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Rawls and Contract Law

Kevin A. Kordana* & David H. Tabachnick**

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Introduction

The conventional view of Rawlsian political philosophy is that the private law lies outside the scope of the two principles of justice—it is not part of the “basic structure” of society, which, in this view, is limited to basic constitutional liberties and the state’s system of tax and transfer. This narrow view of the basic structure invites the conclusion that Rawlsian political philosophy is neutral with respect to the private law. In this narrow view, the private law is plausibly understood to operate in Rawlsian political philosophy (if it is to exist at all) independent of the two principles of justice.¹

Consider, for example, the contemporary debate over the *ex ante* and *ex post* conceptions of contract law. The *ex post* conception (i.e., autonomy or “will” theory) typically understands contract law as a unified and distinct body of law. According to Charles Fried, for example, contracts are uniquely based upon the moral notion of a promise.² For the autonomy theorist, given the absence of procedural defects, a promise is necessary and sufficient for

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¹ For example, in his contribution to the recent *Rawls and the Law Symposium*, Arthur Ripstein takes as an assumption, based upon his reading of the Rawlsian texts, that contract law lies outside the basic structure. Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811, 1813 (2004). He goes on to argue that tort law, analogously, must be conceived as lying outside the basic structure and that it is governed by some principles other than the two principles of justice. *Id.* (“I will argue that the same line of reasoning [as applies to the rules of contract] requires that we also conceive of tort law as governing transactions between private parties, albeit involuntary ones.”).

² CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 17 (1981).

contractual obligation—and this is what is distinctive about contract law. In this view, the standard of justice or fairness by which contracts are to be evaluated is *endogenous* to the terms of the contract—the will of the parties defines the conception of justice. For the autonomy theorist, barring procedural defects, contracts are understood as fair because they embody the will of the parties.

On the other hand, the *ex ante* view, both in the economic efficiency conception attributed to Richard Posner³ and in the distributive justice conception attributed to Anthony Kronman,⁴ conceives of contract law as serving a particular independent social value. In this view, justice or fairness in contracts is to be evaluated on terms *exogenous* to the will of the consenting parties. Such standards as utility, distributive justice, or economic efficiency are understood as duty imposing, despite the fact that they do not arise from the will of the contracting parties.⁵

Recall that if the narrow view of the basic structure is correct, Rawlsianism swings clear of this debate over conceptions of contract law. In the narrow view, the two principles of justice simply do not apply to the private law: the private law is not understood to be *subject* to the two principles of justice. One might reasonably infer that, in this view, Rawlsianism is neutral with respect to the debate over conceptions of contract law.

Interestingly, this conventional (or narrow) view of the basic structure, in which the private law embodies no equity-oriented distributive aims, has tempted scholars with law and economics commitments to argue that, counterintuitively, Rawlsians may as well embrace the wealth-maximization approach to the various areas of private law (e.g., contract, tort, and bankruptcy).⁶ Their argument is that the wealth-maximization approach to these areas of private law will ultimately lead to maximal wealth creation that would be subject to (re)distribution via a system of tax and transfer. This, in turn, will best satisfy the demands of the two principles of justice.⁷ This invites the unlikely conclusion that Rawlsians and law and economics scholars alike ought to adopt the wealth-maximization approach to the private law. Equity-oriented distributive aims are to be achieved, not via the rules of the private law, but only through tax and transfer. This conclusion, of course, is

³ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 93–141 (6th ed. 2002).

⁴ See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472 (1980).

⁵ Consider, for example, the exogenous standard(s) embodied in statutes forbidding the performance of (and, therefore, the contracting over) physician-assisted suicide, *Washington v. Glucksberg*, 521 U.S. 702, 728, 731–32 (1997) (upholding constitutionality of ban and pointing to both legal tradition and (as a matter of distributive justice) concerns about the poor), or laws that ban contracting over certain forms of human tissue, see Julia D. Mahoney, *The Market for Human Tissue*, 86 *VA. L. REV.* 163 (2000).

⁶ See, e.g., Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 *U. ILL. L. REV.* 1, 40 (suggesting that a Rawlsian “would enact an economically-derived bankruptcy regime rather than current law”).

⁷ Indeed, Rawls himself justifies the selection of the difference principle over perfect equality on the grounds that the introduction of certain forms of inequality may “make everyone better off,” which seems to imply some affinity with at least aspects of the argument in the text above. JOHN RAWLS, *A THEORY OF JUSTICE* 62 (1971).

predicated on the assumption that the rules of the private law are not themselves subject to the two principles of justice (i.e., the claim that the private law lies outside the basic structure).

If, however, as we argue, the narrow view is incorrect and the private law *is* properly understood as subject to the two principles of justice, it no longer follows that the two principles of justice are best met by applying the wealth-maximization approach to the private law. Assuming the private law is subject to the two principles of justice, some of its rules (e.g., minimum wage laws, the unconscionability doctrine, and some aspects of bankruptcy) might be constructed to aid in meeting the demands of the two principles of justice. If this is correct, (re)distribution need not be done *exclusively* through tax and transfer, and the conclusion that Rawlsians ought to be committed to the law and economics approach to the private law should be rejected.

In what follows, we argue that the view of the private law as lying outside the bounds of the basic structure is ultimately incoherent. In our view, private ordering, specifically contract law, *must* be viewed as subject to the demands of the two principles of justice. For us, Rawlsian political philosophy, properly understood, is *not* neutral over conceptions of private ordering. For Rawlsianism, contract law is properly understood as one of the many loci of distributive justice.

We argue that individual areas of the private law must be constructed—in conjunction with all other legal and political institutions—in a manner that best meets the demands of the two principles of justice. In our view, the private law, for Rawlsianism, should not be viewed as separable from other areas of law. Despite the confusion in the literature over the narrow view of the basic structure, we maintain that the private law is not independent of the demands of the principles of justice. We argue that private ordering, for Rawlsianism, is properly understood as one component of an *entire* scheme of legal and political institutions. Taken as a whole, this scheme (in comparison with all other possible *complete* schemes of legal and political institutions) best meets the demands of the two principles of justice.

Importantly, we also argue that our thesis—that contract law is subject to the two principles of justice—does *not* imply that either individual contracts or doctrines of contract law answer *directly* to the two principles of justice. That is to say, individual contracts and rules of contract law need not, in our view, *pattern* themselves after nor be *read directly off* the principles of justice. Instead, we argue that for the Rawlsian, contract law is a matter of (re)distribution, consistent with a *post-institutional* right to freedom of contract. We understand freedom of contract, for Rawlsianism, to be defined as the scheme of contracting options constructed as *open* or *free* (in the post-institutional sense) in conjunction with the overall scheme of legal and political institutions that, when taken as a whole, best serves the demands of the two principles of justice.

Our paper proceeds as follows. In Part I, we introduce Rawls's notion of primary goods and their distribution via what Rawls terms the basic structure. First, we attempt to explain Rawls's likely motivation for introducing the notion of the basic structure, which (arguably) limits the domain of the

two principles of justice. Second, we introduce the confusion over which institutions are, in Rawls's view, within the bounds of the basic structure. In Part II, we return to the relationship between conceptions of contract law and the narrow view of the basic structure. Part III takes up the relationship between Rawls's first principle of justice and contract law. Here, we analyze whether contract law might be *required* by Rawls's first principle of justice. Next follows Part IV, in which we analyze the relationship between the difference principle and contract law. We argue for a "broad" conception of the basic structure and explain that contractual matters that appear (from the inside) to be "free" of state regulation within a Rawlsian scheme are nevertheless *within* the basic structure. In Part V, we analyze what it means for contract law to reside within the basic structure, emphasizing that this does not entail that individual contracts or contract doctrines need to pattern the difference principle. Part VI takes up an important objection to our view of how contract law is to be constructed within a Rawlsian scheme. We raise, but ultimately offer a solution to, concerns arising from the role of democracy in Rawlsian political philosophy. Part VII provides an example of how our view of Rawlsian contract law might operate by considering the doctrine of (substantive) unconscionability. In Part VIII, we consider the relationship between the opportunity principle and contract law. Last, we offer our conclusion.

I. *Primary Goods and the Problem of the Basic Structure*

In *A Theory of Justice*, Rawls famously argues that his two principles of justice are adopted in what he calls the "original position."⁸ Rawls maintains that social institutions are to be constructed in keeping with these two principles.⁹ He further argues that the two principles of justice apply *only* to the basic structure of society in its provision of "primary goods."¹⁰

Primary goods, for Rawls, are those items that, "from the standpoint of the original position, it is reasonable for the parties to assume that they want, whatever their final ends."¹¹ Primary goods are thus those items that all persons, given Rawls's conception of the reasonable, can be assumed to want, independent of their particular desires or conceptions of the good. Importantly, Rawls's index of the primary goods is an objective standard for assessing competing legal and political schemes.¹² Rawls understands primary goods as "rights, liberties, and opportunities, income and wealth, and the social bases of self respect."¹³ The theory of the primary goods therefore provides a metric for the evaluation and design of competing legal and political schemes. In constructing legal and political institutions, one is to compare

⁸ RAWLS, *supra* note 7, at 60.

⁹ *See id.* at 54–60.

¹⁰ *See id.* at 61–62.

¹¹ JOHN RAWLS, *Reply to Alexander and Musgrave*, in *COLLECTED PAPERS* 232, 240 (Samuel Freeman ed., 1999).

¹² *Id.* at 241. For a critique of the use of such an objective standard in distributive justice, see, e.g., Richard J. Arneson, *Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare*, 19 *PHIL. & PUB. AFF.* 158 (1990).

¹³ RAWLS, *supra* note 11, at 241.

competing schemes with regard to their provision of primary goods and select the scheme that, taken as a whole, maximally satisfies the demands of the two principles of justice.¹⁴

While it is clear that competing schemes are to be judged in terms of their provision of primary goods, it is less clear what exactly counts as society's basic structure. That is to say, it is unclear exactly which social institutions are to be evaluated according to their provision of primary goods and designed according to the principles of justice. One might wonder, for example, whether private firms (if they are to exist), universities, or hospitals fall within the bounds of the basic structure and are thereby subject, in their design, to the two principles of justice. One might further wonder exactly which political and legal institutions are properly understood as directly or indirectly answerable to the demands of the two principles of justice.

For example, it is clear that Rawls holds that a body of constitutional law is required and is properly designed in keeping with the two principles of justice. It is much less clear, however, which other legal institutions are required by the two principles of justice and which legal institutions, even if they are not required by the principles of justice, must (if they are to exist) conform to the principles of justice. While the two principles of justice do not (strictly speaking) require contract law, it is an important question whether these legal institutions (if they are to exist) must be understood as part of society's basic structure and therefore subject to the demands of the two principles of justice.¹⁵

Before answering this question, it is essential to clarify: (1) *why* Rawls introduces the concept of the basic structure; and (2) *which* institutions constitute the basic structure. Question one is essential to understanding the Rawlsian project, while question two is essential to its application. As is the case with any maximizing principles, the normative conclusions prescribed are a function of the domain over which the principles are applied; the range of application of the maximand must thus be specified.¹⁶

¹⁴ Of course, the relationship between the demands of the two principles of justice and the legal and political institutions they prescribe is mediated by the democratic process, a complication we address in detail *infra* Part VI. See JOHN RAWLS, *POLITICAL LIBERALISM* 338–39 (1993).

¹⁵ See John G. Bennett, *Ethics and Markets*, 14 *PHIL. & PUB. AFF.* 195, 195 & n.3 (1985) (contrasting Ronald Dworkin's avoidance of "discussing *which* resources should be privately owned, what the details of the rights of ownership should be, or how those things not privately owned should be controlled" (citing Ronald Dworkin, *What is Equality?, Part 2: Equality of Resources*, 10 *PHIL. & PUB. AFF.* 283 (1981)) with Rawls's discussion of the issues (citing John Rawls, *The Basic Structure as Subject*, in *VALUES AND MORALS* 47–71 (A.I. Goldman & Jaegwon Kim eds., 1978)), and commenting that "the[se] issues [that] Dworkin doesn't discuss are considerably more important than the ones he does").

¹⁶ Analogously, utilitarians must define the proper scope of the utility principle. Some commentators have suggested that Bentham understands the scope of the utility principle as limited to government action, as opposed to the general conduct of individuals. See Loren Lomasky, *A Refutation of Utilitarianism*, 17 *J. VALUE INQUIRY* 259, 275 (1983) ("Indeed, in one striking passage, Bentham seems to restrict utilitarian calculation *exclusively* to the political sphere."). In the passage to which Lomasky refers, Bentham writes:

"Let us recapitulate and bring to a point the difference between private ethics, . . . on the one hand, and that branch of jurisprudence which contains the art or science of legislation Private ethics teaches how each man may dispose himself to

We turn first, then, to Rawls's explanation for the focus on the basic structure. For Rawls, the domain of the two principles of justice is what he calls the "basic structure." Although Rawls is not always clear about what exactly constitutes the basic structure, he explains his focus on it and its importance. His explanation begins by discussing what he calls "background conditions." Rawls rejects a version of what he takes to be a Lockean view of fairness that grounds justice in local or individual consensual relations between persons. Rawls rejects this purported Lockean view because what he calls "background justice" is a necessary condition of complete social justice.¹⁷ For Rawls, fairness cannot be viewed locally—that is, as merely a matter of the relationship between individual persons conducting private transactions. Justice is to be viewed instead from what he calls the "social point of view."¹⁸ Whether social justice obtains is a matter, for example, of whether or not there has been fairness of opportunity that extends "backward in time and well beyond any limited view" of individual transactions.¹⁹

For Rawls these background conditions are crucial to determining the justice of particular or individual transactions. Claims of justice are *not* (as he seems to think the Lockean view suggests) simply a matter of informed consensual transactions between persons but instead must be defined, in

pursue the course most conducive to his own happiness, by means of such motives as offer of themselves: the art of legislation . . . teaches how a multitude of men, composing a community, may be disposed to pursue that course which upon the whole is most conducive to the happiness of the whole community, by means of motives to be applied by the legislator."

Id. (quoting JEREMY BENTHAM, *The Principles of Morals and Legislation*, ch. xix, § 1, in 1 THE WORKS OF JEREMY BENTHAM (John Bowring ed., 1962)). We are not certain we agree with Lomasky's interpretation of the passage (to us, Bentham is making the distinction between the personal and the political, but to the extent he is endorsing "private ethics" that instruct the pursuit of personal, rather than collective, ends, it is at least conceivable that he is doing so because he thinks that such personal conduct will, all things considered, maximize total happiness). While ultimately arguing that the interpretation Lomasky attributes to Bentham is correct, David Lyons has argued that there are strong reasons in favor of both interpretations. "If we take [Bentham] to assume that interests naturally converge, then we can understand how he could say in effect that a man who serves his own happiness will always serve the happiness of his fellow-creatures, and vice versa." DAVID LYONS, *IN THE INTEREST OF THE GOVERNED* 54–55 (1991). The philosophical point, however, that Lomasky and Lyons are making holds; one might, for various reasons, adopt a maximand but constrain the domain over which it operates.

¹⁷ JOHN RAWLS, *The Basic Structure as Subject*, in *POLITICAL LIBERALISM*, *supra* note 14, at 265–67, 287 ("[T]he constraints that Locke imposes on the as-if historical process are not strong enough to characterize a conception of background justice acceptable to free and equal moral persons."). For an alternative view, see A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 288–98 (1994) (offering a conception of moderate Lockean liberalism that he takes to be most consistent with persons conceived of as free and equal).

¹⁸ RAWLS, *supra* note 17, at 266. For Rawls, social justice is a matter of a complete set of social rules, the general adherence to which best promotes the demands of the two principles of justice. This account is arguably liable to what David Lyons has called the charge of "extensional equivalence." DAVID LYONS, *FORMS AND LIMITS OF UTILITARIANISM* 63, 161–77 (1965). While the question of whether a set of rules can be justified by a particular maximand is an interesting one, and certainly one to which Rawlsianism needs to answer, it is beyond the scope of this Article. We are explicating the Rawlsian view of contracts rather than defending Rawlsianism *per se*.

¹⁹ RAWLS, *supra* note 17, at 266–67.

some measure, in terms of whether or not certain conditions exist in the background to individual (or local) transactions. The necessity of background conditions to social justice²⁰ creates a demand for a basic structure that establishes these conditions.

An additional explanation (or purported justification) for the focus on the basic structure is Rawls's claim that even when "fair background conditions . . . exist at one time [they may] be gradually undermined" by individuals engaging in individual transactions even when their actions strictly follow "local" rules of private transactions.²¹ Rawls argues that the "invisible hand" tends to work in the wrong direction, "away from" justice and so as to "erode[]" just background conditions.²² This judgment turns on Rawls's view that rules for private transactions cannot (or should not) speak to social justice—such rules (alone) will not be sufficient to ensure and maintain background justice. This is because rules for "individual transactions cannot be too complex, or require too much information to be correctly applied; nor should they enjoin individuals to engage in bargaining with many widely scattered third parties, since this would impose excessive transaction costs."²³ For Rawls, then, full-blown social justice requires a set of institutions (i.e., the basic structure) governing background conditions.²⁴ The basic structure, then, functions to ensure background justice; the rules for private transactions are to answer to "simplicity and practicality."²⁵

Now that there is an explanation of why Rawls introduces the concept of the basic structure, we turn to our second question: *which* institutions constitute the basic structure? Rawls's writing on this subject is ambiguous.²⁶ In some places, it appears that Rawls holds that all social institutions that affect one's life prospects are understood as constitutive of the basic structure—this view is sometimes understood as the "broad" view.²⁷ At other times, *indeed*

20 See, e.g., *id.* at 267 ("Thus whether wage agreements are fair rests, for example, on the nature of the labor market: excess market power must be prevented and fair bargaining power should obtain between employers and employees. But in addition, fairness depends on underlying social conditions, such as fair opportunity . . .").

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at 268–69.

25 *Id.* at 268.

26 See THOMAS W. POGGE, *REALIZING RAWLS* 21 (1989) ("Rawls leaves this notion [of the basic structure] not merely vague but also ambiguous."); *id.* at 23 ("This notion of basic structure, an elaboration of the account in *A Theory of Justice*, conflicts with a narrower understanding of the term which dominates Rawls's discussion in 'The Basic Structure as Subject.'"); Hugo Adam Bedau, *Social Justice and Social Institutions*, in 3 *MIDWEST STUDIES IN PHILOSOPHY: STUDIES IN ETHICAL THEORY*, 159, 169 (Peter A. French et al. eds., 1978) ("[T]he whole concept of basic institutions in Rawls's theory is vaguer than one might expect, given the role he insists they are supposed to play in any adequate theory of social justice.")

27 Here, a question arises as to which aspects of social life (if any), given the broad conception, lie outside the basic structure. The answer to this question is, however, not uncontroversial. See, e.g., G.A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 *PHIL. & PUB. AFF.* 3, 4 (1997) ("[T]he view that I oppose is the Rawlsian one that principles of justice apply only to what Rawls calls the 'basic structure' of society."). Some commentators question the relevance of making a distinction between a basic structure and other aspects of social life. See, e.g., Liam Murphy, *Institutions and the Demands of Justice*, 27 *PHIL. & PUB. AFF.* 251, 251 (1999)

even in his explanation of the focus on the basic structure discussed above, Rawls writes in a manner suggesting that the basic structure is less expansive and is exclusive of the private law and private ordering—the so-called “narrow” view.²⁸ From Rawls’s writing, then, it is an open question what exactly constitutes the basic structure of society and which institutions are to be evaluated in terms of their provision of primary goods.

In the broader conception associated chiefly with *A Theory of Justice*, the basic structure is constituted by the distribution of “fundamental rights and duties,” the allocation of the benefits and burdens of “social cooperation,” the “political constitution and the principal economic and social arrangements,” the “legal protection of freedom of thought and liberty of conscience,” “competitive markets, private property in the means of production, and the . . . family.”²⁹ In this view, it appears that any aspects of social life that affect one’s life prospects constitute the basic structure.³⁰

In *The Basic Structure as Subject*, on the other hand, Rawls defends the narrow conception.³¹ He maintains that there is

a division of labor between two kinds of social rules, and the different institutional forms in which these rules are realized. The basic structure comprises first the institutions that define the social background and includes as well those operations that continually adjust and compensate for the inevitable tendencies away from background fairness, for example . . . income and inheritance taxation designed to even out the ownership of property.³²

He elaborates, “What we look for, in effect, is an institutional division of labor between the basic structure and the rules applying directly to individuals and associations and to be followed by them in particular transactions.”³³ In this narrow view (call the previous sentence “A”), Rawls holds that contracts and private ordering are outside the scope of the two principles of justice.³⁴

(“I defend the contrary view: all fundamental normative principles that apply to the design of institutions apply also to the conduct of people.”).

²⁸ See *infra* notes 33–34 and accompanying text.

²⁹ RAWLS, *supra* note 7, at 7.

³⁰ *Id.* (“Taken together as one scheme, the major institutions define men’s rights and duties and influence their life-prospects, what they can expect to be and how well they can hope to do. The basic structure is the primary subject of justice because its effects are so profound and present from the start.”); see *id.* at 178 (“The principles of justice apply to the basic structure of the social system and to the determination of life prospects.” (discussing criticisms of utilitarianism)).

³¹ See RAWLS, *supra* note 17.

³² *Id.* at 268.

³³ *Id.* at 268–69. He further writes, “If this division of labor can be established, individuals and associations are then left free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made.” *Id.* at 269.

³⁴ This is somewhat controversial. In the previous paragraph, Rawls writes in a manner that might conceivably be construed as supportive of a broad conception.

This structure also enforces through the legal system another set of rules which govern the transactions and agreements between individuals and associations (the law of contract, and so on). The rules relating to fraud and duress, and the like,

It is an open question, as a matter of Rawls exegesis, which view of the basic structure Rawls himself held. Independent of what Rawls himself actually thought, the philosophical puzzle comes to this: (1) *which* institutions constitute the basic structure; and (2) exactly *why* are these institutions—as opposed to other political and legal institutions, social practices, or private actions—the subject of justice and thus constitutive of the basic structure. In other words, it is an open question which conception of the basic structure would be justifiably held by a thoroughgoing *Rawlsian* and what the ramifications of this conception are for contract law.

Several possible candidates have been introduced as philosophically defensible conceptions of the basic structure. The first candidate is the narrow view that we discussed above. To be clear, in the narrow conception, the basic structure is limited to a scheme of constitutional liberties plus the system of tax and transfer. That is, the domain of the second principle of justice is limited to the system of tax and transfer.

The second candidate, the “coercive conception,” holds that all coercive political and legal institutions are constitutive of the basic structure.³⁵ In this view the social ethos of society, for example, is outside the scope of the basic structure. Rawls himself, however, seems to deny the truth of the coercive conception and instead defends a narrower conception, one seemingly limited to tax and transfer, in *The Basic Structure as Subject*.³⁶

A third candidate is what we have called above the broad view—namely, the view that all aspects of social living that affect citizens’ life prospects constitute the basic structure. This view has been defended by G.A. Cohen, who argues that this is the proper conception of the basic structure, although he

belong to these rules, and satisfy the requirements of simplicity and practicality.

They are framed to leave individuals and associations free to act effectively in pursuit of their ends without excessive constraints.

Id. at 268 (emphasis added). The answer to the interpretive question turns on exactly what Rawls means here by “this structure”—if he means the basic structure, then this passage might be taken to suggest support for the broad view. See Murphy, *supra* note 27, at 261 & n.30. We, however, maintain that this interpretation is not possible in light of sentence “A” above. Murphy, in essence, appears to treat sentence “A” as a mistake. *Id.* at 261 (“All this suggests that Rawls did not after all intend the account of the basic structure offered in ‘The Basic Structure as Subject’ to differ significantly from that offered in *A Theory of Justice*.”). Note as well that *The Basic Structure as Subject* is not the only Rawlsian text in which Rawls defends the narrow view. See JOHN RAWLS, *A Kantian Conception of Equality*, in COLLECTED PAPERS, *supra* note 11, at 262 (“[T]he difference principle holds, for example, for income and property taxation, for fiscal and economic policy; it does not apply to particular transactions or distributions, nor, in general, to small scale and local decisions, but rather to the background against which these take place.”). For an interpretation of the “division of labor” as invoking the narrow conception, see Ripstein, *supra* note 1, at 1813.

³⁵ This conception is attributed to Rawls by G.A. Cohen. Cohen, *supra* note 27, at 19 (“The basic structure, in this . . . understanding of it, is, so one might say, the *broad coercive outline* of society, which determines in a relatively fixed and general way what people may do and must do . . .”). Cohen, of course, also recognizes that, as a textual matter, Rawls is ambiguous regarding the basic structure, so this is just one of the possible interpretations of the Rawlsian texts. See *id.*

³⁶ See RAWLS, *supra* note 17, at 268–69 (stressing the “institutional division of labor between the basic structure and the rules applying directly to individuals and associations and to be followed by them in particular transactions”).

concludes that this conception “shipwrecks” the Rawlsian project.³⁷ Thomas Pogge, on the other hand, attributes something akin to this view to the Rawls of *A Theory of Justice*.³⁸ We defend this broad view as the proper Rawlsian conception and maintain that it does *not* “shipwreck” the Rawlsian project. We argue that this view is consistent with what we take to be the Rawlsian conception of contracts.

We argue that despite the ambiguity in the Rawlsian text and the confusion that this ambiguity has engendered in the philosophical literature, there is in Rawlsian political philosophy a coherent view of the bounds of the basic structure of society. We further argue that despite Rawls’s remarks to the contrary, the broad view of the basic structure must be correct: the two principles of justice properly apply to all social institutions that affect one’s life prospects.

It follows from this that contrary to the *conventional* view of Rawlsianism,³⁹ contract law should be properly understood as *subject* to the principles of justice. If this is correct, Rawlsianism is *not*, as it is often thought to be, indifferent with regard to the nature of contract law. Interestingly, while we do hold that Rawls’s writing is ambiguous in this regard, we maintain that our understanding of Rawlsianism is not *entirely* revisionist—we will argue that there are passages in Rawls’s writing that our (arguably) controversial view helps to clarify.

II. Contract Law and the Basic Structure

As we saw above in the Introduction, in the narrow conception of the basic structure, contract law is outside the scope of the two principles of justice, and Rawlsianism is, therefore, neutral with regard to it. In this view of the basic structure, the domain of the principles of justice is limited to (roughly) institutions of tax and transfer (in addition to the basic constitutional liberties).⁴⁰ In the narrow view, contract law is a private matter, not

³⁷ Cohen, *supra* note 27, at 11 (“[If] the Rawlsian basic structure includes . . . conventions and usages that are deeply entrenched but not legally or literally coercive . . . it shipwrecks . . . the whole approach to justice that Rawls has taught so many to pursue.”).

³⁸ POGGE, *supra* note 26, at 23.

³⁹ RAWLS, *supra* note 7, at 8 (“[The principles of justice] may be irrelevant for the various informal conventions and customs of everyday life; they may not elucidate the justice, or perhaps better, the fairness of voluntary cooperative arrangements or procedures for making contractual agreements.”); Kronman, *supra* note 4, at 500 (“Rawls’s preference for taxation . . . and his reluctance to view the private law of contracts as an equally appropriate vehicle for redistributing wealth reflect an attitude shared by many liberal thinkers. Is it possible to justify this preference for taxation and the non-distributive conception of contract law that it entails?” (citation omitted)); Joseph Mendola, *On Rawls’s Basic Structure: Forms of Justification and the Subject Matter of Social Philosophy*, 71 *MONIST* 437, 439 (1988) (“Rawls does *not* hold that the first subject of social evaluation should be *all* institutions or practices. That would be, he thinks, *too* broad a concern. He wants us, rather, to focus first on a few institutions that are important in a specific [way]. For instance, he rules out of the basic structure . . . ‘procedures for making contractual agreements.’” (citation omitted)); Ripstein, *supra* note 1, at 1813 (arguing that tort law, like contract law, lies outside the basic structure).

⁴⁰ See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 195 (1980) (“Rawls . . . restrict[s] his principles of justice to something called the ‘basic structure,’ specifically exempting all issues involving the fairness of particular transactions.”); DAVID LYONS, *ETH-*

subject to the principles of justice, which do “not apply to particular transactions or distributions, nor, in general, to small scale and local decisions.”⁴¹

For the proponent of the narrow conception of the basic structure, then, the very question as to what is the Rawlsian conception of contract law is ill-formed. Indeed, from such a perspective, the question itself embodies a theoretical confusion over the domain of the two principles of justice because, in this view, contract law is outside the basic structure.

Our purpose is to argue that the narrow conception of the basic structure is mistaken and to explain our understanding of the basic structure and the place of contract law in Rawlsian political theory.⁴² In our view, the confusion over the basic structure is attributable to an instructive misunderstanding concerning what a Rawlsian *should* think about the domain of the principles of justice and their relationship to the private law. If the narrow conception is incorrect, there are two possible alternatives: contract law might lie partly inside and partly outside the basic structure, or contract law might lie entirely inside the basic structure (call these the “medium” and “broad” conceptions, respectively).⁴³

III. Contract Law and the First Principle of Justice

If contract law is within the basic structure (in whole or in part), it is governed by the two principles of justice. The first principle of justice con-

ICS AND THE RULE OF LAW 131–32 (1984) (“Rawls defines benefits in terms of ‘primary goods’—socially distributable goods, such as income and wealth, liberty and opportunity This fits nicely with Rawls’s concentration on the basic structure of society. The principles of justice are meant to regulate the effects of basic institutions and do not apply to private arrangements and transactions.”); POGGE, *supra* note 26, at 23 (contrasting a “narrow” with a “wider” view of the basic structure and stating that, with respect to the economic aspects of the narrow view, “[t]he basic structure of a developed society might then include little more than its welfare and school systems”); RAWLS, *supra* note 17, at 262–63 (“[The difference principle] applies in the first instance to the main public principles and policies that regulate social and economic inequalities. It is used to adjust the system of entitlements and rewards, and the standards and precepts that this system employs. Thus the difference principle holds, for example, for income and property taxation, for fiscal and economic policy; it does not apply to particular transactions or distributions, nor, in general, to small scale and local decisions, but rather to the background against which these take place What is enjoined is that the inequalities make a functional contribution to those least favored.”); *see also* Thomas W. Pogge, *On the Site of Distributive Justice: Reflections on Cohen and Murphy*, 29 PHIL. & PUB. AFF. 137, 138 (2000) (“[A]ccording to [Rawls’s difference principle] a society’s basic structure, its tax regime in particular, should be shaped to achieve [compliance with the difference principle].”). Kronman cites Rawls as an example of a liberal “who oppose[s] the use of contract law as a redistributive device . . . because . . . distributional objectives . . . are always better achieved through the tax system than through the detailed regulation of individual transactions.” Kronman, *supra* note 4, at 474 & n.11.

⁴¹ RAWLS, *supra* note 17, at 262.

⁴² While we draw upon the Rawlsian texts, our project is ultimately normative as opposed to interpretive (i.e., an exegesis of John Rawls’s thinking). We attempt to demonstrate what a plausible Rawlsian political theorist ought to think in this regard given her theoretical commitments.

⁴³ *See* Murphy, *supra* note 27, at 258 (“[On the narrow view] the institution of contract law, which does impinge on people’s daily lives insofar as it rules out force and fraud in contractual relations, does not count as part of the basic structure, whereas on the broader characterization offered in *A Theory of Justice* it would seem to.”).

structs and distributes what might be understood as, roughly, constitutional liberties.⁴⁴ The basic liberties Rawls mentions to be distributed by the first principle include:

political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.⁴⁵

It is tempting to conclude that the first principle, given its focus on liberty, must guarantee the right to contract. The “High” Rawlsian position, however, is that, strictly speaking, all economic constructions—tax and transfer, property rules (i.e., the details of ownership, including rights of transfer and use, acquisition and bequest, etc.), antitrust, minimum wage, offer and acceptance, unconscionability, and the other doctrinal rules of contract law—are properly understood as second principle matters. To invoke these matters at the level of the first principle would be implicitly to invoke economic conceptions and distributive notions that are simply *nonexistent* at the first principle stage. Given, for example, that the details of the right to contract are a function of property rules that must be constructed as a second principle matter, it is clear that the first principle of justice cannot construct the specific *details* of contract law.

Rawls himself, however, is less than fanatical about how strictly the divide between basic liberties and economic matters must be observed. He allows, for example, the right to *personal property* to be constructed by the first principle, but he is also clear that the *details* of this *abstract* right are to be constructed by the second principle.⁴⁶ Our modest claim is that, by analogy, the first principle may require the construction of at least some contracting options as open—the details of which (of course) must be created by the second principle in its construction of the complete economic scheme.⁴⁷

To be clear, all of contract doctrine and the *details* of the post-institutional right to contract are to be understood as *second principle matters*.⁴⁸

⁴⁴ RAWLS, *supra* note 7, at 302 (“Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.”).

⁴⁵ *Id.* at 61; see also RAWLS, *The Basic Liberties and Their Priority*, in POLITICAL LIBERALISM, *supra* note 14, at 291 (listing basic liberties constructed by first principle of justice).

⁴⁶ RAWLS, *supra* note 45, at 298 (“[A]mong the basic liberties of the person is the right to hold and to have the exclusive use of *personal property*. The role of this liberty is to allow a sufficient material basis for a sense of personal independence and self-respect [W]ider conceptions . . . of property are decided at later stages. . . .”).

⁴⁷ Rawls himself, to be clear, appears to stop short of including transfer rights in his conception of personal property as a first principle matter. *Id.* (“Two wider conceptions of the right of property as a basic liberty are to be avoided. One conception extends this right to include certain rights of acquisition and bequest.”). Our point, however, is that there does not appear to be any principled difference between the independence and self-respect fostered by at least some use and exclusion rights with regard to personal property and those fostered by at least some transfer rights. The latter might be constructed to include some contract options.

⁴⁸ On this matter, we are in apparent disagreement with Nathan Oman. See Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. (forthcoming 2005) (manuscript at 27, on file with authors) (noting that for the Rawlsian, “limitations on contractual freedom,

The first principle, in our view, may operate in this regard at only the most abstract level—imposing upon the second principle (in its economic construction) an abstract requirement that (at least) some contracting options be constructed as open. To commit ourselves to anything stronger, for example, something patterning the Friedian notion of a pre-institutional right to contract, at the level of the first principle would be to invoke what Murphy and Nagel have called the “myth of ownership”⁴⁹ and would be mistaken. Analogously, it would be mistaken to conclude that when Rawls introduces the notion of *personal property* he has committed himself to any particular, *robust* conception of private property or system of ownership (Lockean or otherwise).

If we are correct, the first principle might guarantee that the state would stand ready to enforce at least some aspects of private promises or bargains. No *particular* set of free contracting options (including remedies), however, would be guaranteed to be constructed. Indeed, Rawls is explicit in his view that the first principle of justice does not guarantee that all contracting options be open. He writes that a “[l]ibert[y] not on the list [guaranteed by the first principle], for example, the right to . . . freedom of contract as understood in the doctrine of *laissez-faire* [is] not basic: [it is] not protected by the priority of the first principle.”⁵⁰

Rawls takes seriously the possibility that society can be organized in any number of different institutional forms. Some such forms might include a system of contract law, while others might not.⁵¹ In any case, as we have said, an unconstrained freedom to contract is not guaranteed by the first principle. For example, an institutional scheme might feature bargaining and promising,

such as those represented by the doctrines of consideration, capacity, and unconscionability need to be justified in terms of preserving equal liberty”).

⁴⁹ LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 98–99 (2002).

⁵⁰ RAWLS, *supra* note 11, at 239. While a *laissez-faire* conception of the freedom to contract is typically understood as a pre-institutional matter, Rawls is best understood as pointing out that any post-institutional right to contract constructed by the liberty principle would not feature a commitment to leaving all options open in a manner that would pattern itself after the (pre-institutional) *laissez-faire* approach. H.L.A. Hart has remarked that *basic or fundamental liberties* guaranteed by the first principle need not pattern pre-institutional notions of *liberty*. “[The liberty principle] refers not to ‘liberty’ but to basic or fundamental *liberties* which are understood to be legally recognized and protected from interference.” H.L.A. Hart, *Rawls on Liberty and Its Priority*, in *READING RAWLS* 230, 235 (Norman Daniels ed., 1975). Rawls himself appears to accept Hart’s remark: “Hart noted, however, that in *Theory* I sometimes used arguments and phrases which suggest that the priority of liberty as such is meant; although as he saw, this is not the correct interpretation.” RAWLS, *supra* note 45, at 292; see Samuel Freeman, *Illiberal Libertarians: Why Libertarianism Is Not a Liberal View*, 30 *PHIL. & PUB. AFF.* 105, 112–15 (2002) (discussing role of private property and contract in various forms of liberalism).

⁵¹ Rawls is not always clear as to which legal institutions will or will not be required by the two principles of justice, nor does he always provide the argument as to why. See Bedau, *supra* note 26, at 170 (“But all [Rawls] really says is that these institutions suffice; he explicitly denies he gives any argument that they are necessary, and suggests that perhaps they are not. Such caution is praiseworthy, but it is troubling not to be told whether, for example . . . [various legal and political institutions are] *necessary* to implement the principles of justice in a constitutional democracy. It is difficult to believe that none of these institutions is necessary, and it is also difficult to believe that there is no argument that shows they are necessary.” (citations omitted)).

but lack state enforcement of promises.⁵² For Rawls, at least, it seems that this possibility is open.⁵³

The preceding quotation from Rawls, however, can be misleading. While it is clear that the first principle of justice does not enjoin an unconstrained right to freedom of contract (i.e., a right to have all contracting options open), it does not follow that the first principle of justice should not guarantee that *some* contracting options be constructed as “free.”⁵⁴ If, for example, it were true that state enforcement of promises (i.e., contract law) were to provide (in at least some cases) a net increase in liberty, then the right to have at least *some* contracting options open would be generated by the first principle of justice. Constructing some contracting options as open would not seem seriously to encroach upon other important competing liberty interests (e.g., freedom of thought and conscience, and freedom of the person).⁵⁵

⁵² See RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (defining “contract” as a promise enforced by the state).

⁵³ RAWLS, *supra* note 7, at 345–46 (“I shall not regard promising as a practice which is just by definition, since this obscures the distinction between the rule of promising and the obligation derived from the principle of fairness. There are many variations of promising just as there are of the law of contract. Whether the particular practice as it is understood by a person, or group of persons, is just remains to be determined by the principles of justice.”).

⁵⁴ Samuel Freeman also raises the question of the status of the right to private property and freedom of contract in liberal political philosophy. He writes:

[L]iberals do not respect the outcome of just any given private agreement as a valid enforceable contract. This is related to the omission of rights of property and freedom of contract from the lists of liberal basic rights and liberties Some may see this omission as glaring. Locke, after all, is said to have argued for a ‘natural right of property’ [H]is argument seems to place rights of property on a par with basic rights. But whatever Locke intended by his account of property in the state of nature, neither he nor any other major liberal philosopher argue that governments have no authority to regulate property and contractual agreements, and burden them when necessary for the public good.

Freeman, *supra* note 50, at 113–14 (citations omitted). Similarly, Thomas Nagel writes:

[I]t isn’t clear what is to be included in ‘liberty.’ If it includes unrestricted economic liberty, the result would be extreme economic laissez-faire; but that is not what Rawls has in mind. The equal liberties he thinks justice requires are personal and civil liberties and basic political rights; they do not include unrestricted freedom of contract and disposition of property or freedom from taxation for redistributive purposes.

THOMAS NAGEL, *The Writings of John Rawls, in CONCEALMENT AND EXPOSURE AND OTHER ESSAYS* 79 (2002). The point is that demonstrating that rights of property and contract are not absolute is not sufficient to show that some aspects of such rights are not *basic* (i.e., constructed by the first principle). Rawls argues that basic liberties can be traded off against one another. See *infra* note 55. Therefore the obviously true claim that the right of contract is not absolute is not sufficient to show that some aspects of it cannot be guaranteed by the first principle of justice. In a later essay, Thomas Nagel acknowledges this point. See Thomas Nagel, *Rawls and Liberalism, in THE CAMBRIDGE COMPANION TO RAWLS* 62, 68 (Samuel Freeman ed., 2003) (“This rejection of economic freedom as a value in itself is one feature of Rawls’s view that has attracted opposition . . . [if] this should be allowed to have some effect on the form of a just economic system [t]hat might be expressed by some modification in the interpretation of Rawls’s first principle, to admit a measure of economic freedom as a protected right.”).

⁵⁵ RAWLS, *supra* note 11, at 239 (“[Liberties protected by the first principle] have a central range of application within which they can be limited and adjusted only because they clash with other basic liberties. None of these liberties, therefore, is absolute, since they may conflict with

To further elaborate, some aspects of contract law might provide an increased freedom to rely on promissory transactions. This reliance could be an aspect of maximizing the liberty content of the package of equal basic liberties required by the first principle of justice. Of course, there are other mechanisms that can promote such beneficial reliance. These include, for example, reputation (through reciprocal interactions or ethnic ties) and hostage giving.⁵⁶ To the extent, however, that these other mechanisms offer only incomplete⁵⁷ and sometimes illiberal solutions that would need to be traded off against other liberties, contract law seemingly allows for beneficial reliance, and therefore some (open) contracting options may conceivably be required by the first principle of justice. In a complex liberal society in which citizens have different life plans, goals, and values, it seems particularly likely that noncontractual mechanisms will fail to best allow for beneficial reliance.

This matter is, however, even more complicated than it initially appears. The first principle of justice, in Rawls's view, is a maximizing principle, taking lexical priority over the second principle. The question of exactly how strictly the requirements of maximizing and lexical priority are to be understood, even in the context of Rawls's "special conception,"⁵⁸ has been the subject of substantial discussion.⁵⁹ The issue comes to this: if one takes seriously (1) the maximizing component of the Equal *Maximal* Liberty Principle; (2) the claim that the first principle is not to address or guarantee economic freedom or minimal welfare rights; and (3) the requirement of adherence to the lexical priority of the first principle over the second, it is possible that such a vast sum of society's resources will be consumed in meeting the liberty-maximizing demand of the first principle of justice that few resources will remain available for meeting the economic demands of the second.⁶⁰

This problem has led commentators to argue that either the first principle needs to be interpreted so as to require that minimal economic needs be met,⁶¹ or that the first principle should not be conceived of as an uncon-

one another; but, however they are adjusted to form one's system, this system is to be the same for all.").

⁵⁶ See, e.g., David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373 (1990); Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORG. 5 (1985); Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519 (1983).

⁵⁷ See, e.g., Charny, *supra* note 56, at 408-09 (discussing situations in which parties prefer legal enforcement of contracts).

⁵⁸ RAWLS, *supra* note 7, at 151-52, 542.

⁵⁹ See, e.g., Hart, *supra* note 50, at 252 ("Rawls' argument for the priority of liberty purports to rest on interests . . . and to demonstrate that the general priority of liberty reflects a preference for liberty over other goods which every self-interested person who is rational would have I do not think that [his argument] succeeds in demonstrating [liberty's] priority."); POGGE, *supra* note 26, at 123-34.

⁶⁰ POGGE, *supra* note 26, at 147 n.45 ("[O]ne needs, though Rawls does not provide, the notion of a *sufficiently* secure or well-protected basic right or liberty. Failing this, the first principle could, realistically, never be satisfied and would then require all available social resources to be devoted to such things as expansion of police forces (to improve protection of the basic right to physical integrity).").

⁶¹ This entails the piercing of the strict lexical priority between the first and second principles of justice in the sense that the first principle now includes some economic concerns that were previously purely a second principle matter. However, note that the first principle, so

strained maximizing principle. As an example of the first proposed solution, Thomas Pogge has suggested that the first principle should be interpreted to require some guarantee of basic economic needs, even at the cost of some tradeoffs in liberty.⁶² The second proposed solution transforms the maximization component of the first principle into a *sufficiency* principle.⁶³

The Rawlsian solution to this dilemma seems to be that the maximizing component of the first principle of justice be jettisoned. This is the position Rawls adopts in *The Basic Liberties and Their Priority*.⁶⁴ If the first principle merely requires the provision of *adequate* liberty, then presumably the second principle of justice continues to play a crucial role with respect to economic matters.

Once the notion of the first principle of justice as a maximizing principle has been abandoned, it no longer seems as likely that, simply because beneficial reliance may be liberty-enhancing, aspects of contract law are *required* by the first principle of justice. Indeed, the very reasons for abandoning the strictly maximizing version of the first principle are to ensure that: (1) society's resources will not be exhausted by the first principle; and (2) the economic scheme will not be entirely structured by the demands of the first principle of justice. Without the maximization criterion, some liberty-enhancing moves (e.g., large increases in expenditures on policing with only insignificant gains in personal security) might *not* be made. Therefore, aspects of contract law might *not* be required even if they *were* liberty-enhancing.

There is, however, an aspect of contract law that would seem to distinguish it from liberty-enhancing moves that come at some economic cost, such as the policing expenditures in the previous example. The adoption of some aspects of contract law might be efficiency enhancing. Therefore, if it both increased liberty and decreased (on net) the cost of "liberty packages," it is difficult to see why it would *not* be included as part of an adequate equal liberty package selected by a nonmaximizing first principle of justice. There would certainly be no guarantee (or requirement), however, that it *would* be so included. So, the case that some aspects of contract law be required as a first principle matter remains murky once the first principle is modified so as not to be maximizing. Nonetheless, with regard to Rawls's remark quoted

interpreted, continues to maintain lexical priority over the second principle (which would govern economic matters that are not a matter of providing for basic economic needs).

⁶² POGGE, *supra* note 26, at 142–47.

⁶³ See *id.* at 147 n.45. A third potential solution might be to subject the maximization component of the first principle to a cost ceiling.

⁶⁴ RAWLS, *supra* note 45, at 332 ("[I]t is tempting to think that the desired criterion should enable us to specify . . . the basic liberties in the . . . *optimum*[] way. And this suggests in turn that there is something that the scheme of basic liberties is to *maximize*. Otherwise, how could the *best* scheme be identified? But in fact, it is implicit in the preceding account . . . that the scheme of basic liberties is *not* drawn up so as to *maximize* anything Rather, these liberties and their priority are to guarantee equally for all citizens the social conditions essential for the *adequate* development and the full and informed exercise of [their moral] powers" (emphasis added)). Nonetheless, in this later essay, Rawls does continue to maintain that the difference principle remains a maximizing one. *Id.* at 326 ("The basic structure of society is arranged so that it *maximizes* the primary goods available to the least advantaged . . ." (emphasis added)).

above concerning the first principle of justice,⁶⁵ it still does not follow that because not *all* contracting options are guaranteed to be open the first principle does not require some aspects of contract law.⁶⁶

IV. *Conceptions of Contract Law and the Difference Principle*

We turn now to the question of whether the second principle of justice might provide a guarantee that at least some contracting options are constructed as open. For present purposes, we are concerned with the demands of the difference principle.⁶⁷ The difference principle demands that society's economic scheme be arranged to ensure that inequalities are to the advantage of the least well-off. It is, however, an open question exactly how the demands of the difference principle are best met. The narrow conception of the basic structure holds that the best way to meet the demands of the difference principle is through a system of taxation and transfer. Importantly, given Rawls's post-institutional conception of property, taxation is not a matter of redistribution, as it is typically understood in our public lexicon, but rather a matter of *distribution*.⁶⁸ For Rawlsians, post-tax incomes represent distributive shares that are justified by the overarching distributive scheme (the difference principle). Market outcomes have no independent normative significance and are an irrelevant baseline for the purposes of economic distribution in a Rawlsian scheme.⁶⁹

One might object to the narrow conception by questioning its reliance on taxation and transfer to satisfy the demands of the difference principle. It is not clear to us that a Rawlsian *must* hold that the demands of the difference principle are best met *entirely* through a system of taxation and transfer. Assume for the sake of argument, as Rawls sometimes does,⁷⁰ that the politi-

⁶⁵ See *supra* text accompanying note 50.

⁶⁶ Of course, as we argued above, the details of contract law would be constructed in service to the demands of the second principle of justice.

⁶⁷ We discuss the equal opportunity component of the second principle of justice below in Part VIII.

⁶⁸ See MURPHY & NAGEL, *supra* note 49, at 32–33 (discussing what they term “everyday libertarianism,” a view embodying a confusion over the distinction between *distribution* and *redistribution*). They write:

There is no market without government and no government without taxes; and what type of market there is depends on laws and policy decisions that governments must make. In the absence of a legal system supported by taxes, there couldn't be money, banks, corporations, stock exchanges, patents, or a modern market economy—none of the institutions that make possible the existence of almost all contemporary forms of income and wealth. It is therefore logically impossible that people should have any kind of entitlement to all their pretax income. All they can be entitled to is what they would be left with after taxes under a legitimate system, supported by legitimate taxation—and this shows that we cannot evaluate the legitimacy of taxes by reference to pretax income.

Id.

⁶⁹ RAWLS, *supra* note 7, at 311–13 (“[A] just scheme gives each person his due: that is, it allots to each what he is entitled to as defined by the scheme itself.”). This point is not exclusive to Rawls but is true for any political theory featuring a post-institutional conception of property. See MURPHY & NAGEL, *supra* note 49, at 36; Kevin A. Kordana & David H. Tabachnick, *Tax and the Philosopher's Stone*, 89 VA. L. REV. 647, 649–52 (2003).

⁷⁰ E.g., RAWLS, *supra* note 7, at 275–81.

cal institutions adopted to meet the demands of the difference principle will include a market economy and a system of private law. Assume further that the latter includes contract and tort law. It then is not clear why contract and tort law cannot be leveraged to help in meeting the demands of the difference principle. Political and legal institutions have complex and dynamic effects on one another. It thus seems unlikely that an economic scheme that maximizes the position of the least well-off would rely exclusively on tax and transfer for distribution. For example, the manner in which the rules of tort law function may have dramatic effects on the position of the least advantaged.⁷¹ To the extent that tort law is one of the means through which accidents are deterred and accident victims are compensated, it seems that it (in addition to tax) could be harnessed to meet the demands of the difference principle.

Consider our claim that nontax legal and political institutions may properly be understood as the subject of distributive justice in the context of the contemporary debate over conceptions of contract law. Central to this debate is the question of the role (if any) distributive justice plays in one's conception of contract law. Consider again two (possibly) conflicting conceptions of contract law:⁷² an *ex post* approach that gives priority to and has at its foundation the value of autonomy,⁷³ and an *ex ante* approach that gives priority to a specified distributive end.⁷⁴ There are two obvious candidates for an *ex ante* approach: Kronman's conception of contract as distributive justice,⁷⁵ or the wealth-maximization approach.⁷⁶ Kronman defends a conception of contract law in which contract law embodies (or is suffused with) a conception of distributive justice. For Kronman, legitimate contracts embody a standard of justice exogenous to the will of the contracting parties.⁷⁷ Contrast this view with a "will" theory of contracts that maintains that autonomy is central to contract law.⁷⁸ In this view, the conception of legitimacy or fairness in contracting is endogenous to the will of the contracting parties; questions of distributive justice (i.e., exogenous standards of justice)

⁷¹ Kevin A. Kordana & David H. Tabachnick, *On Belling the Cat: Rawls and Corrective Justice* 12–13 (Jan. 13, 2005) (unpublished manuscript, on file with authors).

⁷² See, e.g., Peter Benson, *Contract*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 24, 43 (Dennis Patterson ed., 1996); Jody S. Kraus, *Philosophy of Contract Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 687 (Jules Coleman & Scott Shapiro eds., 2002) (discussing distinction between deontic and consequential theories of contract).

⁷³ See, e.g., FRIED, *supra* note 2, at 13–14; A. JOHN SIMMONS, *ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY* 72 (1993) (discussing social contract theory and political obligation); Randy E. Barnett, *Contract Remedies and Inalienable Rights*, in *PERSPECTIVES ON CONTRACT LAW* 70 (Randy E. Barnett ed., 2d ed. 2001).

⁷⁴ Here, it is important to understand that for Rawls the conception of contract law that is adopted is inevitably *ex ante*, in the sense that, if it exists, it serves the demands of the two principles of justice. The question of what *form* such contract rules will take, however, is open.

⁷⁵ See Kronman, *supra* note 4, at 472–73.

⁷⁶ See, e.g., POSNER, *supra* note 3, at 94–96; Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 *YALE L.J.* 1261, 1265–67 (1980); Lewis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 *HARV. L. REV.* 961, 967 (2001).

⁷⁷ See Kronman, *supra* note 4, at 474.

⁷⁸ See FRIED, *supra* note 2, at 16.

are not addressed at the level of contract law. Our aim is not to weigh in on this debate, but rather to show that Kronman's conception of contracts is a viable approach for a Rawlsian, and that therefore the narrow conception of the basic structure is mistaken.⁷⁹

Interestingly, Kronman can be plausibly interpreted as distinguishing his view from that of Rawls. Kronman appears to maintain that he, unlike Rawls, holds that contracts are necessarily understood as a locus of distributive justice. He seems to attribute to Rawls the narrow conception of the basic structure and to view this as inconsistent with his own (Kronman's) conception of contract law. In this vein, Kronman suggests that Rawls would not view contracts as a proper locus of *redistribution*. He cites Rawls as an example of a liberal "who oppose[s] the use of contract law as a redistributive device . . . because . . . distributional objectives . . . are always better achieved through the tax system than through the detailed regulation of individual transactions."⁸⁰

While we agree with Kronman that Rawls has made statements consistent with the narrow view, we are less certain that Rawls *should* have adopted (or that a Rawlsian should adopt) this conception of the basic structure. The difference principle demands that we select, in comparison with alternative economic schemes, that scheme which maximizes the position of the least well-off. Consider a scheme in which at least some contract rules (e.g., unconscionability) are designed to achieve desirable distributive effects. In this scheme, some contracting options—those deemed unconscionable—are closed. If, as it may be sound to think is the case,⁸¹ the position of the least well-off is higher in this scheme than in a scheme where distribution is accomplished solely through taxation and transfer, the Rawlsian would select the former scheme. There does not seem to be any principled reason for rejecting, *a priori*, the use of some contract rules for distributive ends.

Furthermore, in keeping with there being no principled reason for a Rawlsian to prefer the exclusive use of tax and transfer for the achievement of distributional aims, it seems difficult to distinguish between "taxation" and "other legal rules." In the Rawlsian political scheme, the very objects of taxation (e.g., property and income) are themselves post-institutionally created and defined by legal rules, among them the rules of taxation. The conventional distinctions between property law, contract law, and taxation, that seem natural and intuitive in political theories with a pre-institutional conception of property, are blurred for a Rawlsian. For example, a Rawlsian might plausibly view the required remittance of fifty percent of one's wages to the government as constituting "taxation" at a fifty-percent rate, but could also plausibly characterize that remittance as instantiating a "property" rule

⁷⁹ See Murphy, *supra* note 27, at 260 (discussing relationship between Kronman's view and the basic structure, and concluding "whether taxation and transfer, on the one hand, or contract law, on the other, can better achieve the aim of securing justice while leaving people as free as possible to pursue their own interests unhindered by the machinery of justice is in large part an empirical question, subject to changing circumstances").

⁸⁰ Kronman, *supra* note 4, at 474 & n.11.

⁸¹ See Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797, 798 (2000).

(i.e., both I and the government own fifty percent of my “wage”). Any claim, then, that distribution is best achieved via taxation and transfer might, for the Rawlsian, be either trivially true (if “taxation” is defined, post-institutionally, as any mechanism of distribution) or trivially false (e.g., rules implementing distribution are defined as “property” law). Therefore, maintaining a principled distinction between tax and nontax legal rules seems difficult (and, perhaps, unmotivated) for a Rawlsian.

To the extent that one insists that such a distinction is nonetheless plausible, one might argue that as an empirical matter the principles of justice are best satisfied exclusively through a system of tax and transfer.⁸² Importantly, the truth of such an empirical claim presupposes the truth of the broad view of the basic structure, because legal rules other than those of tax and transfer must be *considered* in making such an empirical judgment. The mere posing of the empirical question of whether distribution is best done solely via tax and transfer, or also via the construction of some *non-tax-and-transfer* legal rules, itself presupposes that non-tax-and-transfer legal rules *are* subject to the principles of justice.

Even if *non-tax-and-transfer* legal rules are (on empirical grounds) constructed to be maximally efficient, leaving all efficiency-equity tradeoffs to the system of tax and transfer, it still follows that contract law is *subject* to the two principles of justice. The efficient design of contract law (in this hypothetical example) is in *service* to the principles of justice. Since legal rules (even when constructed so as to maximize economic efficiency) are to serve as distributive devices, the narrow view of the basic structure is false.

There is, however, reason to be dubious of the hypothetical claim that as an empirical matter the demands of the principles of justice are best met exclusively via a system of tax and transfer and that, therefore, contract law would not feature any equity-oriented commitments (i.e., all efficiency-equity tradeoffs would be made via the system of tax and transfer). Recall that for Rawls the two principles of justice distribute primary goods, not merely liberties on the one hand and wealth and income on the other.⁸³ These primary goods include, importantly, the “social bases of self-respect.”⁸⁴ Thus, even if a difference principle conceived of as distributing merely *income* were best satisfied only through the use of taxation and transfer, it does not follow that the distribution of primary goods (subject to the difference principle) is best satisfied in the same manner.⁸⁵ For example, suppose that the incomes of the least well-off are somewhat lower, but their level of self-respect is higher (such that overall they receive more in terms of the *objective* index of the primary goods) under a scheme in which they suffer fewer (albeit compensated) injuries or in which they receive more leisure than they might otherwise contract over if, for example, all wealth-maximizing contract options

⁸² See Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

⁸³ JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 59 (Erin Kelly ed., 2001) (“The two principles of justice assess the basic structure according to how it regulates citizens’ shares of primary goods, these shares being specified in terms of an appropriate index.”).

⁸⁴ *Id.* at 58–59; see also RAWLS, *supra* note 7, at 179.

⁸⁵ We are grateful to John G. Bennett for helping us to clarify this matter.

were constructed as open. The difference principle would, therefore, reject the wealth-maximization conception. In other words, it does not follow that because tax and transfer might be the preferred instruments of distribution given the aim of wealth maximization, they would so remain with the aim of maximizing the position of the least well-off in terms of the index of the primary goods.⁸⁶ If this is correct, Rawls cannot properly be viewed as a wealth-maximization theorist with regard to the private law. The rules of the private law should contain at least some efficiency-equity tradeoffs.

If we are correct that some contract rules could have advantageous distributive effects, then the Rawlsian (arguably) arrives at what we have termed the medium conception of the basic structure—at least some contract rules are drawn into the basic structure, where they serve the end of distributive justice. The rest of contract rules remain outside the basic structure.

A more thorough analysis of what exactly this would mean, however, demonstrates the implausibility of the medium conception. In order for some portion of the total scheme of contract rules to have been moved within the basic structure, *all* the rules of the scheme must have been evaluated as candidates. In the medium conception, only those rules that are most instrumental to the demands of justice are subsumed under the basic structure; the rest are left external to it. But that account fails to recognize that the compatibility of *every* rule within the scheme is assessed against the demands of the difference principle. Even if the scheme of contract rules constructs the vast majority of contracting options as *open* (or *free*), it would *not* follow that only part of the scheme is in the basic structure. The portion of the scheme that is constructed as *free* is not outside the basic structure but is constructed as *open in service to* the difference principle.⁸⁷ All the rules of contract law are thus subject to the difference principle, even those that construct options as *open*. In other words, even if a contract doctrine, from the internal perspective, appears *free*, from the external perspective that doctrine is serving the demands of the difference principle. *Freedom* (or from the internal perspective, anything that might appear to be outside the basic structure) has been constructed instrumentally, in service to the difference principle. *All* of contract law resides *within* the basic structure, so now the only remaining possible conceptions are either what we termed in Part I the coercive conception, or the broad view. The medium conception is incoherent.

The coercive conception can be rejected for reasons similar to those for which we reject the medium conception. In essence, the coercive conception is question begging. It asserts that only the coercive political and legal insti-

⁸⁶ In other words, while if viewed in isolation there might be little economic difference between, for example, direct transfer payments (via welfare or earned income tax credits) and indirect arrangements that less transparently advantage the least well-off, the mechanism via which money is delivered can affect self-respect.

⁸⁷ This is analogous to a point Bedau has made in discussing Rawls's purported neutrality between socialist and capitalist societies. In our case, the "freedom" to contract is instrumental to the difference principle (even if indirectly so), as the "residual issues" are in Bedau's analysis. Bedau, *supra* note 26, at 170 ("Rawls can think of his principles of justice as neutral between socialist and capitalist economies *only with respect to residual issues*; he has already turned over to government major functions of what could otherwise be in the private sphere." (emphasis added)).

tutions of society are in the basic structure; the rest of society (e.g., “social ethos”) is outside. Crucially, however, this conception fails to indicate *which* institutions are to *be* coercive, i.e., it lacks the resources to adjudicate the important question of *which* aspects of social arrangements (e.g., dating?) are to be coerced by the state. We maintain that *all* social arrangements are *considered* as possible subjects of political and legal policy. Some matters might be constructed to be *free* from state-sanctioned coercion—but this is because either the first principle of justice requires *freedom* as a matter of liberty, or because the difference principle finds that, all things considered, the demands of justice are best achieved by constructing those matters as *free*. But because such matters are *free in service to* the two principles of justice, they are *inside* the basic structure—within the range of the two principles of justice. The coercive conception is thus false and the broad view is correct.⁸⁸

In light of this conclusion, recall from Part I Rawls’s explanation of the basic structure as necessary to ensure background justice; he maintained that the rules pertaining to individual (or local) transactions are not (alone) sufficient to ensure and maintain background justice. Granting him, for the sake of argument, the latter point, we can now see that this does *not* demonstrate that contract law must be outside the basic structure. It simply shows that the rules of contract law (that should, in our view, be understood as constitutive of the basic structure) are not *sufficient* to provide full justice. But there is no reason to conclude from the fact that justice requires, for example, a system of tax and transfer that contracts are to be understood as outside the basic structure. So, Rawls’s reason for focusing on the basic structure (i.e., the need for background justice) does not preclude contract law from being subject to the principles of justice. Indeed, quite the contrary: background justice may, in fact, require that contract law be deployed instrumentally in meeting the demands of the two principles of justice. Rawls’s argument concerning background conditions, then, simply shows that a Lockean view is not sufficient to achieving what is, for the Rawlsian, *full justice*. It does not show that anything in particular is *outside* the basic structure. Indeed, from

⁸⁸ Liam Murphy has in passing argued against the conventional narrow conception and in favor of a broad conception of the basic structure that would include contracts. Murphy, *supra* note 27, at 261 (“[I]t is indeed hard to see how legal rules applying directly to people could be regarded as entirely outside the purview of justice, so that, for example, sales taxes, or principles of unconscionability in contracts, could in principle not be evaluated on grounds relating to distributive justice.”). We are in agreement with Murphy’s theoretical claim concerning the relationship between the basic structure and contracts. We disagree with him, however, that Rawls in *The Basic Structure as Subject* need be interpreted as advocating the broad view. See *supra* note 34. While Murphy’s argument does laudably maintain that contracts are within the basic structure, he treats as a mistake Rawls’s remarks that the “rules that govern the transactions . . . between individuals . . . (the law of contract, and so on) . . . are framed to leave individuals . . . free to act effectively in pursuit of their ends and without excessive constraints,” RAWLS, *supra* note 17, at 268 (emphasis added); see Murphy, *supra* note 27, at 261. Our argument suggests that, if Rawls in *The Basic Structure as Subject* is to be read, as Murphy advocates, as supporting the broad view (despite our claim to the contrary), one need not treat Rawls’s remarks as mistaken. Our conception of Rawlsian freedom of contract (as referring to the set of contracting options constructed as open in service to the principles of justice) provides an explanation of what Rawls might have meant by “free,” assuming that Murphy is correct that Rawls was defending the broad view in *The Basic Structure as Subject*.

this argument, *nothing* follows concerning what is to be left outside the basic structure. Of course, in our view, it is incoherent for any institution to be outside the basic structure—even matters that appear to be free have been constructed as options open or *free*.

V. *Inside the Basic Structure*

Now that we have shown that the broad conception of the basic structure is correct, it is necessary to explore exactly what this means. It is, as we will see, an easy mistake to assume that this means that those legal or political institutions (such as contract law) that lie within the basic structure must therefore *pattern* or appear to be “read off of” the principles of justice. We will explain, with reference to several examples, the nature of post-institutional *freedom* and what it means to be subject to the principles of justice yet at the same time free of their *direct* governance in particular transactions or activities.

We begin by explaining how our view differs from that of G.A. Cohen. Recall from Part I that Cohen holds: (1) social ethos is inside the basic structure; and (2) this “shipwrecks” the Rawlsian project, because “[t]he basic structure, the primary subject of justice, is always said by Rawls to be a set of institutions, and, so he infers, the principles of justice do not judge the actions of people within (just) institutions whose rules they observe.”⁸⁹ This statement, however, appears to conflict with our notion of the role of *freedom* in the Rawlsian framework. True, some options will be constructed as *free*, such that people have a choice as to whether to exercise those options, *but such options are constructed as free in service to the two principles of justice*. Thus, if, for example, social ethos is *free*, it may well be free in service to the first principle of justice (i.e., as required by freedom of thought and conscience). If this is so, then social ethos is *inside* the basic structure (Cohen is correct on this point), but people are *free*, to use one of Cohen’s examples,⁹⁰ to dissent from a “Protestant ethic” even if such an ethos were to be instrumental to improving the position of the least well-off. Thus, for us, even though social ethos is subject to the principles of justice, that does not imply that the ethos must reflect the difference principle.⁹¹ This is due to the lexical priority of the liberty principle and the fact that ethos may well be constructed as *free* by that principle. The Rawlsian project, on our reading, is therefore not shipwrecked by the illiberal inevitability of its requiring that social ethos be read directly off of the difference principle.

Next, consider Rawls’s statement with regard to the difference principle and private ordering. He writes that the difference principle

applies in the first instance to the main public principles and policies that regulate social and economic inequalities. It is used to adjust the system of entitlements and rewards Thus . . . [it] holds, for example, for income and property taxation, for fiscal and economic policy; it does not apply to particular transactions or distributions,

⁸⁹ Cohen, *supra* note 27, at 18.

⁹⁰ *Id.* at 14.

⁹¹ *See id.* at 22.

nor, in general, to small scale and local decisions, but rather to the background against which these take place.⁹²

In our view, the Rawlsian text is confused when it says that the difference principle “does not apply to particular transactions.”

While it *is* true that individual, small scale, or local transactions may be *free*, that is to say, operating within options constructed as open, it is confused to say that the principles of justice do not “apply” to these legally permissible moves. It is, after all, the principles of justice that constructed the options open—instrumentally—that is to say, *for* a particular purpose. The freedom surrounding local and small scale transactions is post-institutional freedom (i.e., legally permissible options constructed as open) in service to the principles of justice. Of course, it does not follow from this point that the substance of local and small-scale transactions is to be directly read off of the principles of justice. To be clear, individual contracts must conform to the rules of contract law, which are in turn designed (in conjunction with all other rules and policies) in a manner maximally instrumental to the principles of justice.

While the substance of individual contracts is not directly read off of the principles of justice, it is incoherent to think that such contracts are not subject to the principles of justice. Their legal permissibility is a function of the two principles of justice.⁹³ To draw upon an analogy from the rules of chess, it is incoherent to think that the rules of chess do not “apply” to the permissible diagonal moves of a bishop, simply because those rules (when taken in their totality) in some instances (e.g., when one’s own piece does not block the way) *allow* the bishop to move diagonally *freely*. Of course, this *freedom* is constructed subject to the rules of chess.

Enough with games. The crucial point is that the rules of contract law are not directly “read off of” the difference principle. Only the complete scheme of all legal and political institutions is directly answerable to the difference principle. Therefore, Rawls is in our view incorrect to draw a distinction between contract and tax law. Tax policy is to be designed in a manner subservient (or instrumental) to the demands of the difference principle, but it (too) is not directly answerable to the difference principle. Instead, both tax law and contract law are selected as part of an overall scheme that maxi-

⁹² RAWLS, *supra* note 34, at 262.

⁹³ This would also hold true for the relationship between the two principles of justice and the “family.” Intrafamilial interactions need not directly pattern the two principles of justice, but the rules of family law are to be constructed in service to them (though the rules need not pattern them). That is to say, the (micro)interactions of each and every family are not read directly off of the two principles of justice, but the principles of justice do govern the rules or laws that constitute the institution of the “family.” It is in this sense that family law, too, is in the basic structure, even if aspects of it are constructed as free or open. Contrast this with Robert Nozick’s view that the principles of justice simply cannot apply to the family. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 167 (1974) (“Should a family devote its resources to maximizing the position of its least well off and least talented child, holding back the other children or using resources for their education and development only if they will follow a policy through their lifetimes of maximizing the position of their least fortunate sibling? . . . [W]hat I think would be Rawls’ reply [is] that some principles apply at the macro level which do not apply to micro-situations.”).

mizes the position of the least well-off. Thus, the difference principle applies in the same sense to both tax and contract—only the overall scheme of all legal and political institutions is selected in keeping with the two principles of justice.

If we are correct, all of contract law lies within the basic structure, and the Rawlsian must arrange contract law, in conjunction with the overall scheme, in a manner that is instrumental to serving the demands of the principles of justice. Even if a particular scheme maximizes the position of the least well-off entirely through mechanisms of tax and transfer, it does not follow that contract law is outside the basic structure. Contract law would still be within the basic structure, because contract rules would have been evaluated and constructed as open (in service to the difference principle). For Rawlsian theory, then, contract law is both governed by and suffused with distributive aims. If we are correct, Rawls is not silent over conceptions of contract law. Contract law is within the basic structure (even when, by design, contracting options are constructed as open).

Take, for example, Rawls's distinction between "domestic" and "local" justice. He says that the former applies to the basic structure and the latter to "associations." He states that domestic justice "constrain[s] (or limit[s]), but do[es] not determine uniquely, the suitable principles of local justice."⁹⁴ "[Q]uestions of local justice . . . call[] for separate consideration on their merits."⁹⁵ In our view, this is somewhat misleading, but we can offer an interpretation that maintains, to some degree, the distinction Rawls is attempting to draw. "Local justice" could, in our view, be seen as the outcome of choices made within options open. Thus interpreted, Rawls's comment about domestic justice constraining but not determining local justice makes sense. On the other hand, his comment that local justice is "separate" is misleading, as, in our view, options were constructed open in service to the principles of justice. Nonetheless, from the internal perspective, the citizen in a Rawlsian scheme might find Rawls's comment more intuitive, inasmuch as it is certainly true that the many possible decisions and arrangements private citizens make within the confines of what we call "options open" need not pattern, nor appear to be read off of, the principles of justice.

We are now in a position to show where Rawls fits in the contemporary debate over competing conceptions of contract law. If there is to be an institution of contract law, Rawls would adopt the view that contract is a matter of distributive justice. This conception is consistent with Kronman's claim that contract law is the subject of distributive justice.⁹⁶ For Rawls, the freedom to contract is simply the question of which contracting options are constructed as open and which are closed in service to the two principles of justice—which serve as the exogenous standard(s) of distributive justice.

Interestingly, Rawls's view of contract law as distributive justice would also be quite distinct from that of Kronman.⁹⁷ Kronman defends a version of

⁹⁴ RAWLS, *supra* note 83, at 11–12.

⁹⁵ *Id.* at 11.

⁹⁶ Kronman, *supra* note 4, at 474.

⁹⁷ Larry Alexander and William Wang have argued that Kronman should have embraced the Rawlsian maximand, the difference principle, for the purposes of assessing legitimacy in

Paretianism as the exogenous standard of distributive justice governing contract law.⁹⁸ For Rawls, contract law would be constructed such that, when viewed in conjunction with all other legal and political institutions, it best serves the demands of the principles of justice. For Rawls, the two principles of justice define distributive shares that are just, so the introduction of an independent standard of distributive justice for the assessment of contract (e.g., the Pareto Principle) is incoherent. This is not to say, however, that an independent standard of justice in contracting cannot potentially be used; the point is that such a standard would have no normative significance independent of the two principles of justice. Such a standard of distributive justice would be entirely instrumental in serving (along with all other aspects of the scheme) the demands of the two principles of justice.

In addition, our understanding of contract law may be of assistance in explaining Rawls's shift from a broad to a narrow conception of the basic structure. In *The Basic Structure as Subject*, Rawls seems anxious to point out that, consistent with the difference principle, "individuals and associations are then left free to advance their ends."⁹⁹ This seems to have led him to assert that contract law is outside the basic structure and to suggest that distribution is best done via tax and transfer. Our point is that although contract law resides within the basic structure, this does *not* imply that all or most contracting options will be closed because they are subject to the demands of the two principles of justice. It may well be that the economic scheme that best maximizes the position of the least well-off will construct many contracting options as open. Individuals are thus *free* to pursue their ends, within the bounds of the contracting options that remain open, *without* additional interference by the two principles of justice.¹⁰⁰ Thus, if Rawls was principally concerned in *The Basic Structure as Subject* with rebutting Robert Nozick and demonstrating that his project *was* compatible with a certain level of individual freedom in private transactions, he need *not* have narrowed his conception of the basic structure. For a Rawlsian, the freedom to contract exists *as* a function of the demands of the two principles of justice.

VI. *The Objection from Democracy*

Our claim is that contract law for the Rawlsian is properly understood as being subject to the two principles of justice and that Rawlsianism is, therefore, not neutral with regard to conceptions of contract law. One might,

contract. Larry Alexander & William Wang, *Natural Advantages and Contractual Justice*, 3 L. & PHIL. 281, 284 (1984) ("[T]here is a third version of paretianism that it is fair to claim Kronman actually holds. That version requires that all rules reflecting pre-contractual assignments of wealth, as well as all rules governing contractual relations—indeed, all rules affecting the distribution of wealth generally—be tailored to maximize the wealth of those with the least wealth.").

⁹⁸ Kronman, *supra* note 4, at 486.

⁹⁹ RAWLS, *supra* note 17, at 269.

¹⁰⁰ Contracts that are allowed (i.e., contracts over options constructed as open) are *in* compliance with the demands of the difference principle, i.e., the private allocation of resources by contracting parties is not (again) "reviewed" by the difference principle. *Id.* at 283 ("[T]he [Nozickian—though Rawls avoids naming him] objection that the difference principle enjoins continuous corrections of particular distributions and capricious interference with private transactions is based on a misunderstanding."); see NOZICK, *supra* note 93, at 167.

however, object that our conclusion, while in some sense true, is also misleading. Such an objection holds that even if contract law is for Rawlsian political theory a matter of distributive justice, the rules of contract law still cannot (in any interesting sense) be subject to the difference principle. In this view, it is the legislature, not the principles of justice, that determines contract law (as well as all difference principle matters). That is to say, contract rules are not simply the set of rules that (jointly with the other rules in the full scheme of legal and political institutions) maximizes the position of the least well-off. Contract rules are to be determined by a democratically elected legislature.

The first principle of justice requires that (nonconstitutional) political institutions be designed by a democratically elected legislature.¹⁰¹ For Rawls such nonconstitutional institutions include the scheme of tax and transfer, as well as rules of contract law and other private law matters (if there is to be a private law). Rawls (himself) is explicit that second principle matters are not among the constitutional essentials.¹⁰² Given that (1) the first principle of justice takes lexical priority over the second; and supposing (2) it is the difference principle (not the liberty principle) that demands contract law, the objection holds that it is misleading for us to conclude that the rules of contract law are governed by the difference principle. Therefore, our conclusion that contract law is (for the Rawlsian) a matter of distributive justice is misleading, if by this we mean that contract law (in conjunction with all other legal and political institutions) is under the control of the difference principle. In this view, second principle (including difference principle) matters are to be adjudicated by the democratically elected legislature—the legislation it enacts is by definition *just* and this is a matter of *pure procedural justice*. So, the objection concludes, we are in some sense mistaken—matters of contract are not (as we suggest) answerable to any maximand.

There are a number of responses to this objection. First, the *first* principle of justice may well demand that some contract options be left open; if this is true, it does not follow that the democratic process takes lexical priority over all contracting options. On the other hand, our central argument does suggest that the difference principle (in addition to the first principle) may require that some contract options be constructed as open. If this is correct, then the objection that the democratically elected legislature is to rule on contract law holds, so our claim that contract law (in conjunction with the entire scheme of legal and political institutions) must answer to the second principle of justice is arguably misleading.

To be clear, the objection holds that institutions over which the second principle governs are to be selected by the democratically elected legislature, so whatever conception of contract law the legislature constructs is just by definition. This, again, is taken to be a matter of pure procedural justice—

¹⁰¹ RAWLS, *supra* note 45, at 339 (“[T]he constitution specifies a just political procedure and incorporates restrictions which both protect the basic liberties and secure their priority. The rest is left to the legislative stage.”).

¹⁰² *Id.* at 337 (“Although delegates have a notion of just and effective legislation, the second principle of justice, which is part of the content of this notion, is not incorporated into the constitution itself.”).

even when the legislature fails to create law that maximizes the position of the least well-off, it succeeds in making *just* law.

A second and perhaps stronger response is to address the matter head-on. One might suggest that Rawls was mistaken to exclude the second principle of justice from the constitution and that a Rawlsian should incorporate both principles of justice in the constitution.¹⁰³ If this is correct, the legislators would be explicitly duty bound to implement the scheme of contract rules (if there is to be contract law) that best serves the *two* principles of justice. If the second principle of justice is conceived of as a constitutional matter, presumably the legislators' failure to implement the second principle of justice would be corrected by judicial review.¹⁰⁴

A third response is that simply because contract law possesses the pedigree of having been enacted by a democratically elected legislature, it does not follow that the legislature has made no *mistake* when it enacts legislation that does not meet the demands of the difference principle (i.e., maximizing the position of the least well-off). While it may be true that such a law of contract should (in Rawlsian terms) be viewed as *just* law, it would also be coherent to state that the legislature has failed in its *duty* to maximize the position of the least well-off.¹⁰⁵ On this account, the democratically elected legislature is not free to vote however it sees fit—its members are to enact political policies that satisfy the demands of the second principle of justice.¹⁰⁶ Of course, the legislature may fail in its duty, and this failure may be either culpable or nonculpable (given the constraints of knowledge). When it fails, it has made a mistake (blamable or not) even if this mistake is ultimately to constitute *just law*.¹⁰⁷

In this view, the legislature is duty bound to create political and legal institutions that maximize the position of the least well-off. There is no reason to believe that contract law is excluded from the range of legal mechanisms for doing so, which means that contract law is inside the basic

¹⁰³ We analyze Rawls's explanation and purported justification for excluding second principle matters from constitutional essentials in Kevin A. Kordana & David H. Tabachnick, *Rawls, Judicial Review and the Second Principle of Justice* (Mar. 2004) (unpublished manuscript, on file with authors).

¹⁰⁴ See POGGE, *supra* note 26, at 158 & n.65 (describing Rawls's failure to incorporate the second principle of justice into the constitution as a "remarkable fiat" and stating that "I see no reason why the basic political liberties should have to be understood as including the liberty to pass legislation that violates the second principle"). Pogge maintains that "the equal basic political liberties . . . are consistent with a system of judicial review that would filter out at least the clearer cases of legislation violating the second principle." *Id.*

¹⁰⁵ RAWLS, *supra* note 45, at 338 ("[A]ll legal rights and liberties other than the basic liberties as protected by the various constitutional provisions (including the guarantee of the fair value of the political liberties) are to be specified at the legislative stage *in the light of the two principles of justice.*" (emphasis added)).

¹⁰⁶ See RAWLS, *supra* note 83, at 48 (discussing "the legislative stage in which laws are enacted as the constitution allows and as the principles of justice *require* and *permit*" (emphasis added)).

¹⁰⁷ For a discussion that addresses the obligation of individual citizens to obey *just* law and questions the sense in which such law applies to individuals and why they are bound to *particular* just institutions, see A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 147–52 (1979); see also RONALD DWORKIN, *LAW'S EMPIRE* 193 (1986).

structure. Therefore, contract law is to be constructed in keeping with the principles of justice in exactly the same way that *all* second principle matters (e.g., taxation) are to be constructed. There is no contract law *exceptionalism*, contra what Rawls himself often appears to indicate.¹⁰⁸

This third response, however, is subject to the criticism that it abandons the Rawlsian project's attempt to deliver a theory of pure procedural justice. Instead, it treats the legislative stage as a matter of imperfect procedural justice—that is, it invokes a standard (the second principle of justice) exogenous to the procedures being followed to criticize the outcome produced by the procedures. This problem, however, arises for all second principle matters; (again) our claim is simply that there is no contract law exceptionalism. In other words, to the extent that the failure to constitutionalize the second principle of justice is problematic and not solved by one of our three suggested solutions, the problem is one for Rawlsianism *simpliciter*, not a problem unique to the role of contract law in Rawlsianism.

If it is correct that Rawlsians are unwilling to abandon their commitment to creating a true theory of pure procedural justice,¹⁰⁹ it seems that Rawls's opposition to constitutionalizing the second principle of justice should be rejected, lest the difference principle be rendered impotent.

VII. Application: Unconscionability

We will illustrate the role of contract in Rawlsian political philosophy using the doctrine of unconscionability. Because, in our view, Rawlsian contract law is to be governed by the two principles of justice, fairness in contracting is defined in terms of a conception of distributive justice that is exogenous to the will of the contracting parties. That is, for contracts to be viewed as fair they must, in some fashion, answer (or conform) to the demands of the two principles of justice. This is, as we have seen, by *no* means to say that the maximand of the difference principle is to be applied directly to each and every individual contract. Instead, the two principles of justice select a set of rules that, when applied generally, is instrumental to the overall scheme of legal and political institutions that maximizes the position of the least well-off, as compared to other possible schemes. For the Rawlsian, then, the function of unconscionability, should it be selected as one of the set of contract rules, would be to close contracting options¹¹⁰ in a manner that is in service to the two principles of justice. The economic scheme that maximizes the position of the least well-off, then, may include a scheme of contract law that itself contains a rule resembling what is conventionally understood as unconscionability. Unconscionability, as we argue below, provides an instructive illustration of the contrast between the distributive jus-

¹⁰⁸ See, e.g., RAWLS, *supra* note 7, at 8.

¹⁰⁹ Cf. POGGE, *supra* note 26, at 151 n.53 (discussing how his approach differs from that of Rawls).

¹¹⁰ Such as the option of a furniture company to extend credit with an enforceable cross-collateral clause to Mrs. Williams. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

tice approach to contract law, which invokes an exogenous standard, and the *ex post* or autonomy conception.

Unconscionability is, of course, not without opponents. Proponents of the autonomy conception of contracts view the doctrine with skepticism because of its perceived paternalistic character and have also found the doctrine to be (in part) incoherent.¹¹¹ If contract law is understood as part of the basic structure, however, a nonpaternalistic (indeed, distributive) justification for a coherent conception of the doctrine is available (should that doctrine be selected).

We illustrate the role that unconscionability might play in a Rawlsian set of contract rules in the context of Seana Shiffrin's recent and important work on unconscionability. Shiffrin proposes what she maintains is a coherent and nonpaternalistic account of the doctrine of "pure substantive unconscionability."¹¹² She argues that her account of the doctrine is consistent with the theory of contract law most antithetical to substantive unconscionability: the "will" theory of contracts. Shiffrin assumes for the sake of argument that *the will theory is true*.¹¹³ As we explain below, we are not certain that Shiffrin's conception of unconscionability is consistent with the will theory, nor that her view, given her acceptance of the will theory, is properly understood as nonpaternalist. Nonetheless, we do think that portions of Shiffrin's conception of unconscionability are consistent with what we take to be the *Rawlsian* account of contract law.

Our understanding of Shiffrin's view is this: the state has obligated itself to enforce all fully consensual contracts, but this obligation is not absolute. There are times when the state's obligation to enforce (even) fully consensual contracts can be overridden.¹¹⁴ Shiffrin proposes that if the state deems a contract to be manifestly unfair, that provides a reason for overriding the obligation of enforcement.¹¹⁵ In this view, the state is being called upon to facilitate a manifestly "unfair" arrangement, but because the state's obligation of enforcement is not absolute, the state has the discretion to abstain from enforcement in such cases.

To be clear, Shiffrin's claim is *not* that the state ought to refuse to enforce some fully consensual contracts out of direct concern for the "exploited" party, which she maintains would be paternalistic, but rather that the state's refusal "to enforce an unconscionable contract could reflect an unwillingness to lend *its* support and its force to assist an exploitative contract be-

¹¹¹ *E.g.*, FRIED, *supra* note 2, at 104–05 (labeling the notion of substantive unfairness in unconscionability "two parts sentiment and one part common sense").

¹¹² Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 209 (2000), ("[T]hat is, the doctrine that independent of whether there are procedural defects in the contract's formation that taint a transaction's voluntariness, a contract's terms may themselves be so oppressive or unfair that they warrant a court's refusal to enforce them."), *reprinted in* PHILOSOPHY OF LAW 508, 509 (Joel Feinberg & Jules Coleman eds., 7th ed., 2004).

¹¹³ *Id.* ("Moreover, to share as much ground as possible with critics of the unconscionability doctrine, I will also suppose that a 'will' theory of promising, of or like the kind advocated by Charles Fried, is true.")

¹¹⁴ *Id.* at 227–28.

¹¹⁵ *Id.* at 205, 227–28.

cause it is an unworthy endeavor to support. In such a case, the refusal to enforce unconscionable contracts would not be paternalist."¹¹⁶

We are, however, uncertain of Shiffrin's conclusion that the will theorist would accept the unconscionability doctrine as grounds for vitiating "exploitative" agreements. We will explain our uncertainty. For will theorists, fully voluntary contractual arrangements that embody the will of the consenting parties are thought to be autonomy-preserving and therefore fair by definition. Typically, this requires the absence of procedural defects such as fraud or duress and of immoral or illegal terms (typically reflecting a concern with third-party effects—e.g., contract killing). For the will theorist, if such defects or terms are present, contractual arrangements fail to represent the legitimate will of the parties. Such arrangements do not preserve the parties' autonomy and are, by definition, "unfair." These arrangements are thought to be illegitimate from the start and, therefore, should not be enforced.

Legitimate¹¹⁷ contracts, in contrast, are those that lack procedural defects and do not embody immorality or illegality. Such contracts embody the will of the parties and are therefore understood as fair by definition. Shiffrin, however, understands terms that are "seriously one-sided, . . . exploitative, or otherwise manifestly unfair"¹¹⁸ to constitute grounds for justifying the state's refusal to enforce an agreement because of the "unfairness" contemplated by such terms. Shiffrin is correct that the obligation to enforce (even legitimate) contracts is not absolute, but, given her acceptance of the will theory, conceptions of *fairness* external to the will of the parties are incoherent and therefore not possible candidates for outweighing the state's obligation to enforce. Such claims of unfairness require an exogenous conception of distributive justice, which is not available.¹¹⁹

For the will theorist, a contract that is otherwise legitimate (i.e., lacking in procedural defects or immoral or illegal terms) but that contains one-sided terms is, by definition, fair. Therefore, "inequities" cannot ground a claim of unconscionability owing to unfairness. Claims of unfairness must instead be addressed to the conception of fairness itself—the will theory.¹²⁰ It is, of course, possible that one might argue, under the objective theory of contract, that inequities are *evidence* of procedural unconscionability. The will theorist, however, would view such evidence as only being more or less useful to

¹¹⁶ *Id.* at 227–28 (citation omitted).

¹¹⁷ We use "legitimate" to denote voluntary arrangements that are autonomy-preserving and involve no procedural defects. In this model, legitimacy is to contracts as validity is to truth. On the other hand, "justification" is understood as a matter of "all things considered" right action. While Shiffrin does not adopt this language, it seems that doing so might have made her view a bit more clear. See A. John Simmons, *Justification and Legitimacy*, 109 *ETHICS* 739, 741 n.5 (1999).

¹¹⁸ Shiffrin, *supra* note 112, at 205.

¹¹⁹ See JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW* 163 (rev. ed. 1990) ("In [Fried's] view, because contract is based on and enforces promises, courts are not entitled to use a dispute that arises in contract either to promote an independent ideal of *justice* by refusing to enforce bad or hard deals, or to further the economic or other aims of society as a whole.").

¹²⁰ See *id.* at 166 ("The libertarian view, then, squares with Fried's analysis of contract as promise and . . . deeply conflicts with the position that contract law promotes the aims of distributive justice."); Kordana & Tabachnick, *supra* note 69, at 664.

the central inquiry into the existence of consent.¹²¹ Shiffrin, however, appears both to understand such arrangements as unfair and to view this judgment as nonpaternalistic. We disagree; the judgment that the arrangement is “unfair” fails to take seriously (in paternalistic fashion) that the will of the consenting parties is definitive of fairness.

In contrast, consider what we take to be the Rawlsian view of contract law. In this view, fairness is not defined in terms of the will of consenting parties, but rather by an external standard of distributive justice. If (even fully consensual) contractual arrangements depart from a contract rule of substantive unconscionability adopted because it instrumentally serves the two principles of justice, then that rule may be invoked *on fairness grounds* that would *not* involve paternalism. For example, judges might be duty bound to abstain from enforcing seriously lopsided (or “exploitative”) contracts because, all things considered, doing so would be to the advantage of the least well-off. Such a doctrine might *appear* paternalistic to contracting parties, but, crucially, there is an available nonpaternalist justification for the doctrine that is rooted, ultimately, in the two principles of justice—which *define* the conception of fairness.¹²²

VIII. Contract Law and the Opportunity Principle

We have not yet commented on the role of the opportunity principle (a component of Rawls’s second principle of justice and taken to be lexically prior to the difference principle).¹²³ Here, the central question for our purposes is whether the opportunity principle opens and closes contracting options, assuming that contract law is understood as a component of the basic structure. Rawls, discussing the opportunity principle, states that it entails not merely that “careers [be] open to talents” but also “that all should have a fair chance to attain them.”¹²⁴ As an example of the latter, he states that the government must assure that those with similar “native endowments” of talent (presumably this means “potential talent”) be afforded similar opportunities to develop those talents.¹²⁵ “[T]hose who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system”¹²⁶

The precise meaning of the opportunity principle is not well filled-in in the Rawlsian texts,¹²⁷ and several conceptions are at least plausible.¹²⁸ We

¹²¹ Of course, the will theorist has no theoretical commitment to the objective view of contracts. FRIED, *supra* note 2, at 61 (“[T]he so-called objective standard of interpretation . . . palpably involves imposing an external standard on the parties.”).

¹²² See Gerald Dworkin, *Paternalism*, 56 *MONIST* 64, 65 (1972) (discussing “paternalistic” looking rules with available nonpaternalistic justifications).

¹²³ RAWLS, *supra* note 7, at 302–03 (“Social and economic inequalities are to be arranged so that they are . . . attached to offices and positions open to all under conditions of fair equality of opportunity.”).

¹²⁴ RAWLS, *supra* note 83, at 43.

¹²⁵ *Id.* at 44.

¹²⁶ RAWLS, *supra* note 7, at 73.

¹²⁷ See, e.g., POGGE, *supra* note 26, at 167 (“The first ambiguity, then, concerns the kind of limitation Rawls want to impose upon socioeconomic inequalities that institutions allow to arise

sidestep this debate and explain how, whatever its precise meaning, the opportunity principle would operate for a Rawlsian in terms of contract law.

It might seem obvious that the requirement of "careers open to talent" would exclude discrimination in employment contracts on grounds such as race or sex.¹²⁹ There exists, however, a serious objection to such a conclusion—namely that jobs might be described in ways that imply that race or sex are themselves construed as constitutive of "talent"—e.g., hiring for the position of "male math teacher." Perhaps the Rawlsian response to the obvious concern of discrimination raised by such a job description is to draw a firm distinction between talents on the one hand (e.g., mathematical ability) and statuses on the other (e.g., sex)¹³⁰—with employers allowed to discriminate on the basis of differential talents but not differential statuses. Such an answer, however, could be objected to on the ground that it would seem to entail closing contracting options over an unduly broad range—for example, the hiring of someone beautiful to work as a model, or someone tall to act in a particular theatrical role portraying a basketball player. This is because, if the distinction between status and talent is to be maintained, beauty or height would seem to fall on the status side of the divide. In other words, once the Rawlsian differentiates between status and talent, she does not appear to have the resources to differentiate between the status of race or sex on the one hand and beauty or height on the other.

We think that the discussion in the preceding paragraph is misleading, because it does not consider two possible Rawlsian solutions to the problem of this form of discrimination. First, bear in mind the post-institutional nature of the Rawlsian legal system. Conceptions of what is and is not relevant to the requirement of "talent" for the Rawlsian could be constructed objectively.¹³¹ Once such conceptions of relevance were employed, and talents relevant to specific jobs so described, employment descriptions, to be legitimate, must limit themselves to naming relevant features of persons as "talents."¹³² In terms of contract law, then, a number of contracting options would be closed—specifically, those that attempted to contract in employ-

from social contingencies The second ambiguity concerns the question 'Equality or inequality of what?'").

¹²⁸ *Id.* at 168 (presenting "four mutually incompatible readings of Rawls's democratic-equality interpretation of the second principle, including four different versions of the opportunity principle as it constrains the difference principle"); *id.* at 174–75 (presenting a fifth version of the opportunity principle).

¹²⁹ See RAWLS, *supra* note 45, at 363 ("[A]nnouncements of jobs and positions can be forbidden to contain agreements which exclude applicants of certain designated ethnic and racial groups, or of either sex, when these limitations are contrary to fair equality of opportunity.").

¹³⁰ Rawls does distinguish between "natural and social contingencies," see RAWLS, *supra* note 7, at 72, but Pogge points out that "[he] does not draw [the distinction] precisely," POGGE, *supra* note 26, at 164.

¹³¹ It is not obvious exactly what theoretical resources a Rawlsian has to draw upon in constructing such notions of relevance. Our narrow point is that some such construction must be possible if this approach is to work.

¹³² See Alan H. Goldman, *The Principle of Equal Opportunity*, 15 S.J. PHIL. 473, 473 (1977) (discussing allocation "according to performance or predicted performance along some socially useful (nonarbitrary) scale. . . . Jobs, for example, are to be formally open to all strictly according to their competence qualifications").

ment on the basis of nontalents (i.e., subjective descriptions of talents). Thus, for example, if race were not constructed as a talent relevant to firefighting, the contracting option to hire “white firemen” would be closed. On the other hand, if beauty were constructed as a talent relevant to fashion modeling, the contracting options to discriminate on the basis of beauty in hiring fashion models would not be closed. But note that beauty might be constructed to be irrelevant to the hiring of a physician.

The opportunity principle would thus mandate that some contracting options be closed. The difference principle, of course, might close some contracting options that were not closed by the opportunity principle. For example, if the difference principle constructed a minimum wage requirement, the option of hiring firefighters at certain wages would be closed. In a sense, we can think of the opportunity principle as closing contracting options along the dimension of who can be contracted with (e.g., closing the option of contracting with white people simply because they are white), while the difference principle opens and closes contracting options along the dimension of what can be contracted over (e.g., if the difference principle mandates warranties of habitability in real estate transactions, then certain options will be closed).

Note as well that because, for the Rawlsian, contracts are part of the basic structure, there can be no distinction between “public” and “private” spheres in terms of contracting. Though Rawls focused his comments regarding the opportunity principle on “careers open to talents,”¹³³ because (in our view) all of contract law is inside the basic structure, contracting options outside of employment (e.g., discrimination in housing or retail sales) might also be closed by the opportunity principle, again based on some objective standards of relevance constructed by the opportunity principle.

There is a second possible solution to the conundrum raised by the example given above featuring an employment description of “male math teacher.” Given Rawls’s assumptions of strict compliance to the principles of justice,¹³⁴ the concern of pernicious discrimination might not loom large and therefore the objective construction of conceptions of relevance might not be necessary. In such a society citizens might opt, then, not to (initially) construct contracting options involving subjective descriptions of talents as closed, hoping that discriminatory talent descriptions would be rare and not of any greater concern than is, say, discrimination on the basis of eye color in the contemporary United States.¹³⁵ A coherent understanding of the opportunity principle would then be that the government would be duty bound to

¹³³ RAWLS, *supra* note 7, at 73. Interestingly, since Rawls is considering here a “market economy,” *id.* at 72, the fact that employment contracts are subject to the demands of the opportunity principle would seem implicitly to reject, as a logical matter, the narrow conception of the basic structure.

¹³⁴ RAWLS, *supra* note 83, at 13 (“The limit [to our inquiry] is that we are concerned for the most part with the nature and content of justice for a well-ordered society. Discussion of this case is referred to in justice as fairness as ideal, or strict compliance, theory. Strict compliance means that (nearly) everyone strictly complies with, and so abides by, the principles of justice. We ask in effect what a perfectly just, or nearly just, constitutional regime might be like, and whether it may come about and be made stable under the circumstances of justice . . .”).

¹³⁵ See generally Richard Wasserstrom, *Racism, Sexism and Preferential Treatment: An Ap-*

monitor whether pernicious and systematic effects to certain segments of society arose due to the openness of contracting options.¹³⁶ Were such discrepancies to arise, the government would have the duty to close the appropriate contracting options. Presumably, this would be implemented via the creation of protected group status, although, in theory, *no* government action that did not violate the first principle of justice would be *a priori* precluded. So if, for example, private school instruction were found to inculcate sexist attitudes in students (an action, we will assume, not protected by the constitutional guarantees of freedom of thought and conscience) which created pernicious and systematic effects on female students' life prospects, state intervention would be required by the opportunity principle.¹³⁷

Conclusion

In this Article, we have addressed the role of contract law in Rawlsian political philosophy. We maintain that despite the ambiguity in the Rawlsian texts concerning the scope of the two principles of justice and the controversy this ambiguity has engendered in the philosophical and legal literature, there exists a coherent conception of the basic structure available to Rawlsian political theory. Our view is that the narrow conception is objectionably arbitrary and that what we have called the medium and coercive conceptions are incoherent. We thus accept the truth of the broad view of the basic structure, which maintains that all aspects of society that affect life's prospects are properly understood as subject to the two principles of justice. Our conclusions are bold. We argue that, given the truth of the broad conception, it follows that, contrary to the conventionally held narrow conception, contract law is within the basic structure. Therefore, in our view, Rawlsianism is *not*, as it is conventionally thought to be, neutral with regard to conceptions of contract law. In our view, contract law for the Rawlsian is governed (albeit indirectly) by the two principles of justice. A Rawlsian ought thus to accept as true the contract-as-distributive-justice conception of contract law. Thus, the Friedman or autonomy conception is incompatible with Rawlsian political philosophy.

If we are correct in our argument concerning the broad conception of the basic structure, the door is open for a deeper understanding of the role that private law plays in Rawlsian political philosophy—it is no longer accurate to believe that Rawlsianism is silent on matters of contract and private ordering, as has conventionally and historically been maintained.

proach to the Topics, 24 UCLA L. REV. 581, 604 (1977) (discussing eye color and the "assimilationist ideal").

¹³⁶ Of course, it would appear that the government would also need to ensure that potential talents were nurtured (this would be true as well in the "construction of conceptions of relevance to talents" solution) but this lies outside the domain of contract law.

¹³⁷ Indeed, it appears to us that, contra Richard Arneson, such intervention would be required even if the sexism took the form of reducing female students' ambitions. To do otherwise would not sufficiently nurture potential talents. Cf. Richard J. Arneson, *Against Rawlsian Equality of Opportunity*, 93 PHIL. STUD. 77, 78 (1999) (arguing that Rawls's opportunity principle does not forbid "discrimination by ambition formation").