinction between the equal political liberties and their fair value is critical for Rawls, as it distinguishes him from other liberal approaches to political equality. Whereas non-egalitarian liberals argue that citizens should be free to decide what resources and energies to bring to bear in their political participation, Rawls holds that social and economic inequalities must be regulated in order to ensure that all have a fair chance to attain political offices and influence.

As Daniels argues, while Rawls recognizes that these sorts of inequalities are a concern for political equality, his theory of justice nevertheless fails to adequately deal with them. Instead, Rawls's two principles of justice, in particular the difference principle, continue to permit significant socio-economic inequalities between citizens in their political participation. As such, Rawls remains open to the same sorts of criticisms that are raised against non-egalitarian approaches to political equality. How can citizens be said to enjoy political equality if there are significant social and economic inequalities in their political participation?

Daniel's critique is important not only because it raises an important issue in liberal political thought, but also because it motivates a significant change in Rawls's theory of justice. As will be discussed later, Rawls clarifies his notion of political equality, motivated in part by Daniels's critique. In doing so, Rawls explicitly recognizes a special proviso or condition in regard to citizens' political liberties, in which the first principle is intended to guarantee the fair value or worth of these liberties.

Before turning to Daniel's specific critique of Rawls's notion of political equality, a number of qualifications need to be noted. First, Daniels's critical examination may be understood as an internal critique, in which he works within Rawls's own system of justification. Daniels's basic claim is that Rawls's own arguments, once fully developed and applied, would lead to a more robust egalitarian position. As he states, "considerations internal to Rawls' own theory would open him to the charge that equal liberty without equal worth of liberty is a worthless abstraction."<sup>115</sup> This work adopts this basic strategy as well, using Rawls's own discussion of the importance of political equality to advocate a more robust socio-economic egalitarianism.

Second, Daniels's critique is quite broad in its scope and potential implications. Not only does he attack Rawls's conception of equality, but also his view of liberty or freedom. According to Daniels, Rawls's distinction between the equal liberties and their fair value is arbitrary and unhelpful. How can one be said

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<sup>115</sup> Norman Daniels, "Equal Liberty and Unequal Worth of Liberty." *Reading Rawls: Critical Studies of A Theory of Justice*. ed. by Norman Daniels, (New York: Basic Books, INC., Publishers, 1975), 263.

to be at liberty if they are unable to effectively exercise their legal rights due to social or economic factors? Daniels argues, instead, that it is much more useful to talk about liberty in a unified and broader sense, which includes freedom from a wide range of legal, social and economic obstacles. Furthermore, while Daniels spends considerable time critically examining Rawls's discussion of the equal worth of the political liberties, he eventually generalizes his conclusions to all of the basic liberties. According to Daniels, Rawls liberalism demands radical egalitarianism across a wide range of basic rights and social institutions and processes. For our purposes here, however, attention will be focused primarily on Daniels's discussion of Rawls and the worth of the political liberties, and its implications for political equality.

### **The Difference Principle and the Political Liberties**

Why would Rawls's notion of political equality be criticized on the grounds that he fails to properly address social and economic inequalities? Previously, it was argued that Rawls sharply differs from non-egalitarian liberal views precisely because he recognizes the need to deal with these sorts of inequalities. For Rawls, political equality requires more than simply formal equality or equal political liberties. Also important is guaranteeing for all some measure of actual fair opportunity, which takes into account social and economic circumstances. According to Daniels, however, Rawls fails to adequately address

social and economic inequalities because he relies on the difference principle to guarantee the equal worth of the political liberties.

In developing this idea, it is important to draw together a number of key ideas in Rawls's notion of political equality. According to Rawls, political equality is understood in terms of procedural fairness: all are to have an equal chance in their political participation, such as running for public office. In order to secure this procedural fairness, not only must all enjoy an equal set of political liberties (formal equality), but the fair value of those political liberties. This last requirement demands some regulation of social and economic inequalities, so that all have an actual fair chance in their political participation. According to Daniels, Rawls looks to his second principle of justice, in particular the difference principle, to ensure the fair value of the political liberties. As discussed in Chapter One, the difference principle is intended to govern the general distribution of social and economic goods in society. In doing so, it holds that inequalities in distribution of these goods may only be justified if they are to the advantage of all, including those who find themselves with less than others.

So the fair value of persons' basic liberties, including the political liberties, is to be secured by the difference principle. Why might this be a problem? Critical for Daniels is the fact that the difference principle permits significant social and economic inequalities. Under the difference principle, it is perfectly just for some to enjoy greater levels of wealth, income, education, social



status and so forth. According to Daniels, this socio-economic inequality, in turn, can lead to inequalities in the worth of the political liberties.

More needs to be said about the difference principle itself. As discussed earlier, this principle forms a basic element of Rawls's second principle of justice and is intended to govern the distribution of social and economic goods within society. Crucial to our context is the idea that the principle doesn't necessarily seek equality, but seeks to maximize the absolute stock of social and economic goods for the least advantaged in society. In unpacking this idea, it is important to note that the difference principle permits social and economic inequalities if they are to the benefit of all in society, including the worst off. When might inequalities be beneficial to the least advantaged? One possibility is when inequalities result in the least advantaged possessing a greater absolute amount of key social and economic goods than they otherwise would have.

It is useful to contrast two hypothetical situations.<sup>116</sup> In case A, the state regulates incomes between persons, ensuring strict equality. All persons earn an income of \$30,000 annually. In case B, the state permits significant income inequalities between persons on the grounds that it will encourage economic growth and wealth in society. The assumption is that some in society will strive for wealth and, in doing so, increase overall economic growth in society. As such,

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<sup>116</sup> These examples are overly simplistic, at least insofar as they contrast only one sort of good: income. Under Rawls's difference principle, one would have to take a much more complex analysis, in which the persons' absolute "indexes" of primary goods are compared. This would require comparing persons across a range of goods, such as income, wealth, health, education, etc. The simple comparison of income, however, is sufficient to develop the basic idea underlying the difference principle, which is that persons will trade off inequalities in the distribution of social and economic goods if it is the case that they will have more in absolute terms.

in case B, those at the top earn an annual income of \$10,000,000, while the least advantaged earn \$80,000 per year. Under the difference principle, case B represents a permissible inequality. Even though some earn considerably more than others, all in society benefit from this inequality. Even if a person finds themselves at the bottom of income distribution in the unequal society, they would still have more money than they would in the equal society. The difference principle is intended to encapsulate this sort of result. It is meant to maximize the situation of the least advantaged in society by permitting those inequalities that will raise the absolute amount of social and economic goods they possess.

Daniels argues that it is not clear how citizens can enjoy the equal worth of their political liberties if the distribution of social and economic goods is to be governed by the difference principle. Quite the opposite, the difference principle would seem to entail significant inequalities in citizens' abilities to exercise their political liberties. If some enjoy greater levels of social and economic goods than others, which the difference principle certainly permits, then the worth of the political liberties will be greater for those at the top than those at the bottom. Those citizens with more wealth, income, education, social status and so forth will be able to exercise their political liberties to exert greater levels of political influence than those with less.

Wealthy citizens, for example, can use their financial advantage to exert greater influence on the outcome of elections, either by contributing larger amounts of money to the campaign of their preferred candidate and political party

or to expensive forms of political communication, such as mass media advertising. Citizens with less wealth or income may be unable to undertake such activities, or to engage in them to the same extent. Those with more wealth and income will always be able to contribute larger amounts of money to candidates and political parties and will always be able to spend more money on political advertising than others in society. In sum, while all may enjoy the same basic rights and liberties in their political participation, the worth of those political liberties is nevertheless greater for the socially and economically advantaged in society.

### **Self-Respect and the Equal Political Liberties**

Why is the unequal worth of the political liberties a problem? As discussed above, Daniels undertakes an internal critique of Rawls, arguing that Rawls's own arguments, once fully developed, would reject the idea that socio-economic inequalities are compatible with equality in political participation. In outlining this internal critique, it is necessary to return to Rawls's basic approach to justifying his two principles of justice. As discussed in Chapter One, Rawls adopts a contractarian form of justification, which holds that the agreement or consent of all persons to a set of social arrangements shows that those arrangements are just. In this regard, Rawls posits the hypothetical original position, which is intended to represent an impartial and fair situation from which to deliberate about justice.

From this original position, Rawls argues that parties would accept his two principles of justice. The first of these principles guarantees formal equality; all are entitled to an equal set of basic liberties, including an equal set of political rights and freedoms. As discussed above, the second principle, specifically the difference principle, permits socio-economic inequalities, which in turn can lead to inequalities in the worth of the political liberties secured by the first principle.

As Daniels argues, it is not clear why parties in the original position would demand political equality in the formal sense, but then accept political inequality in the socio-economic sense. Put differently, why would parties demand an equal set of political liberties, but then accept the unequal worth or value of those liberties? Daniels develops this important critique in two parts. First, he identifies within Rawls's theory a particular justification for the equal political liberties, which is grounded on the notion of self-respect. Daniels then uses Rawls's own argument for the equal political liberties to show that parties in the original position would also demand social and economic equality in political participation, so as to ensure the equal worth of their political liberties.

In regard to the first part, Daniels reconstructs a particular line of reasoning within Rawls for the equal political liberties. He draws from a number of different points in Rawls's theory, particularly those found in Sections 36, 63,

67 and 82 of *A Theory of Justice*.<sup>117</sup> He summarized this line of reasoning as follows:

(1) Since without self-respect ‘nothing may seem worth doing’ (p. 440), self-respect is an important primary good, basic to all life plans. (2) When the index of primary goods is at a certain level, most urgent needs of the worst-off will be met (p. 542) and ‘the fundamental interest in determining our plan of life... assumes a prior place’ (p. 543). (3) At this point, self-respect becomes crucially important and parties in the original position would want ‘to avoid at almost any cost the social conditions that undermine self-respect’ (p. 440) or increase risks to self-respect. (4) Similarly, at this point, parties in the original position would reject further increases in the index in favor of increases to self-respect or at least in favor of eliminating conditions that undermine self-respect. (5) Self-respect (a) could be based on socio-economic status, or ‘income share’ (p. 544), as it is in current societies, or (b) it could be based on ‘the public recognition of just institutions’ and the ‘publicly affirmed distribution of fundamental rights and liberties’ (p. 544), especially the liberties of political participation. But, (6) basing self-respect on socio-economic status is risky; since the Second Principle allows inequalities in the index of primary goods, some persons would have less self-respect than others. What is worse, (7) those with less self-respect have no acceptable compensation. All they have in return for their low index is the assurance that their index is maximal. But the fact that their index is maximal does not mean that their self-respect is; self-respect is based on the *relative* level of its index, not on its absolute level. Moreover, the higher index itself is not acceptable compensation by step (4). So, (8) basing self-respect on the publicly affirmed distribution of fundamental rights and liberties’ would be less risky than basing it on income share, provided that the distribution were equal; unequal distribution would be subject to similar objections to those

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<sup>117</sup> Section 82 is particularly important to Daniels’s paraphrase of Rawls. In this section, however, Rawls is primarily focused on defending the priority of the first principle over the second. Nevertheless, as Daniels recognizes, Rawls also provides an argument for the “equal” distribution of basic rights and liberties, including the political liberties. Moreover, in Section 82, Rawls makes reference to the rights and liberties of “equal citizenship.” In his reconstruction, Daniels assumes that Rawls intends only the political liberties, such as the right to vote, run for public office, and freedom of political association and speech. However, at times, Rawls seems to speak of equal citizenship as including all basic rights and freedoms, not just those relevant to participation in formal political processes. In my own development of Daniels’s critique, I also rely on Section 37 in *A Theory of Justice*, in which Rawls more clearly focuses on the political liberties and their importance to self-respect.

mentioned in step (7). (9) The liberties most relevant to enhancing self-respect, since they imply one's value to others, are those which recognize as equal the contribution each party can make to determining public policy and action. Therefore, (10) parties in the original position would choose to secure self-respect by the public affirmation of equal citizenship for all.<sup>118</sup>

It is not necessary to fully discuss each step. Attention, instead, can be limited to a few critical points. First, according to Daniels, Rawls leans heavily on the notion of self-respect when justifying the equal political liberties.<sup>119</sup> Parties in the original position would seek principles of justice which arrange the basic structure of society in such a way as to provide the necessary conditions for self-respect or, at least, eliminate circumstances which may degrade persons' self-respect.<sup>120</sup> As Rawls states, without self-respect "nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them."<sup>121</sup> Moreover, "all desire and activity becomes empty and vain, and we sink into apathy and cynicism."<sup>122</sup> According to Rawls, "the parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-

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<sup>118</sup> Ibid, 273-274.

<sup>119</sup> This interpretation of Rawls, in which he understood as grounding his arguments for political equality in the notion of self-respect, has been endorsed by other important commentators. See for example, Samuel Freeman, *Rawls*, (Taylor & Francis, 2007) and Joshua Cohen "For a Democratic Society." *The Cambridge Companion to Rawls*, ed. Samuel Freeman, (Cambridge: Cambridge University Press, 2003).

<sup>120</sup> In his discussion of Rawls, Daniels at times refers to self-respect as a "primary good". The implication being that, for Rawls, self-respect is to be guaranteed to all persons and distributed according to the difference principle. A clearer way of understanding Rawls, however, is that he seeks only to ensure the "necessary conditions" of self-respect. Under this view, then, there is no guarantee that all persons in society will actually have a strong sense of self-respect or the maximum level of self-respect within an index of primary goods. There is only the guarantee that all will enjoy a set of basic social structures which provide for the conditions of self-respect, or at least eliminate significant factors which may be destructive to self-respect. I assume this latter interpretation when discussing Rawls and the importance of the equal political liberties. I thank Mark Blythe for clarifying this point for me.

<sup>121</sup> John Rawls, *A Theory of Justice*, (Cambridge: The Belknap Press of Harvard University Press), 440.

<sup>122</sup> Ibid.

respect” and “the fact that justice as fairness gives more support to self-esteem than other principles is a strong reason for adopting it.”<sup>123</sup>

According to Daniels, Rawls recognizes that persons’ self-respect depends in large part on their status relative to others in society. For Rawls, the “account of self-respect as perhaps the main primary good has stressed the great significance of how we think others value us.”<sup>124</sup> This point is important, as it sets out a basic objective for parties in the original position when they seek to secure the basis of self-respect. Parties will seek to avoid social arrangements which publicly affirm, in important ways, the inferiority of some in society. This, in turn, leads to an important question: what sorts of social arrangements are necessary to the basis of self-respect? Rawls rejects the idea that equal income share should be used as a basis of self-respect. He argues that the difference principle should ensure levels of material conditions that are sufficiently high that “there are no strong psychological propensities prompting [persons] to curtail their liberty for the sake of greater absolute or relative economic welfare.”<sup>125</sup> Moreover, parties in the original position would reject relative income share as a basis of self-respect on the grounds that it would “make the good of social union difficult if not impossible to achieve.”<sup>126</sup> Rawls argues that not everyone can have the highest status in the distribution of income and wealth and to improve one’s status comes at the cost of another person’s status. As such, “persons are set at odds with one

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<sup>123</sup> Ibid.

<sup>124</sup> Ibid, 544.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid, 546.

another in the pursuit of their self-esteem” and the “parties in the original position surely do not want to find themselves so opposed.”<sup>127</sup>

Instead of relative income share, Rawls argues that parties would seek to secure the basis of self-respect through the equal distribution of basic rights and liberties, as guaranteed by the first principle of justice. As Rawls states:

... in a well-ordered society the need for status is met by the public recognition of just institutions, together with the full and diverse internal life of the many free communities of interests that equal liberty allows. The basis for self-esteem in a just society is not then one’s income share but the publicly affirmed distribution of fundamental rights and liberties. And this distribution being equal, everyone has a similar and secure status when they meet to conduct the common affairs of the wider society.<sup>128</sup>

Important to Rawls’s position is the idea that equal basic rights and liberties, particularly when guaranteed in a society’s political constitution, publicly affirms the equal status of all in society. Such equality rejects the notion of a two-tiered citizenship, in which some enjoy a broader set of rights and liberties, and are thus recognized as superior to other citizens. As Rawls states, inequality in this formal sense would “have the effect of publicly establishing [persons’] inferiority as defined by the basic structure of society.”<sup>129</sup> This “subordinate ranking in the public forum experienced in the attempt to take part in political and economic life, and felt in dealing with those who have a greater liberty, would indeed be

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<sup>127</sup> Ibid, 545.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid, 544.



humiliating and destructive of self-esteem.”<sup>130</sup> With the constitutional guarantee of equal basic rights and liberties, however, persons are publicly recognized as deserving of the same status when taking part in the basic structures of society. This recognition, Rawls argues, forms an important basis for persons’ self-respect.

According to Daniels, Rawls holds that the equal distribution of political liberties, such as the right to vote, run for office, and so forth, is particularly important in providing the basis of self-respect. This importance stems not simply from the instrumental value of the political liberties in advancing one’s ends in political life, but also from their effect on the “moral quality of civic life.”<sup>131</sup> As Rawls states, the equal political liberties ensure that “citizens’ relations to one another are given a secure basis in the manifest constitution of society.”<sup>132</sup> With formal political equality, the “medieval maxim that what touches all concerns all is seen to be taken seriously and declared as the public intention.”<sup>133</sup> It publicly recognizes that citizens are to have “an equal voice along with others in settling how basic social conditions are to be arranged.”<sup>134</sup>

This claim about the equal political liberties can be illustrated by reference to early western laws that limited the franchise. Under these laws, many groups, such as women, were denied the right to vote. Rawls’s point is that this formal inequality degrades the basis of self-respect of women by publicly suggesting that they are an inferior or subordinate group in society, not worthy of participating in

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<sup>130</sup> Ibid, 544-545.

<sup>131</sup> Ibid, 233.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

decisions on the arrangement of basic social conditions. According to Rawls, parties in the original position would seek to avoid such a situation by advancing principles of justice which guaranteed all an equal voice in political processes. Specifically, they would endorse the first principle of justice, which holds that all enjoy equal basic rights and liberties, including those relevant to political participation. This would result in a constitutional framework that publicly affirms the equal status of all in political decision making and forms an important basis of self-respect for persons in society.

### **Equal Worth of the Political Liberties Revisited**

As discussed above, Daniels develops his critique of Rawls in two parts. He begins by reconstructing Rawls's justification for the equal political liberties. He then uses this same line of reasoning to show that parties in the original position would also demand the equal worth of their political liberties. Specifically, Daniels argues that inequality in the worth of political liberties would also undermine self-respect. Parties in the original position, therefore, would demand principles of justice which guaranteed not only equal political rights and liberties, but also the equal ability to exercise those liberties.

Daniels focuses on two key points. First, he argues that inequalities in the worth of the political liberties "would be no less 'publicly known' than the equal

liberties themselves.”<sup>135</sup> This point simply assumes that persons would be aware that the political liberties have greater worth to some than others. While this inequality may not be publicly stated in a society’s political constitution, as would be the case with unequal political liberties, persons would nevertheless recognize the fact in the realities of their political participation. As Daniels states, those who are socially or economically worst off would know that those better off “are more able to have their views and interests put forward in the mass media, are better able to select candidates, and are more effective in influencing office holders.”<sup>136</sup>

Second, Daniels argues that this public knowledge of the unequal worth of the political liberties would undermine the basis of self-respect. For Daniels, “the mechanism here seems identical to the one Rawls cites in arguing for equal basic liberties.”<sup>137</sup> The “subordinate ranking” experienced by those socially or economically worst off when dealing with those who enjoy greater worth of their political liberties “would indeed be humiliating and destructive of self-esteem.”<sup>138</sup>

In developing this point, it is useful to discuss it within the historical context of political liberties and economic class. Early Canadian electoral laws tied the right to vote to property ownership. This qualification effectively prevented large segments of the working population from voting, as they only earned modest incomes and were unlikely to own their own homes. Under

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<sup>135</sup> Norman Daniels, “Equal Liberty and Unequal Worth of Liberty.” *Reading Rawls: Critical Studies of A Theory of Justice*. ed. by Norman Daniels, (New York: Basic Books, INC., Publishers, 1975), 275.

<sup>136</sup> Ibid, 276.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

Rawls's view, this formal inequality in democratic institutions would publicly affirm a subordinate ranking of the poor in Canadian society which would be humiliating and destructive of their self-esteem. This would, in turn, justify the elimination of such laws in order to ensure that the lower classes have an equal voice in settling how basic social conditions are to be arranged.

As Daniels argues, simply guaranteeing the equal political liberties for lower classes alone does not secure self-respect. While lower classes enjoy equal status insofar as they possess the same set of political liberties as the upper class, the value or worth of their liberties is not equal. As the upper class has greater financial resources, they are able to exercise many of their political liberties to a greater extent. In the context of political speech, for example, those with greater resources are able to make greater use of the mass media to communicate their views. They can also draw on greater personal wealth when running for public office or financially contributing to their preferred candidate. This, in turn, provides them with better opportunities to influence the outcome of political processes. This socio-economic inequality in persons' political participation, just as the income and property qualifications of early Canadian electoral law, publically affirms the subordination of the lower classes. It recognizes that some in society are to enjoy better opportunities to influence the political process, simply because they have greater wealth and income than others.

One might respond to Daniels's argument by noting that Rawls's difference principle would not permit the sort of economic circumstances faced by

the early working class in Canada. Under the difference principle, the level of social and economic goods possessed by the worst off in society would be maximized. As such, none would be in a state of economic poverty and destitution, but would instead enjoy quite high standards of wealth and income. With this in mind, then, all should enjoy an adequate level of financial resources from which to exercise their political liberties. None would experience a sense of subordination that would come with the unequal value of their political liberties, at least not to the extent that their self-respect would be threatened.

Daniels's point, however, is not that subordination results just from a lack of financial resources from which to exercise one's political liberties. Public affirmation of inferiority can stem from the fact that some simply have more financial resources than others. It may be that those at the bottom enjoy a middle class life and, as such, are able to exercise their political liberties to some extent. Nevertheless, those at the top possess far greater levels of wealth and income and, as such, are able to exercise far greater levels of political influence. No matter how much money those at the bottom have, those at the top will always have more and, as such, will always enjoy a better opportunity to exercise political influence.

In developing this point, it is useful to discuss it within the context of campaign contributions. In example A, society is characterized by significant inequalities in wealth and income. On the one hand, there is a segment of the population which earns at or below the level of subsistence. On the other, there is

a segment which earns well above the level of subsistence so that they have millions of dollars which they can spend on political activities. In this example, the reality and sense of subordination is quite clear. Those at the top can use their resources to contribute considerable monies to their preferred political candidates and parties. Those at the bottom have no personal wealth to spend on political contributions. As a result, one might assume, as Rawls does, that candidates and political parties will cater to the interests of the wealthy class, not only during their campaigns, but also once in power, as their political success is dependent upon maintaining the flow of contributions from this class. Those at the bottom, therefore, will see themselves as being unimportant in the electoral process, with their interests and voice being subordinate to those of the wealthy.

In example B, Rawls's difference principle has ensured that there is no segment of the population which earns at or below the level of subsistence. Instead, those at the bottom find themselves in a strong financial position, with significant disposable income to dedicate to their political activities. Nevertheless, society is still characterized by significant economic inequalities, in which the upper class possesses considerably more wealth than the lower class. At first glance, it is not clear how a sense of subordination might arise in such a situation. While those at the bottom possess significantly less financial resources than those at the top, they nevertheless have some resources to dedicate to their political activities. Their situation is nowhere as extreme as the poverty-stricken class in the first example.

While all can afford to pay political contributions, this is not to say that all can do so to the same extent. The super rich can afford to provide considerably more to their preferred candidates and parties than the lower classes. As such, these candidates and parties may enjoy a financial advantage and better opportunity of being elected to government. Moreover, candidates and parties may still cater to the interests of the super rich, as they represent a constituency by which large funds can be raised in a relatively efficient manner. Instead of attempting to build a campaign on hundreds of thousands of smaller donations, a candidate or party can target a few large donations from wealthy individuals, groups and corporations. Just as in example A, those at the bottom will see themselves as being inferior in the electoral process, with their interests and views subordinate to those of the wealthy. Moreover, this subordination stems from their relative economic status in society. Simply moving up the level of those at the bottom would not correct this subordination, as those at the top would always have more resources to out-spend those at the bottom.

This point can also be developed by revisiting the *Libman* case. There the issue was provincial legislation which sought to restrict the amount of money persons could spend on political advertising during a referendum. Both the provincial legislature and the Supreme Court of Canada recognized political advertising as an important means of influencing electoral outcomes. Through such advertising, individuals and groups could attempt to sway the behaviour of voters, candidates and political parties.

Again, with example A, there is a segment of the population at the bottom which earns at or below the level of subsistence. At the top, there is a group which earns above the level of subsistence and can spend millions of dollars on their political activities. While those at the bottom may desire to communicate their political views through mass media advertising, their economic position prohibits them from doing so. They lack the money necessary to purchase advertising space in important mediums of mass communication. Again, as their economic position is so precarious, they are unable to devote time away from work to fundraise for such activities or even engage in low cost forms of communication, such as going door-to-door. The economic upper class in society, by contrast, can actually exercise their freedom of political speech in important ways. They can use their own personal funds to pay for large media campaigns. Moreover, they can afford to dedicate large amounts of their time to organize advocacy groups for the purpose of political advertising. Again, in such a situation, the subordination of the lower class, and the resulting impact on the basis of self-respect, is quite clear.

What about example B, in which there still exist significant inequalities, but the worst off enjoy a strong economic position? Those at the bottom cannot hope to spend to the sort of level as those at the top and engage in the same sorts of advertising campaigns. While all may be able to afford to purchase some local radio spots, only the super rich are able to afford national media campaigns. Moreover, only the super wealthy can afford to hire expensive media experts to develop and implement sophisticated communication strategies. Even if all could afford to purchase expensive national campaigns, those at the top would still be



able to out-bid those at the bottom for premium advertising space and time. In sum, those at the top enjoy a better opportunity to influence political processes than those at the bottom. Moreover, this subordination is the result of persons' relative economic status, as opposed to their absolute level.

### **Implications of the Radical Egalitarian Critique**

Daniels's critique is significant for a number of reasons. Importantly, he takes the position that Rawls, at least in his early works, does not go so far as to advance a radical egalitarian view of political equality. According to Daniels, this is due to the fact that Rawls relies on the difference principle in order to secure the fair value of persons' basic liberties, including those liberties relevant to political participation.

In developing this point, it is useful to return to the ideas of formal and actual fair opportunity. One can approach the concept of political equality by distinguishing two sorts of contexts. On the one hand, there is formal fair opportunity, which holds that fair opportunity requires all citizens to enjoy the same legal entitlements to participate in political processes. All should, for example, possess the same set of political liberties, such as the right to vote, run for political office, freedom of political speech, and so forth. On the other hand, there is actual fair opportunity, which views political equality in terms of persons' social and economic circumstances. Central to this view of political equality is the

concern that social and economic inequalities may negatively impact persons' political participation, even though they enjoy the legal right to participate. In order to ensure political equality, therefore, steps must be taken to prevent social and economic inequalities from rendering the political process unfair.

Rawls differs from libertarian and liberal free-market views by acknowledging the importance of actual fair opportunity and the need for the state to regulate social and economic inequalities in citizens' political participation. Daniels's critique, however, questions the sort of actual fair opportunity that Rawls advances. For Daniels, actual fair opportunity requires more than simply maximizing the social and economic resources of the least advantaged via the difference principle. The concern is that these inequalities will degrade actual fair opportunity by allowing some to use their social or economic advantages to exercise greater influence than others. In order to protect political equality, steps must thus be taken to eliminate these advantages. Social and economic inequalities must be minimized as much as possible, so that all can participate on a truly level playing field. As citizens enjoy the same level of social and economic resources in their political participation, no individual or group will be subordinate due to their class and all will be recognized as equals in the political life of society. According to Daniels, Rawls fails to secure this radical egalitarianism. By relying on the difference principle, Rawls permits significant social and economic inequalities in citizens' political participation and, in turn, inequalities in the worth of their political liberties.

In raising this critique, however, Daniels suggests that Rawls's theory, once properly developed, could support a radical egalitarian view. According to Daniels, Rawls justifies his notion of political equality on the idea of self-respect. Moreover, as Daniels argues, if Rawls takes self-respect seriously, then a radical egalitarian view should follow. Simply maximizing the social and economic resources of the least advantaged is not enough. The commitment to self-respect would require a stronger form of egalitarianism, in which social and economic inequalities are minimized as much as possible, so that all are affirmed as having equal weight in decision making,

With this in mind, Daniels suggests that Rawls could alter his theory by refusing to allow any social and economic inequalities which would undermine the equal worth of the basic liberties, including the political liberties. This would require a significant departure from the difference principle. The difference principle permits inequalities if they maximized the absolute stock of social and economic goods for those at the bottom. Under this new approach, however, this justification would not be sufficient. All social and economic inequalities that resulted in inequalities in the worth of the political liberties would be prohibited or eliminated, regardless of whether they maximized the absolute level of the least advantaged.

According to Daniels, this approach could be facilitated by "resting very heavily on the priority of the First Principle."<sup>139</sup> The first principle of justice would demand not only the equal distribution of formal rights and liberties, but

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<sup>139</sup> Ibid, 279.

also the equal worth of those liberties. Moreover, as the first principle has priority over the second, any cases in which the two conflicted would be resolved in favour of the former's stricter egalitarianism. Thus, even if a social or economic inequality could be justified under the difference principle, it could still be denied by reference to the higher ranked first principle and its demand for strict social and economic equality in the exercise of basic liberties.

## **Conclusion**

Rawls's liberal-egalitarianism sharply differentiates him from other liberal approaches to the notion of political equality. Nevertheless, his concern over the negative impacts of social and economic inequalities does not make him immune from important egalitarian challenges.

Daniels's critique highlights an important point in understanding Rawls's conception of political equality. While acknowledging that steps must be taken to secure the fair value of the political liberties and some measure of actual fair opportunity for all, Rawls seems to have stopped short of advancing a radical egalitarian view. Instead of requiring social and economic inequalities to be minimized as much as possible, Rawls's difference principle permits significant inequalities between persons in the exercise of their political liberties. As such, it is possible for some in society to exercise greater levels of political influence simply because they enjoy more money or social status.

Moreover, as Daniels argues, it is not clear that Rawls's own arguments could justify such a position. Under Rawls's view, parties in the original position would seek to secure the basis of self-respect by rejecting social arrangements which publicly affirmed the inferiority of some groups in society. It is on this ground that he justifies the first principle's guarantee of equal political liberties. Yet this same justification would also support an entitlement to the equal worth of the political liberties. According to Daniels, Rawls's own arguments would seem to support a radical egalitarian notion of political equality, in which all citizens enjoy equal weight and influence in their political participation, regardless of their social or economic position. Moreover, this requires minimizing socio-economic inequalities as much as possible.

As will be discussed in the next chapter, Rawls significantly clarifies his view of political equality in light of Daniels's radical egalitarian critique. In doing so, Rawls introduces a special proviso to the first principle of justice, which is intended to buttress the difference principle, and secure for all the fair value of their political liberties. While some have interpreted this special proviso as endorsing radical egalitarianism in political participation, examination of Rawls's later discussions of political equality would suggest a much more modest egalitarian position.

## Chapter Six

### Liberal-Egalitarianism: Rawls's Later Clarifications

#### Introduction

Following Norman Daniels's early critique of his notion of political equality, Rawls responded by significantly clarifying his notion of the fair value of the political liberties in later works, such as *Political Liberalism* and *Justice as Fairness: A Restatement*. Of particular importance was Rawls's recognition that the difference principle was insufficient to ensure that all had a fair chance to attain positions of power and influence. In the place of the difference principle, Rawls recognized a special proviso or condition under the first principle of justice. This condition held that the political liberties, and only the political liberties, were to be guaranteed their fair value or worth.

While this clarification represented an important evolution in Rawls's theory of justice, it has garnered little attention in scholarly literature. For the most part, commentary focuses on Rawls's claim that the political liberties are deserving of special treatment compared to other basic liberties when it comes to the distribution of social and economic goods. There is, however, little discussion of what Rawls actually means with the addition of the special proviso. While it is clear that Rawls is endorsing a form of egalitarianism that is stronger than the difference principle, what precisely is this new egalitarianism?

From the limited literature that does exist, two key positions can be garnered. On the one hand, Rawls's idea of the fair value of the political liberties is treated in a very ambiguous and vague manner, as asserting that there is to be "rough" or "approximate" social and economic equality in citizens' political participation. On the other, it is assumed that Rawls is adopting a radical egalitarian view of political equality. It is argued that Rawls's principle of the fair value of the political liberties is intended to prevent the privileged from using their social or economic advantages to exercise greater political influence for others. In sum, it seeks to ensure that all may exercise the same level of influence on the political process.

This chapter takes issue with this latter interpretation, arguing that Rawls does not go as far as to endorse a radical egalitarian view of political equality. Rawls's principle of the fair value of the equal political liberties, instead, only seeks to prevent the privileged from controlling the political process by using their social and economic advantages to exclude others. This alternative reading is evident in his discussion of the importance of the fair value of the political liberties, which he grounds on the concern that the privileged few, in particular the wealthy, will hijack the political process in pursuit of their own narrow self interests. Moreover, these socio-economic elites will do so by combining with one another to exclude others from exercising political influence.

In developing this conclusion, this chapter begins by examining Rawls's response to radical egalitarian challenges, such as the one offered by Daniels. Of

particular importance is Rawls's acknowledgement of the importance of this critique and his introduction of the principle of the fair value of the political liberties to address it. Discussion then turns to scholarly commentary on Rawls's later views on political equality, with a critical discussion of the radical egalitarian interpretation. Finally, this critical discussion is placed in the broader context, by arguing that while Rawls moves away from the difference principle, he nevertheless advances a moderate egalitarian view of political equality.

## **Rawls's Response to the Egalitarian Challenge**

Since the publication of *A Theory of Justice*, Rawls made a number of important alterations to his concept of justice as fairness. In *Political Liberalism*, for example, he broached the problem of reasonable pluralism and the stability of a well-ordered society by introducing the idea of the overlapping consensus.<sup>140</sup> In addition, Rawls also made a number of significant changes to his two principles of justice. In *A Theory of Justice*, he argued that persons have an equal right to “the most extensive basic liberty” compatible with a similar liberty for others. In his later works, however, Rawls changed the first principle to read that each

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<sup>140</sup> In *Political Liberalism*, Rawls recognizes that the idea of a well-ordered society as it appears in *A Theory of Justice* is unrealistic. Critical for Rawls was the assumption of reasonable pluralism in modern democratic societies; that is, the presence of a plurality of irreconcilable moral, religious and philosophical doctrines. In his later works, Rawls recognized that reasonable pluralism posed important challenges to a well-ordered society over time, in which the principles of justice are publicly accepted by everyone and that the basic social institutions are publicly known to satisfy those principles, as persons may view justice as fairness as just one comprehensive doctrine amongst many. In order to rectify this problem, Rawls introduces the idea of the overlapping consensus, which holds that persons in modern liberal democracies should come to accept justice as fairness as the preferred “political conception” of justice, no matter which of society's many “comprehensive conceptions” he or she endorses.



person has the same indefeasible claim to a “fully adequate scheme of equal basic liberties”, which scheme is compatible with the same scheme of liberties for all.<sup>141</sup>

Important to this work is Rawls’s introduction of a special proviso to the first principle, which he refers to as the idea of the fair value of the equal political liberties. With this addition, the first principle guarantees each person not only an equal claim to a fully adequate scheme of equal basic rights and liberties, but also to a scheme in which the “the equal political liberties, and only those liberties, are to be guaranteed their fair value.”<sup>142</sup> Rawls asserts that the special proviso would be agreed to in the social contract. As he states, when the principles of justice are chosen in the original position, “it is understood that the first principle includes this proviso and that parties take this into account in their reasoning.”<sup>143</sup>

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<sup>141</sup> The change was due in large part to criticisms leveled by H.L.A Hart (see H.L.A. Hart, “Rawls on Liberty and Its Priority,” *University of Chicago Law Review* 40 (Spring 1973), reprinted in *Reading Rawls* (1975 & 1986)). Hart argued that, in *A Theory of Justice*, Rawls often moved between the terms “liberty” and “liberties” in his discussion of the first principle, which seemed to suggest two different interpretations. On the one hand, it suggested that the priority to liberty was a quite general principle, in which no form of liberty could be restricted except for the sake of liberty. On the other hand, it suggested that the first principle entailed a more specific principle that only the basic liberties were only to be restricted for the sake of basic liberties. In his later works, Rawls endorsed the latter, moving away from the term “liberty” in the first principle of justice. Hart further criticized the general idea that the basic liberties could only be limited for the sake of the basic liberties, arguing that Rawls had failed to provide an adequate criterion by which to settle conflicts between liberties. In this context, Rawls later introduced the idea that conflicts should be settled by reference to citizens’ interest in being guaranteed the social conditions essential for the adequate development and the full and informed exercise of their two moral powers in case of their capacity for a sense of justice and a conception of the good.

<sup>142</sup> John Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993), 5.

<sup>143</sup> John Rawls, *Justice as Fairness: A Restatement.*, (Cambridge: The Belknap Press of Harvard University Press, 2001), 148.

Rawls introduces this special proviso in an attempt to deal with radical egalitarian critiques such as the one posed by Daniels.<sup>144</sup> Interestingly, Rawls perceives Daniels's criticisms primarily in terms of a misunderstanding. As he states, the idea of the fair value of the political liberties "is an important aspect of the two principles of justice as presented in *A Theory of Justice*."<sup>145</sup> Nevertheless, the "idea was not sufficiently developed or explained" and thus it was "easy to miss its significance."<sup>146</sup> According to Rawls, there is no real conflict between Daniels and himself. The debate, instead, stems simply from a failure on his part to adequately explain his views. Rawls, therefore, introduces the special proviso in order to provide this clarification.<sup>147</sup>

With the idea of the fair value of the political liberties, Rawls asserts that the political liberties are intended to have more than value in the formal sense. As he states:

The idea of [the fair value of the equal political liberties] is introduced in an attempt to answer this question: how shall we meet the familiar objection, often made by radical democrats and socialists (and by Marx), that the equal liberties in a modern democratic state are in practice merely formal? While it may appear, the objection continues, that citizens' basic rights and liberties are effectively equal – all have the right to vote, to run for political

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<sup>144</sup> In his later works, Rawls expresses his debt to Daniels for raising the problem of the worth of the political liberties. See, for example, John Rawls "The Basic Liberties and their Priority" *The Tanner Lectures on Human Values, Vol. III*, (Salt Lake City: University of Utah Press, 1982), 42 (fn. 34) and John Rawls, *Justice as Fairness: A Restatement*, (Cambridge, Mass: The Belknap Press of Harvard University Press, 2001), 148 (fn. 20).

<sup>145</sup> John Rawls, "The Basic Liberties and their Priority" *The Tanner Lectures on Human Values, Vol. III*, (Salt Lake City: University of Utah Press, 1982), 42 (fn. 34).

<sup>146</sup> *Ibid.*

<sup>147</sup> In claiming that debate centres on a misunderstanding, Rawls seems to be referring only to Daniels's criticism concerning the equal worth of the political liberties. Daniels final claim is that all of the basic liberties should be guaranteed their equal worth. As is discussed below, Rawls clearly rejects this idea by limiting the special proviso to just the political liberties. The worth of the other non-political basic liberties is to be ensured by the difference principle alone.

office and to engage in party politics, and so on – social and economic inequalities in background institutions are ordinarily so large that those with greater wealth and position usually control political life and enact legislation and social policies that advance their interests.<sup>148</sup>

The assertion that the political liberties are to have more than simply formal value is not new. What is significant is Rawls's recognition that the difference principle is insufficient to ensure the fair value of the political liberties. As Rawls states, "without a guarantee of the fair value of the political liberties, those with greater means can combine together and exclude those who have less."<sup>149</sup> Moreover, "the difference principle is presumably not sufficient to prevent this."<sup>150</sup> As such, Rawls intends the special proviso to buttress the difference principle in securing the fair value of the political liberties. For him, the fair value of the political liberties should secure for each citizen a "fair and roughly equal access" to the use of those public facilities that govern the political process and control the entry into positions of political power.<sup>151</sup> In this context, Rawls advocates certain democratic reforms, such as the public funding of elections, restrictions on campaign contributions, the assurance of a more even access to public media, and certain regulations of freedom of speech and of the press (but not restrictions affecting the content of speech).

It is important to note that Rawls extends this idea only to the political liberties. For the other non-political basic liberties, Rawls maintains that the

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<sup>148</sup> John Rawls, *Justice as Fairness: A Restatement*, (Cambridge, Mass: The Belknap Press of Harvard University Press, 2001), 148.

<sup>149</sup> *Ibid*, 150.

<sup>150</sup> *Ibid*.

<sup>151</sup> *Ibid*, 150.

difference principle is adequate to ensure their adequate exercise. In doing so, Rawls argues that a wide guarantee of fair value for all basic liberties “carries the idea of equality further than the two principles” and is “either irrational, or superfluous, or socially divisive.”<sup>152</sup> If the wider guarantee means that income and wealth are to be distributed equally, then Rawls argues it is irrational, as “it does not allow society to meet the requirements of social organization and efficiency.”<sup>153</sup> If it means that a certain level of income and wealth is to be assured to everyone, Rawls asserts that “it is superfluous, given the difference principle.”<sup>154</sup> Finally, if the wider guarantee means that income and wealth are to be distributed “according to the content of certain interests regarded as central to citizens’ plans of life,” then it is “socially divisive.”<sup>155</sup> Of concern for Rawls is that society may be forced to devote large resources to citizens who have ends that have high material requirements. This, in turn, could lead to controversy, particularly for those whose have ends with less material requirements and thus receive a substantially lower portion of society’s resources.

This, however, raises a number of important questions. In introducing the special proviso, is Rawls endorsing a radical egalitarian view of political equality, similar to the one advanced by Daniels? Or does Rawls intend a moderate view of political equality?

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<sup>152</sup> Ibid, 150-151.

<sup>153</sup> Ibid, 151.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

## **Interpretations of Rawls's Political Equality**

While Rawls characterizes his later changes as merely clarifications, the addition of the special proviso is far from insignificant. Not only does it involve an alteration to the wording of his first principle, it also entails a clear distinction in the treatment of persons' basic liberties. Whereas the non-political basic liberties are to be guaranteed their fair value with the difference principle, the political liberties are to be supported by some other principle of distribution, which involves a stricter egalitarianism in the distribution of social and economic goods.

Since Rawls's later clarification, there have been some scholarly commentaries. For the most part, attention has centred on Rawls's general claim that the political liberties require special treatment, beyond the difference principle, when it comes to the distribution of social and economic goods. As discussed above, Rawls stipulates under his first principle of justice that the political liberties, and only the political liberties, are to be guaranteed their fair value or worth. This is not to suggest that the worth of the other basic liberties is inconsequential. Instead, Rawls is simply singling out the political liberties as requiring some sort of special treatment. For Rawls, the difference principle is sufficient to ensure the worth of the other non-political basic liberties. In the case of the political liberties, however, the difference principle is inadequate. Some other, stricter, egalitarian principle is required to ensure the fair worth of these basic liberties.

Some commentators have been sympathetic to Rawls in singling out the political liberties. Joshua Cohen, for example, argues that Rawls's conception of justice is deeply democratic and, as such, offers a justification for the special treatment of the political liberties. In particular, Cohen emphasizes Rawls's grounding of the basis of self-respect on political equality. As he states, "the right to political liberties acknowledges our possession of that moral capacity and enables us to develop and exercise it."<sup>156</sup> As such, what is essential is "the affirmation of our equality that comes from acknowledgement of our right to the political liberties."<sup>157</sup> Amy Gutmann also draws on the democratic nature of Rawls's theory of justice when discussing the special treatment of the political liberties. As she states, it is a "democratic strength" of Rawls's political liberalism that it "ranks political liberties fully alongside of personal liberties and that it is consistent with finding ways in which citizens can respond constructively to reasonable conflicts about matters of justice by exercising their equal political liberties."<sup>158</sup> Other commentators, however, have questioned Rawls's special treatment of the political liberties. Stephen Wall, for example, rejects the notion that Rawls's theory of justice is deeply democratic. Moreover, far from deserving special treatment, the political liberties are best understood as "subordinate to other, more fundamental, basic liberties, such as the liberty of conscience, the

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<sup>156</sup> Joshua Cohen, "For a Democratic Society" *The Cambridge Companion to Rawls*, ed. Samuel Freeman. (Cambridge: Cambridge University Press, 2003), 111.

<sup>157</sup> Ibid.

<sup>158</sup> Amy Gutmann, "Rawls on the Relationship between Liberalism and Democracy" *The Cambridge Companion to Rawls*, ed. Samuel Freeman, (Cambridge: Cambridge University Press, 2003), 187.

freedom associated with the integrity of the person, and the liberties covered by the rule of law.”<sup>159</sup>

Little attention, however, has been paid to what Rawls is actually requiring in the distribution of social and economic goods. While all acknowledge that Rawls is rejecting the difference principle as being sufficient to securing the fair value of the equal political liberties, absent is a comprehensive examination of what he is endorsing in the alternative. From the very limited commentary, two sorts of readings of Rawls’s later treatment of the issue can be garnered.

In some cases, Rawls’s position is left very ambiguous. Richard Krouse and Michael McPherson, for example, argue that Rawls “insists on measures to secure the ‘fair value’ of political liberties”, which means “approximate equality, or at least the absence of severe inequality, in the resources and capabilities essential for the effective achievement of formally equal political liberty.”<sup>160</sup> This sort of reading, however, raises a number of critical questions. What does “approximate” equality mean? At what point do inequalities become “severe”? Are approximate equality and the absence of severe inequality really the same thing?

In other cases, commentators have argued that Rawls intends strict equality, in which differences in social and economic goods are minimized as much as possible. As Wall states, “the fair value guarantee, accordingly, includes both

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<sup>159</sup> Stephen Wall, “Rawls and the Status of Political Liberty” *Pacific Philosophical Quarterly* 87 (2006), 246.

<sup>160</sup> Krouse, R. & McPherson, M. “Capitalism, ‘Property-Owning Democracy,’ and the Welfare State” *Democracy and the Welfare State*. ed. Amy Gutmann, (Princeton: Princeton University Press, 1988), 85.

equality of resources to exercise political influence and the fair opportunity to obtain positions of political power.”<sup>161</sup> Wall bases his comments in large part on Harry Brighouse’s earlier, and much more thorough, discussion of Rawls, in which he claims that Rawls’s notion of the fair value of the political liberties requires equal value, in which “each citizen should have available equal resources to exercise political influence.”<sup>162</sup>

What is the basis of this reading of Rawls? Brighouse begins by assuming that Rawls intends radical egalitarianism in his treatment of the worth of the political liberties. Nevertheless, Brighouse recognizes that Rawls’s discussion of the issue is brief and lacks full argumentation. With this in mind, his objective is to “provide the missing argument for the fair value of the political liberties and why this is properly thought of as a matter of justice.”<sup>163</sup>

Brighouse argues that Rawls takes the position that all citizens are to enjoy an equal availability of political influence.<sup>164</sup> Moreover, he goes on to argue that Rawls views (or would view) the equal availability of political influence as an important primary good in persons’ life pursuits. As he states, “like income and wealth it [political influence] is useful to everyone regardless of their conception of the good.”<sup>165</sup> As such, everyone has an interest in having equal availability of political influence “because their lives are shaped and their hopes and ambitions

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<sup>161</sup> Stephen Wall, “Rawls and the Status of Political Liberty” *Pacific Philosophical Quarterly* 87 (2006), 246.

<sup>162</sup> Harry Brighouse, “Political Equality in Justice as Fairness”, *Philosophical Studies* 86, 2 (1997), 161.

<sup>163</sup> *Ibid*, 156.

<sup>164</sup> Brighouse uses the concept “equal availability of political influence.” In many ways, this concept is similar to the idea of equal opportunity used throughout this work.

<sup>165</sup> *Ibid*, 164.



are facilitated (or frustrated) in part by the decisions made about their collective affairs.<sup>166</sup>

What does “equal availability of political influence” actually mean? In this context, Brighouse ascribes to Rawls a radical egalitarian view of political equality. According to him, Rawls is concerned that some in society will be able to exercise greater influence on the political process, simply because they enjoy some social or economic advantage. As he notes, Rawls “complains that the wealthier citizens will have ‘larger’ influence, and that they may come to have ‘preponderance’ weight in political matters.”<sup>167</sup> According to Brighouse, underlying this concern is a positive egalitarian principle in which political influence, or at least the means of political influence, is to be distributed equally to all citizens. As he states, “for Rawls equality is the baseline against which any distribution of goods is measured.”<sup>168</sup> In the context of Rawls and political participation, then, “the equal availability of influence is the baseline” and “there are no departures from equal availability of political influence which are *prima facie* permissible.”<sup>169</sup>

With this in mind, Brighouse goes on to argue that Rawls’s special proviso requires eliminating socio-economic inequalities in citizens’ political participation. As he states, “wealth affects the ability of citizens to exercise influence over public decisions which in turn affect the conditions in which they

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<sup>166</sup> Ibid.

<sup>167</sup> Ibid, 160.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

live their lives.”<sup>170</sup> As such, “those with more resources usually have more leisure time available, more education, more money for persuasive public expression of views.”<sup>171</sup> In sum, the “political liberties are more useful to wealthier than to less wealthy citizens.”<sup>172</sup> Those with greater social and economic resources can use their political liberties to exercise greater political influence than others. If, however, political influence, or the means of political influence, is to be distributed equally, then these advantages must be eliminated. When it comes to citizens’ political participation, all should be guaranteed an equal playing field, in which social and economic inequalities are minimized as much as possible.

### **Political Equality and Preventing Control by the Privileged**

In re-examining Rawls’s discussion of political equality, however, it is far from clear that he is endorsing a radical egalitarian view. Instead, Rawls’s concern is one of moderate egalitarianism. For him, steps need to be taken to address social and economic inequalities not because some may be able to exercise a “greater,” “larger,” or “disproportionate” level of political influence than others. The issue, instead, is that the privileged will be able to control the political process for their narrow self interests. Moreover, they will be able to exercise this political control by using their social or economic advantages to exclude others from important means of political influence.

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<sup>170</sup> Ibid, 157.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

In developing this reading, it is important to note Rawls's own justifications for introducing the special proviso in his later works. As discussed above, Rawls recognizes that the difference principle is insufficient to protect the fair worth of the political liberties. This is due to the fact that the political liberties are a special case, as the political "process" or "forum" has limited space. What does Rawls mean by this? Unfortunately, he does not provide a thorough discussion of the idea. One might suppose, however, that Rawls is highlighting the fact that arenas of political participation are finite and somewhat scarce.<sup>173</sup> In developing this idea, it is useful to examine the simple example of a local candidates' debate. In an optimal situation, candidates would have as much time as required to fully present their ideas, criticize and respond to their opponents, and address questions from the audience. Normally, however, this is not the case. Depending on the number participating and the length of the debate, candidates usually find that they have very limited time in which to present themselves. They may only be able to present a few of their key ideas and may only be able to do so in a very simple manner. With this in mind, we may say that a local candidates' debate, as an opportunity to communicate one's platform to voters, has limited space.

From this simple example, one can generalize to other forms of political participation, such as political advertising through the mass media. During elections, candidates and political parties attempt to communicate their political views and messages to large audiences through television, radio and print

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<sup>173</sup> In what remains, it is assumed that Rawls is suggesting something along this sort of line of reasoning.

advertisement. This media of communication, however, has limited space, particularly when one recognizes that not all forms of mass media communication are equal in their reach and effectiveness. Advertisements on television, for example, have a much larger reach, and potentially greater effect, than billboard advertisements. Moreover, advertising on a major network during prime time hours reaches a much larger audience than advertising on a local station during the early morning hours. During elections, candidates and political parties must compete for finite time and space in important media as television, radio and print.

As the political process has limited space, Rawls recognizes that the value of the political liberties is “far more subject to citizens’ social position and economic means than the usefulness of other basic liberties.”<sup>174</sup> Of critical concern for Rawls is that “those with greater means can combine together and exclude those who have less.”<sup>175</sup> It is at this point that Rawls acknowledges that the difference principle is insufficient to guarantee the fair value of the political liberties. While the difference principle seeks to maximize the worth of persons’ basic liberties, as calculated by their absolute stock of social and economic goods, it nevertheless allows for relative inequality in the worth of liberties in so far as “some have more income and wealth than others, and so more all-purpose material means for realizing their ends.”<sup>176</sup>

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<sup>174</sup> Ibid, 150.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid, 149.

Like Daniels, Rawls recognizes that the difference principle is insufficient to ensure the fair value of the political liberties. Nevertheless, for Rawls, the reason is quite different. As discussed in the last chapter, Daniels's concern was grounded in a radical egalitarian view of political participation, in which the views of all were to carry the same weight or influence, regardless of social or economic inequality. The difference principle was insufficient because it permitted significant social and economic inequalities. As such, those at the top are able to use their socio-economic advantages to exercise greater influence than those at the bottom. Rawls, however, points to a much different concern: namely, that the limited nature of the political process means that those with more social or economic resources can combine to exclude those with less. In other words, the concern is not that some will have "more weight" or a "greater voice" than others, simply because they are wealthier or have a higher social status. The concern is that some will have such an advantage that they exclude others completely from the process and, in turn, control political outcomes.

With this in mind, it is useful to return to Brighouse's analysis. In his radical egalitarian interpretation, he leans heavily on Rawls's complaint that "the wealthier citizens will have 'larger' influence, and that they may come to have 'preponderance' weight in political matters."<sup>177</sup> According to Brighouse, underlying this complaint is a positive principle: political influence, or the means of political influence, should be distributed equally to all. In examining Rawls's complaint further, however, it is not clear that one can derive a positive radical

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<sup>177</sup> Ibid, 160.

egalitarian principle. Instead, Rawls is simply expressing the worry that the socially and/or economically privileged in society will come to control political life.

The complaint highlighted by Brighthouse is found in *A Theory of Justice*, in which Rawls states:

The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate. For eventually these inequalities will enable those better situated to exercise a *larger influence* over the development of legislation. In due time they are likely to acquire a *preponderant weight* in settling social questions, at least in regard to those matters upon which they normally agree, which is to say in regard to those things that support their favored circumstances.<sup>178</sup> [Emphasis added]

While Rawls is certainly concerned that some will have a “larger influence” over the political process, the issue, in the end, is not that some will have more influence than others. It is, as Rawls puts it, that some will come to “control the course of public debate.” Moreover, Rawls’s use of the term “preponderant” also suggests a more modest view of political equality. “Preponderant” can simply mean “overpowering,” “overruling,” or “dominant.” As such, the problem is not some will come to enjoy more weight than others. The issue is that some will acquire overpowering or overruling weight in deciding political questions. The socially or economically privileged can use their advantages to effectively control

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<sup>178</sup> John Rawls, *A Theory of Justice*, (Cambridge: The Belknap Press of the Harvard University Press, 1971), 225.

or determine the outcome of political processes in the pursuit of their own narrow self interests.

This more modest objective is evident in other statements made by Rawls. In justifying the introduction of the fair value special proviso, he states, while the first principle ensures citizens' political equality in the formal sense, "social and economic inequalities in background institutions are ordinarily so large that those with greater wealth and position usually control political life and enact legislation and social policies that advance their interests."<sup>179</sup> The concern here is not to ensure that all enjoy some notion of equal availability of political influence. The special proviso is necessary in order to prevent the socially and economically privileged from controlling political life altogether.

Rawls also expresses this modest objective when outlining the purpose of fair equality of opportunity under the second principle. Rawls states that it means "liberal equality," in which the aim is to use political and legal institutions to "adjust the long-run trend of economic forces so as to prevent excessive concentrations of property and wealth, especially those likely to lead to political domination."<sup>180</sup> Fair equality of opportunity under the second principle is valuable because it prevents "political domination." Rawls again expresses the same concern in his discussion of the importance of political participation. As he states, unless there is widespread participation in democratic politics, then political institutions "will eventually fall into the hands of those who hunger for power and

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<sup>179</sup> Ibid, 148.

<sup>180</sup> Ibid, 44.

military glory, or pursue narrow class and economic interests, to the exclusion of almost everything else.<sup>181</sup>

If Rawls is simply seeking to prevent the privileged in society from using their advantages to control the political process, why reject the difference principle and introduce the special proviso? Wouldn't the maximization of resources for the least advantaged be enough to prevent the wealthy from controlling political life? While those at the bottom may have less than those at the top, they should have enough resources to play an active role in political life. Rawls, however, recognizes that this may not always be the case. Even if the resources for those at the bottom are maximized, those at the top may still be able to control political life.

This idea is most clearly expressed by Rawls in his assertion that the special proviso "secures for each citizen a fair and roughly equal access to the use of a public facility designed to serve a definite political purpose."<sup>182</sup> One might read this statement in highly radical egalitarian terms. "Fair" and "roughly equal" access means having the same access to means of political influence. This, in turn, requires minimizing socio-economic inequalities as much as possible. Rawls, however, is actually expressing the more modest concern: that the privileged few will control the political process. He makes this clear in the next paragraph, where he states that without a guarantee of the fair value of the political liberties, "those

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<sup>181</sup> Ibid, 144.

<sup>182</sup> Rawls, J., *Justice as Fairness: A Restatement*, (Cambridge: The Belknap Press of the Harvard University Press, 2001), 150.



with greater means can combine together and exclude those who have less.”<sup>183</sup>

For Rawls, equal access simply means ensuring all enjoy some minimal access to important means of political influence. This requires not only maximizing the level of resources available to citizens, but also preventing those with greater levels of resources from using their advantage to effectively exclude others. While the difference principle presumably accomplishes the first task, it is insufficient to accomplish the second, as it permits significant social and economic inequalities between citizens.

For example, political advertising through the mass media is an important means of influencing the political process, such as the outcome of elections. Candidates, political parties, interests and advocacy groups often use political advertising during elections to sway voter behaviour. In this context, Rawls is concerned that those with lesser financial means could be effectively excluded from using this important means of political influence. Rawls, as I interpret him here, is not suggesting that this exclusion will or must occur. Instead, Rawls is concerned that it is a potential danger. This exclusion, moreover, is not due to the fact that the least advantaged are so poor that they cannot purchase political advertising. It stems, instead, from the ability of the wealthy to combine and stop others from using the mass media to influence voters. To use a hypothetical example, the wealthy business elite in a society could attempt to control the outcome of an election by ensuring that voters only hear their political messages. They could do so by monopolizing important means of political communication,

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<sup>183</sup> Ibid.

such as advertising during an election. This could be accomplished by purchasing all of the available advertising space. In order to ensure political equality, therefore, the state must intervene in order to prevent the wealthy from creating this monopoly. The state could, for example, impose limits on the amount of money speakers can spend, which is sufficiently low to prevent monopolies from occurring.

### **Moderate Egalitarianism and Actual Fair Opportunity**

Rawls rejects the libertarian position that social and economic inequalities in political participation should not be regulated. Instead, he acknowledges the egalitarian concern that social and economic inequalities can be detrimental to fairness in the political process. Yet, he does not go so far as to endorse a radical egalitarian notion of political equality, in which the socio-economically privileged are to be prevented from having a greater influence than others. What sort of notion of political equality is Rawls advancing? The answer is that Rawls represents a moderate egalitarian approach to political equality.

In developing this idea, it is again useful to return to the idea of actual fair opportunity, which views political equality not only in terms of citizens' legal entitlements to participate, but also their social and economic circumstances. Importantly, it recognizes that socio-economic inequalities may negatively impact persons' political participation. In order to ensure political equality in the actual

sense, steps must be taken to prevent social and economic inequalities from rendering the political process unfair.

Under the radical egalitarian view, the idea of actual fair opportunity is understood in a particular way. Actual fair opportunity is denied when the views of some carry more weight or influence than the views of others, simply because they enjoy some social or economic advantage. Under Daniels's formulation, this radical egalitarianism is critical to persons' self-respect; its denial would publicly affirm the subordination of the lower classes. In order to promote actual fair opportunity in this sense, therefore, social and economic inequalities must be minimized as much as possible. It is on this sort of grounds that Daniels is critical of Rawls and advocated the rejection of the difference principle. As the difference principle permitted significant social and economic inequalities in citizens' political participation, it allowed for inequalities in the worth of the political liberties. This, in turn, threatened the self-respect of those in the lower socio-economic classes.

For Rawls, however, the idea of actual fair opportunity is understood much differently. Under his moderate egalitarian view, citizens' actual opportunity is denied only when the privileged few are able to control elections due to the exclusion of those in lower socio-economic classes. If, for example, an individual cannot actually run for public office because they are too poor to pay for its costs, then one would be denied fair opportunity in this sense. Furthermore, if the wealthy were able to combine and use their economic advantages to exclude

others from important means of political influence, then fair actual opportunity would also be denied.

With this moderate egalitarian view of actual fair opportunity in mind, one can understand why Rawls eventually comes to the conclusion that the difference principle is insufficient to secure political equality. This principle of distribution maximizes the absolute social and economic levels of the least advantaged. In doing so, the difference principle works to eliminate situations in which the privileged few can control the political system because the lower classes are simply too poor to participate in political life. Nevertheless, it can allow exclusion in another way, by permitting those at the top to enjoy such an advantage that they can combine to monopolize the limited area of the political process. As such, for Rawls, the difference principle must be buttressed with the first principles' special proviso to prevent this sort of political control.

Interestingly, a key implication of this moderate egalitarian view of actual fair opportunity is that there is no need to minimize social and economic inequalities as much as possible. As discussed in Chapter Three, control by the privileged few and the exclusion of others can be prevented while still permitting significant social and economic inequalities in political participation. In the context of money, for example, the fairness of the political processes can still be maintained even though some in society spend considerably more on their political participation than others. All that is required is preventing inequalities

from being so large or extreme, that those at the top are able to hijack important political institutions.

## **Conclusion**

In his later works, Rawls made significant alterations to his notion of political equality. He explicitly recognized that the difference principle was insufficient to ensure the fair value of citizens' political liberties. As such, he introduced a special proviso to the first principle of justice to buttress the difference principle. This proviso was intended to guarantee the fair value of the political liberties, and only the political liberties.

Scholarly examinations of Rawls's later discussions of political equality have been, for the most part, minimal. From the limited literature, one important position is that Rawls endorsed a radical egalitarian view of political equality by introducing the special proviso. Under this view, the fair value of the political liberties means that all are to enjoy equal weight or influence in their political participation, regardless of their social or economic class. This, in turn, requires minimizing social and economic inequalities between citizens in their political participation.

In examining Rawls's later discussions of political equality, however, it is evident that he intended the special proviso to impose a much more modest form of egalitarianism. Central for Rawls was the concern that a privileged few in

society may be able to control the political process by using their social or economic advantages to exclude others. For Rawls, the difference principle was insufficient to prevent this sort of control and exclusion. As such, he introduced the special proviso to buttress the difference principle in preventing this sort of egalitarian concern.

In sum, Rawls adopts a moderate egalitarian view of actual fair opportunity and political equality. This view differs from non-egalitarian liberal views, for reasons discussed in Chapter Two. Nevertheless, it is strikingly different from the sort of radical egalitarianism espoused by theorists such as Daniels and often ascribed to Rawls in the literature. Not only does this moderate egalitarianism take a different position on why actual fair opportunity is important, and social and economic inequalities are problematic, it also has important practical implications regarding the distribution of social and economic goods. Unlike radical egalitarianism, this liberal strain of egalitarian thought does not necessarily require minimizing social and economic inequalities as much as possible. All that is required is preventing inequalities from becoming so large that those at the top can exclude those at the bottom.

## **Chapter Seven**

### **Rawls and Political Equality: Further Questions**

#### **Introduction**

The purpose of this chapter is to summarize the basic conclusions of this work and raise four questions for further study.

This work provided an examination of Rawls's liberal-egalitarian notion of political equality, arguing that Rawls advances a moderate egalitarian view. This notion of political equality differs from other liberal approaches, such as libertarianism and liberal free-market views of democracy, insofar as it recognizes the importance of actual fair opportunity in political institutions. Nevertheless, it does not, as some have argued, go so far as to endorse a radical egalitarian view of actual fair opportunity.

In developing Rawls's notion of political equality, this work began by outlining a number of core ideas. This included Rawls's reliance on social contractarianism in justifying his two principles of justice and their framing of political equality. In addition, it was argued that Rawls adopted a particular notion of political equality, which he refers to as fair opportunity in political participation. This approach to political equality is intended to function as an instrument of pure procedural justice, which rejects an equality of outcomes approach to the distribution of political power. It is meant only to secure a fair opportunity or chance to attain positions of political power and influence. Finally,

in conceiving of what fair opportunity might entail, Rawls acknowledges that political equality requires not only formal fair opportunity, but also some measure of actual fair opportunity.

This latter point is critical to understanding Rawls within the broader area of liberal thought on political equality. By recognizing that fair opportunity requires addressing social and economic inequalities, Rawls clearly distinguished himself from other liberal views, in particular libertarianism. Whereas the latter emphasizes individual choice and liberty in deciding what energies and resources to bring to bear in the political process, Rawls advocates state intervention in order to regulate social and economic inequalities between citizens. This distinction has important implications, as can be seen by examining the two liberal views within the context of the courts and election financing legislation.

While Rawls's notion of political equality has important egalitarian tendencies, what sort of egalitarianism does he endorse? This question has significant practical importance. When dealing with issues, such as state imposed limits on spending on electoral advertising, it is necessary not only to work out whether the state should be able to undertake such action, but how it should do so. In this context, Rawls's notion of political equality should not be confused with another important view of actual fair opportunity: radical egalitarianism. This conception of political equality, which was espoused by Daniels in his early critique of Rawls, seeks to ensure that all have an equal weight or influence in deciding political outcomes, regardless of one's social or economic class.



Moreover, this sort of political equality tends to demand strict equality; in order for all to be equal in this sense, social and economic inequalities need to be minimized as much as possible. For critics, such as Daniels, Rawls's difference principle was insufficient to guarantee political equality in this radical sense.

In his later works, Rawls recognized the sort of egalitarian challenge posed by Daniels and attempted to deal with it by introducing a special proviso to the first principle of justice. This condition guaranteed all the fair value of the political liberties, and only the political liberties. In doing so, Rawls acknowledged that the difference principle was insufficient to ensure the fair value of the political liberties. As such, he intended the special proviso to buttress the difference principle and secure political equality for all. Interestingly, there has been very little in the way of scholarly commentary on this issue. For the most part, analysis has centred on Rawls's claim that the political liberties are deserving of special attention in the distribution of social and economic goods. These sorts of analyses, however, do not address what this special treatment entails. In the limited literature that does exist on this question, it is often assumed that Rawls endorsed a radical notion of political equality, similar to the one advanced by Daniels.

In examining Rawls discussion of political equality, however, it is clear that he did not go so far as to endorse a radical egalitarian view of political equality. For him, the problem of social and economic inequalities is not that some may have greater weight or influence in the political process, but that some

may be able to control or hijack political institutions by using their social and economic advantages to exclude others. For Rawls, the difference principle was insufficient to prevent this sort of political control and exclusion. In sum, while Rawls is egalitarian in his view of political equality, it is a much more modest sort of egalitarianism than proposed by radical theorists.

The practical importance of this difference is evident when examining the *Libman* and *Harper* cases and the issue of money and political advertising. As was argued, these two approaches would treat the issue of money and political advertising in very different ways. This, in turn, would give rise to alternative views of the Canadian Supreme Court's decisions in those cases, particularly with regard to their position on how governments ought to regulate political advertising. According to the Court, governments could not impose a complete prohibition on advertising spending by individuals and groups. In the alternative, the justices suggested an approach based on the idea that upper limits on spending alone were sufficient to promote political equality.

Moderate egalitarian views of political equality, such as Rawls's, would support such a position. A complete prohibition on advertising spending is not necessary in order to prevent the wealthy from using their economic advantages to control the outcome of an election. Upper thresholds on spending would be sufficient to ensure political equality, understood as simply preventing the wealthy from hijacking the political system by excluding others. A radical-egalitarian view, by contrast, would take issue with the Court's decisions. A

complete prohibition on spending can be conceived as an important and necessary means of preventing the wealthy from have more weight or greater influence in elections. As such, a radical egalitarian view could be used to support the financial scheme imposed by the Quebec government in the *Libman* case.

## **Election Finance: Recent Events**

Recently, there have been a number of events in Canadian and American politics on the issue of electoral financing. In the 2010 case of *Citizens United v. Federal Elections Commission*, a majority of the American Supreme Court rendered a controversial decision regarding limits on political expenditures by corporations and unions. In Canada, the Conservative government of Prime Minister Stephen Harper passed legislation in 2011 which will eventually eliminate public subsidies for federal political parties. While each of these events occurred after Rawls's death, they nevertheless invite a brief discussion.

In *Citizens United*<sup>184</sup>, a majority of the American Supreme Court found that limits on political expenditures by corporations and unions violated the First Amendment's protection of free speech. In their reasons, the majority concluded that corporations and unions were deserving of equal protection as individual speakers under the constitution. Moreover, the majority's decision in *Citizens United* reflected similar lines of reasoning found in *Buckley v. Valeo*. According to the majority in *Citizens United*, the First Amendment was intended to keep

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<sup>184</sup> *Citizens United v. Federal Election Commission*, 558 U.S. [1]

governments from interfering in the marketplace of ideas by attempting to equalize speech between different speakers. This sort of reasoning stands in sharp contrast to Rawls's liberal-egalitarianism. The same critique offered by Rawls against *Buckley* is relevant here. As in *Buckley*, the majority in *Citizens United* failed to recognize that the state should regulate spending in order to protect the fair value of the equal political liberties. In the absence of this protection, democracy is simply a rivalry between economic classes, in which unequal resources can dictate the outcome.

This liberal-egalitarian concern has been heightened with one of the immediate results of the *Citizens United* decision: the rise of independent expenditure political action committees (commonly referred to as "Super PACs"). These organizations may accept contributions from individuals, unions and corporations and make unlimited expenditures during elections. In the 2012 Republican primary, PACs have been created for the purpose of supporting particular candidates, and have spent tens of millions on political advertising. Moreover, some PACs have received much of their funding from a few very wealthy individuals. This had led to wide concerns over the role of money in elections, and the ability of wealthy individuals to exercise disproportionate influence over electoral outcomes.

Since Rawls's death, new events have also occurred within Canada. In 2011, the government of Conservative Prime Minister Stephen Harper passed legislation which phased out public subsidies for federal political parties. Under

the previous scheme, parties were eligible for annual allowances based on the number of votes they received in the past election. Under the new legislation, this subsidy will be phased out over a period of time, eventually forcing parties to depend completely on private donations to support their activities.

From the perspective of Rawlsian political equality, such a move is a cause for concern. For Rawls, the fair value of the equal political liberties is intended to “enable legislators and political parties to be independent of large concentrations of private economic and social power in a private-property democracy.”<sup>185</sup> To bring about the fair value of equal political liberties, Rawls noted that “such things as the public funding of elections and restrictions on campaign contributions”<sup>186</sup> would be necessary. In the absence of public subsidies, Rawls argued that political parties may become dependent upon the contributions of wealthy segments of society and, in turn, cater to their interests over other groups once in government. This, in turn, could undercut the fairness of the political process, as the economic elite may be permitted to use their financial advantages to dominate the political process. The elimination of the public subsidies raises the concern that this may become the case in Canada.

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<sup>185</sup> Rawls, *Justice as Fairness: A Restatement*, (Cambridge: The Belknap Press of Harvard University Press, 2001). 148.

<sup>186</sup> *Ibid*, 147.

## **Rawls and Deliberative Democracy**

An important strain of democratic thought, commonly referred to as deliberate democracy, argues that we must be attentive to the nature of democratic decision making when theorizing citizens' political participation. In order for there to be legitimacy in the lawmaking process, we must secure some measure of authentic deliberation by citizens or their representatives. In my view, this is an important issue in democratic theory. However, it is not one to be addressed within Rawls's theory, but alongside it.

With the idea of the fair value of the equal political liberties, Rawls is attempting to deal with a particular problem: the exercise of the formal liberties within the broader context of social and economic inequality. His concern is that these inequalities will undercut the value of the political liberties for some in society, and allow social or economic elites to dominate democratic decision making. In developing this idea, Rawls does not broach broader concerns of theories of deliberative democracy, such the nature and conditions of authentic decision making and its implications for citizens' political participation.

Rawls's narrow focus, however, does not imply that his theory is incompatible with the idea or practice of deliberative democracy. Protecting the fair value of the political liberties would be important to ensuring some measure of authentic deliberation by citizens. Moreover, the principle of the fair value of the equal political liberties does not prohibit legislators from pursuing more robust forms of deliberation between citizens. In sum, the concerns of deliberative

democracy theorists should be addressed alongside Rawls's more narrow concern for the fair value of the equal political liberties.

### **Scope of Rawls's Moderate Egalitarianism**

The purpose of this work was to develop this moderate egalitarian reading of Rawls on political equality. Nevertheless, it is important to introduce a number of key questions for further study which come out of this examination. While it has been argued that Rawls does not go so far as to advance a radical egalitarian view of political equality, this is not to suggest that his theory is conservative in nature. Even with this moderate egalitarian reading, Rawls's liberal theory of political equality can have very widespread implications for the structure of society.

The scope of Rawls's egalitarianism, however, depends on a critical line of questions, which is left open for further study. If all citizens are to be guaranteed the fair value of their political liberties, what might this entail for the distribution of social and economic goods throughout society? Can the fair value of the political liberties be achieved by simply regulating key democratic institutions and processes, such as the electoral and party systems? Or would it require addressing social and economic inequality in a wide range of social structures, such as the economy, the system of private ownership, the education system and the family?

Central to this line of questions is the breadth of Rawls's special proviso in the first principle. As discussed earlier, this proviso is intended to buttress the difference principle in securing political equality. At first glance, one might suspect that its addition would only have minimal impact on Rawls's broader egalitarianism. For the most part, the distribution of social and economic resources would be governed by the difference principle. Only in a small set of circumstances would the special proviso be required: when inequalities are such that the value of citizens' political liberties is at risk. Moreover, the protection of the political liberties could be accomplished by simply regulating democratic institutions. The idea of upper limits on election advertising spending, as discussed in the context of the *Libman* and *Harper* case, would be an important example. Moreover, financial regulations of political parties, such as those currently found under the *Canada Elections Act*, would be another important example. There the independence of political parties is secured by limiting the sorts of contributions to parties, placing limits on the amount they can spend during an election, and providing public subsidies in support of their election campaigns.

One might, however, question whether simply regulating democratic institutions, such as the electoral and party systems, is sufficient to prevent the privileged from hijacking the political system. For example, it could be argued that control of the mass media cannot be prevented by simply regulating spending during elections. The mass media has become increasingly vulnerable to "elite



control and manipulation of public opinion and political expression.”<sup>187</sup> This is due in large part to concentration of media ownership, in which major media outlets are being owned by fewer and fewer corporations, individuals and families. This raises the concern that the political views represented in the media may be limited to those supported by the few ownership groups. As such, Rawls’s liberal-egalitarianism might extend to the economic realm and the regulation of media in society. One might advocate, for example, changes to media ownership, such as public control over key media outlets.

Another important area of concern would be citizens’ educational and professional positions. One might argue that individuals who did not attend elite schools, or do not work in the legal or business profession, may find themselves effectively excluded from important forms of political participation, such as running for political office. Without the politically useful network of friends and contacts which often comes with an elite educational and professional background, it is difficult to rise through the ranks of political parties. Does this mean that Rawls’s special proviso should also apply to the education system and employment markets?

Other social inequalities that may be relevant would include persons’ social status and contacts due to their religious, ethnic or gender characteristics. Additionally, one might argue that time is an important resource in political participation. Those who are able to dedicate large amounts of time to

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<sup>187</sup> Robert Picard, *The Press and the Decline of Democracy: The Democratic Socialist Response in Public Policy*, (Connecticut: Greenwood Press, 1985), 5.

participating in the political process enjoy a greater opportunity to influence its outcomes. Yet many in society find that they have very little time to dedicate to these sorts of activities, whether it is due to family, work or other commitments. Again, does Rawls special proviso apply to these social institutions?

If inequalities in these sorts of contexts can be linked to the denial of the fair value of the political liberties, then the implications of Rawls's special proviso could be quite sweeping, even though it only advances a moderate egalitarianism. It could have relevance to the organization of the economy, the education system, the employment and labour markets, the system of private ownership and property, the tax system, and the family. Instead of the difference principle alone governing the distribution of social and economic goods in these contexts, a stricter form of egalitarianism would be required.

Interestingly, Daniels suspected this result in his early critique of Rawls. According to Daniels, if Rawls uses the first principle to refuse to allow any socio-economic inequalities which would undermine the equal worth of the basic liberties, then it is the first principle, and not the second, which "carries the egalitarian punch."<sup>188</sup> As Daniels states, "it is the First Principle, even more than the Second, which is likely to force strong egalitarianism with regard to primary social goods other than liberty."<sup>189</sup> It must be noted that Daniels understood the first principle as requiring a radical egalitarianism, in which social and economic

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<sup>188</sup> Norman Daniels, "Equal Liberty and Unequal Worth of Liberty." in *Reading Rawls: Critical Studies of A Theory of Justice*. ed. by Norman Daniels, (New York: Basic Books, INC., Publishers, 1975), 280.

<sup>189</sup> Ibid.

inequalities were to be limited as much as possible. Moreover, his claim concerning the egalitarian punch of the first principle assumes that his arguments concerning the equal value of the political liberties can be generalized to include all of the basic liberties.

Nevertheless, even Rawls's more modest liberal-egalitarianism, restricted only to the political liberties, could have wide spread implications. The scope is potentially so large, that one might go as far as to even question the importance of the difference principle as a stand-alone principle of social and economic distribution in society. This issue, however, is left for further study.

### **The Problem of Disproportionate Influence**

In this work, I have advanced a moderate interpretation of Rawls's notion of political equality. I have argued that Rawls rejected radical egalitarianism and the idea of equality of political influence. Instead, I have argued that Rawls simply sought to prevent social and economic elites from using their advantages to control or monopolize the political process for their own ends. Rawls himself invites this moderate interpretation, as he used the problem of elite control as justification for including the idea of the fair value of the equal political liberties.

However while I share Rawls's concern I think it can be misleading to state the problem in terms of "monopolization" and "control". In modern liberal democracies, such as Canada, the problem is not absolute control or

monopolization, but the exercise of disproportionate influence, in which elites often have a very significant and highly unequal influence on political outcomes. In reality this disproportionate influence is Rawls's concern and I believe the application of his theory needs to be stated in these terms.

This raises an interesting problem. We may agree with Rawls's rejection of radical egalitarianism and the idea of equality of political influence. However, we want to be able to prevent the more common problem of disproportionate influence, in which elites do not control the outcome, but nevertheless exercise highly unequal influence. How might we alter Rawls's notion of political equality to account for this broader, but still moderate, aim?

One possibility is to conceptualize political equality in terms of a continuum.<sup>190</sup> On the one end of this continuum is the radical egalitarian view, in which the objective is to ensure equality of influence. On the other end of the continuum is the very moderate objective of preventing social and economic elites from effectively dictating the outcomes of political processes. The idea of disproportionate influence lies between these two views. Preventing disproportionate influence, therefore, requires more than just preventing elite control, which Rawls emphasizes. It also requires preventing cases where elites exercise highly unequal levels of influence. Nevertheless, it falls short of radical egalitarianism. The objective is not to equalize influence, but simply prevent "highly unequal" levels of influence.

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<sup>190</sup> I thank David Laycock for raising the possibility of thinking about political equality in these terms.

Thinking in terms of this continuum thus allows us to articulate a view of political equality that is broader than the one presented by Rawls, yet still more moderate than the radical egalitarian view. Protecting the fair value of the equal political liberties is not about equalizing political influence. It is about eliminating “highly unequal” influence by social and economic elites, which is to be understood in broader terms than absolute control by elites.

This leaves one final issue: how is this principle to be applied in practice? The idea of the fair value of the equal political liberties, thus understood, represents a general principle of justice. Its full articulation in a society’s constitution, laws and policies would be worked out by legislators and judges. These law makers would be guided by the principle’s basic idea: preventing highly unequal influence by social and economic elites. Their role would be to apply this basic idea to the specific context of a particular society.

This, of course, leaves much room for debate amongst citizens, law makers, and theorists. What should count as highly unequal influence in the Canadian or American electoral context? What sorts of laws should be put into place to limit this type of influence? This represents another important set of questions for further study.

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