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Toward a Feminist Theory of Justice: Political liberalism and Feminist Method

Lori Watson

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TOWARD A FEMINIST THEORY OF JUSTICE: POLITICAL LIBERALISM AND FEMINIST METHOD[1]

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In *Toward a Feminist Theory of the State*, MacKinnon develops a substantive critique of the liberal state, including a critique of its reliance on the "objective stance" that, in her view, theoretically blinds liberalism from addressing substantive gender inequality.[2] Moreover, she develops an account of the feminist method where theorizing about justice and equality is grounded in an understanding of actual lived experience of inequality and injustice that women, in particular, face. In others words, she argues: if we want to respond to the particular forms that gender inequality takes, we must first understand those manifestations in their particulars and our theory of justice (or equality) needs to be constructed so as to address injustice as it actually occurs here and now. Put differently, theory must be built from the bottom up not the top down. In this paper, I will explore the extent to which this criticism attaches to a version of political liberalism that emphasizes reciprocity as the core normative notion for political legitimacy. I will argue that political liberalism (as one form of liberalism) does not rely on the objectionable form of objectivity that MacKinnon calls out. However, this fact alone does not serve to forestall the deeper objection that underlies MacKinnon's points. Her objection goes much deeper and calls into question the methodology of doing "ideal theory" (as Rawls situates his view of justice as fairness). I develop this criticism, and conclude that political liberalism can avoid MacKinnon's criticisms on one level, but they resurface if one accepts the methodology of "justice as fairness" as the correct methodology for determining principles of justice.

WHY POLITICAL LIBERALISM?

In order to motivate the analysis that follows, it is worth asking: if securing substantive sex equality is a fundamental concern, then, in light of MacKinnon's criticisms, why continue to try to defend a version of liberalism at all? Arguably among

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the most important of Rawls's insights is the identification of a problem of legitimacy that modern democracies face. Political legitimacy, in a democratic state, requires some form of agreement (or consent) among all citizens to what is inevitably the coercive power of the state.[3] Yet democratic institutions (ideally) secure the conditions for freedom of conscious and thought equally for all citizens. Under conditions of freedom of conscious, citizens will inevitably develop diverse and irreconcilable conceptions of value and hence diverse conceptions of the good life. Thus, democratic institutions, by their very nature, promote pluralism. Moreover, given humanity's differing conceptions of value and limitations in reaching unified judgments over ordering such values, there will be a range of views which are reasonable and none of which is definitively superior.[4] Thus, democratic institutions will necessarily give rise to what Rawls calls "the fact of reasonable pluralism."[5] This insight frames the work of political liberalism and resituates the task of the political philosopher.

The pressing question for the political philosopher becomes: how is it possible to create fair terms of social cooperation among persons conceived of as free and equal citizens given that they are deeply divided over fundamental values?[6] Rawls allows that it is quite possible that we cannot. (FN) However, failing to show the possibility of a just, legitimate democratic state would entail that we resign ourselves to the fact that state (political) power is always oppressive.[7] We need not be thus resigned, however. The bulk of *Political Liberalism* is spent trying to show that democratic legitimacy, and hence justice, is possible despite the fact that citizens will accept different comprehensive doctrines. Rawls proposes that in light of the fact of reasonable pluralism, we must seek a political conception of justice and eschew appeals to comprehensive doctrines in the course of our deliberations with other citizens. Instead, citizens must rely on public reasons to justify political conceptions of justice and basic political principles.

A citizen engages in public reason, then, when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably to endorse.8

Rawls, of course, defends his particular theory of justice, "justice as fairness," as the most reasonable.[9] However, the two concepts do come apart. One could accept political liberalism and reject justice as fairness as the best articulation of justice. I will explore this point more in what follows. For now, I simply want to motivate the need for developing a defensible version of political liberalism; modern democracies are constituted by deep, yet reasonable pluralism and hence no comprehensive conception of

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3. Here I leave open what precise form of consent is required.

4. *See* JOHN RAWLS, POLITICAL LIBERALISM 54-58 (1993).

5. *Id.* at 4.

6. *See id.* at 3.

7. *See id.* at 37. Rawls notes that failing to accommodate reasonable pluralism will require the oppressive use of state force. He calls this "the fact of oppression." *Id.*

8. John Rawls, *The Idea of Public Reason Revisited, in* JOHN RAWLS: COLLECTED PAPERS 573, 581 (Samuel Freeman ed., 1999).

9. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter RAWLS, A THEORY OF JUSTICE].

justice is possible without the oppressive use of state force, hence, a political conception of justice is our best hope for the possibility of a legitimate democracy. Next, I turn to MacKinnon's critique of liberalism per se in order to see in what ways her criticisms may attach to political liberalism.

MACKINNON'S CRITIQUE OF THE LIBERAL STATE

The core of MacKinnon's critique of the liberal state lies in a critique of the way in which liberalism incorporates an "objective stance" into its account of political justification.[10] In so doing, the liberal state is "male."[11] In order to understand this claim, we need to unpack MacKinnon's critique of male power. As I read MacKinnon, the liberal state — and more specifically liberal jurisprudence as practiced in the liberal state — is gendered male in the sense that it relies on a particular notion of objectivity that sees social categories as justified, and hence rationally employed, insofar as they "accurately" describe and map so-called "natural" categories.

In order to begin to spell out MacKinnon's view of male power, 1 want to distinguish between "exercises of power" and "forms of power." Start with the latter: a form of power combines legitimation with force.[12] An exercise of power may simply be an instance of relying on a particular form of power to justify a particular act of domination. There is another sense of exercises of power that does not rely on an underlying form of power for justification. We might refine this sense by calling it a "brute-exercise of power." Some examples will help here. Suppose I want something you have, and to get it, I use as much physical force as necessary to take it from you. Here I have used brute physical force (power) to take what I want. This is an instance of a "brute exercise of power" marked by a blanket use of force. Contrast this with what I might now call an "authoritative exercise of power."

Altering the example above, suppose that you are the library and the something I want is a book, and my method for getting it involves not physical force but a library card. The library, personified as you, determines that in order to get a library card I must show proper identification and be a member of the relevant community (the University, for example). Having met the relevant criteria and having been issued a library card, you allow me to check out the book. Keeping with the personification within the example, you (as the library) have exercised power over me insofar as you determined the conditions required for borrowing books and determine whether I met those conditions. I have also exercised power (we might say I was empowered by the library via my library card) over the library insofar as I have gotten the book that I want. This we can call an authoritative exercise of power. What distinguishes it from the brute exercise of power? One difference to fix on is the use of physical force in the one example and not the other, but this is not the point of contrast I wish to focus on for, as will become clear, some authoritative exercises of power involve the use of physical force.[13]

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10. *See generally* MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 2.

11. *Id.* at 162.

12. *Id.* at 122.

13. For example, the use of force by the police or state will be authoritative exercises of power on this

What distinguishes brute exercises of power from authoritative exercises of power is their relation to an authorizing form of power. A form of power is an ideological construct through which particular exercises of power are authorized or not. A theory of a form of power, then, provides an account of the origin of legitimation or authorization of the use of force (here force is broadly construed as compel to comply whether it be by physical or non-physical means). So, to return to the examples above, a typical reaction to the example where I used physical force to take what I wanted from you might be: "You have no right to do that!" Or to put it in terms now being introduced: "You have no authority to take that!" To characterize the taking as a brute exercise of power is to point out that there is no legitimating form of power to support the action. Contrast the library book example: if one were to ask, "What gives you the authority (here read as right) to take that book?" the reply would be: "Well, the library allowed me to check it out." To characterize my borrowing the book as an authoritative exercise of power is to say that it has the support of a form of power. That is, the library has legitimate authority to determine the use conditions of its books. What confers legitimate authority will vary across forms of power. But to underscore the main point: what distinguishes something as a form of power is that it has a legitimation story, if you will. Now, this is not to say that all forms of power are themselves legitimate. Forms of power may be just or unjust. One can understand the central point of MacKinnon's work and critique as trying to show that male power is itself an unjust form of power. What characterizes male power as a form of power? From where does it gain its authority?

There are three distinctions to keep in mind and to keep separate as we discuss male power: what it is, what it does, and from where it gains its authority. Essentially male power is the power of men to exert control over the lives of women. Male power is not solely the power of external force, as represented in the statement "*A* exerted power over *B*." Male power is a constructive power: it is a power that constructs the subjectivities of men and women through the normative constructs of masculinity and femininity. As the norms of masculinity and femininity are constructed and reinforced by male domination, male power becomes a power to produce both perspective and reality. MacKinnon puts the point in the following way: "Power to create the world from one's point of view, particularly from the point of view of one's pleasure, is power in its male form."[14]

Male power gains its authority and legitimacy insofar as the world confirms its picture of gender, its picture of how men and women are. So, at the same time that male power constructs the subjectivities of men and women, it is self-confirming. Men and women turn out to be as they are described from the perspective of male power. The process of self-confirmation, if you will, then appears to be objective because the determinants are hidden from view. For example, men are thought to excel at specific activities such as standardized testing or sports more than women, as they often do, and men as a group are found to excel at demanding professions such as the medical profession or the legal profession at a higher rate than women. Now, in absence of a

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analysis. I avoided using such examples for purposes of this distinction in order to avoid muddying the waters early on.

14. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 2, at 121.

critique and understanding the way in which male power produces those realities, in other words looked at from a distanced and aperspectival approach, those realities may just seem to show superior "natural" capabilities of men or may appear as merely innocuous happenstance. From the position of male power, then, pointing out the differences found between men and women will often simply confirm the superiority of males. Rather than revealing the processes by which males have come to have power and continue to have power over women, finding "differences" between men and women supports the picture of the world that maintains male power.

The final pieces of the puzzle require making three points clear: first, that objectivity, as a norm of legitimation, is implicated in the maintenance of sex inequality. Second, liberalism, especially in its approach to sex equality, relies on this conception of objectivity. Finally, this conception of objectivity as rationality and male power rely on the same form of power. In other words, liberal rationality, especially as seen in the context of legal approaches to sex equality, and male power rely on the same form of power for their authority or legitimacy. MacKinnon puts the point as follows: "The state is male jurisprudentially, meaning that it adopts the standpoint of male power on the relation between law and society."[15] That standpoint is: the legitimacy of categories of classification (legal or gender classifications) is grounded in the extent to which these categories accurately map "the world" the way it is.

The objective stance, a particular epistemic approach, "erects two tests to which its method must conform: distance and aperspectivity."[16] Social knowledge within the objective stance is that which accurately represents the world as untainted by one's subjectivity. There is a division between the world out there (reality) and the world in here (mind); to have knowledge in here (in the mind) is to accurately represent/mirror what is out there (reality). The world out there is taken as a given, as constituting the set of background facts.[17] The set of background facts are what they are, we may come to know them, we may not, but our knowing them or not knowing them does not affect what they are.[18]

We are now in a position to see the problem with liberal political philosophy's (and jurisprudence's) approach, insofar as it is committed to a formal model of equality, to questions of sex (in)equality. The problem is with its uncritical incorporation of the objective stance into its account of rationality and this particular rationality test."[19] What will count as rational on this view is that which accurately maps reality (or the set of background facts). Background facts themselves are taken to be the raw data that constitutes the way the world is. The problem is that this view of rationality as objectivity represents a particular approach to the significance and legitimacy of social categories; however, it represents itself as a neutral and unbiased approach.

Anthony Laden reads MacKinnon's critique of liberal objectivity as primarily

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15. *Id.* at 163.

16. *Id.* at 97.

17. *See generally* Anthony Simon Laden, *Radical Liberals, Reasonable Feminists: Reason, Power and Objectivity in MacKinnon and Rawls*, 11 J. POL. PHIL. 133, 137-43 (2003) ("Background facts" is Anthony Laden's term).

18. *See generally id.*

19. CATHARINE A. MACKINNON, SEX EQUALITY 219 (2001) [hereinafter MACKINNON, SEX EQUALITY].

targeted at a form of political justification of which the liberal conception of objectivity is a subset.[20] He calls this form of political justification "rationality as objectivity."[21] What is at stake here is the way in which a theory takes certain pre-political (i.e., background) facts to be related to political facts or categories. MacKinnon refers to this method as the "mirror method." What she is referring to is the way in which liberal jurisprudence aims to justify classifications for the purpose of the law. Those classifications that "adequately" mirror reality are permissible "from the moral point of view"; they are permissible because insofar as they mirror reality they can be given a rational justification and thus are non-arbitrary. They are rationally grounded. What this method misses is that the social reality of gender itself is the product of power relations.

Laden puts the critical point in the following way: "Rationality as objectivity relies on a distinction between . . . social facts and . . . 'background' facts. It takes justification of reliance on social facts to involve connecting them to background facts."[22] So, in terms of the U.S. constitutional law with regard to sex equality, using sex as proxy for legal classifications is permissible (rational) if and only if the social fact (legal status) adequately maps gender-based distinctions that are taken as pre-political (background facts) about persons. "According to the social ontology on which rationality as objectivity rests, background facts are primary."[23] Here we can now make more clear what MacKinnon means by "the mirror method." Social categories/distinctions are justifiable on this view to the extent that they adequately mirror the set of background facts. Background facts are primary then because they are the representation against which we try to mirror social distinctions. Within rationality as objectivity, then, we can measure the rationality (read here as 'legitimacy') of our set of social distinctions by how tightly they map the relevant background facts. Where we are using sex as a social distinction (or basis of legal classification), it must be the case that the rule's intended purpose is to pick out members of a specific sex and that that purpose has a substantial rational basis (i.e., is grounded in a real difference). Because of wide individual variation among persons and gender characteristics, this approach pushes toward gender neutrality. Sex characteristics tend to be both over- and under-inclusive, and so will rarely form a rational basis upon which to base social distinctions — the obvious exception being the female role in reproduction. Well, one may rightly ask at this point: What is so bad about that? If our purpose is to eliminate sex-based discrimination, then isn't prohibiting the use of sex-based distinctions an obvious remedy?

The answer is the problem with the uncritical incorporation of background facts into liberal political theory.[24] What is taken as pre-political background facts are often the result of power relations, and so these very facts are shaped by power and inequality. To take them as neutrally defining untainted categories is to already take a position on gender and one that MacKinnon argues reflects and reinforces male power. Moreover, this conception of rationality will almost never allow gender-based distinctions in law,

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20. *See generally* Laden, *supra* note 17.
21. *Id.* at 138.
22. *Id.*
23. *Id.* at 139.
24. *See generally id.*

and on MacKinnon's view much of the work of getting sex equality for women will require acknowledging the social reality of gender — that is, acknowledging gender as hierarchical. On the liberal model, the use of race and gender is morally permissible — that is, "with good reason" — only if race and gender are non-arbitrarily related to the purpose for which they are invoked as grounds. Showing that the grounds connect to the purpose involves showing that the group in question — racial group or gender group — is picked out on the basis of a "real" difference. The problem, then, is that what counts as a "real" difference is often the product of power relations or real inequalities. So, the liberal approach to discrimination, for example, counts as discrimination the use of morally irrelevant facts — i.e., failing to adequately map the background facts—as related to the group in question. Thus, .the harm of discrimination on this model is treating an individual arbitrarily — i.e., differently — in comparison to others, when there is no "real" reason for the difference in treatment.

"JUSTICE AS FAIRNESS" AND POLITICAL LIBERALISM

Tony Laden argues, convincingly I think, that political liberalism is unique among liberal approaches in that it rejects rationality as objectivity as an appropriate model of political justification.[25] Political liberalism's approach to the problem of political legitimacy is well situated to reject rationality as objectivity insofar as it constructs a theory of reasonable political deliberation in which the concept of reciprocal agreement is the normative core. Reciprocity demands that when we come together to determine the terms of social cooperation (including principles of justice, but also their scope and application), we must offer reasons to one another that we can accept as free and equal citizens — and Rawls himself emphasizes that this entails that no one be dominated or manipulated or under the pressure of an inferior social position.[26] A theory of reasonable political deliberation entailed by political liberalism's account of political legitimacy requires that fair background conditions must be secured for all citizens to participate in public deliberation as free and equal citizens. Thus, political liberalism is committed to eradicating unequal social conditions (including those rooted in hierarchical social identities) that serve to thwart the possibility of reciprocal agreement among citizens. And, as I have argued elsewhere, this shift provides ground from which to move toward a feminist political liberalism.[27] This sketch of a reply may serve to show that political liberalism doesn't fall prey to one set of concerns raised by MacKinnon's critique of objectivity, yet, this doesn't provide a complete answer.

Rawls, and a number of those who endorse his brand of liberalism, are not only just committed to political liberalism as an account of political legitimacy, but they are

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25. *See generally* Laden, *supra* note 17.

26. Rawls, *The Idea of Public Reason Revisited, in* RAWLS, *supra* note 8, at 573, 578.

27. *See* Lori Watson, *Constituting Politics: Power, Reciprocity, and Identity*, 22 HYPATIA 96 (2007); Lori Watson, *Pornography and Public Reason*, 33 SOC. THEORY & PRAC. 467 (2007). Also, I develop this approach further in my work with Christie Hartley. *See* Christie Hartley & Lori Watson, *Feminism, Religion and Shared Reasons: A Defense of Exclusive Public Reason*, 28 L. & PHIL. 493 (2009); Christie Hartley & Lori Watson, *Is Feminist Political Liberalism Possible?*, 5 J. ETHICS & SOC. PHIL. 1 (2010).

also committed to Rawls's defense of "justice as fairness."[28] Justice as fairness refers to the particular principles of justice as well as the methodology for arriving at them, familiar from Rawls's earlier work in *A Theory of Justice*.[29] Let us briefly review the procedure Rawls defends for determining the principles of justice as well as their content. Rawls argues that the principles of justice are those that would be chosen by self-interested rational deliberators as representatives of free and equal persons in an impartial choice situation. This "original position" is intended in part to model a social contract approach to justice — namely, just principles for organizing society are those that could or would be agreed to by persons in an initial position of equality. To ensure fairness, representatives in this original position lack knowledge about their particular circumstances and place in society. Thus, such representatives are imagined to be behind a "veil of ignorance" in which they do not know their race, sex, religion, economic status, particular skills and attributes, and other social factors that might bias their deliberations. Thus, the methodology here requires both high level abstractions away from actual conditions and idealizations (i.e., deliberators are supposed to be rational and self-interested). Rawls argues that the original position with the conditions imposed by the veil of ignorance captures what we mean by "the moral point of view."

> [T]he procedure whereby principles are proposed and acknowledged can be take to represent the constraints of having a morality; it is these constraints which require rational and self-interested persons to act reasonably, in this case, to acknowledge familiar principles of justice.[30]

Rawls's methodology requires strong idealizations. It is not simply that he relies upon normative values (ideals), something that every theory of justice must do. It is that the procedure for determining the principles of justice requires that we abstract away from concrete particulars/facts (of our current conditions, etc.) and imagine counter-factuals in which the antecedents are empirically false (e.g., if persons were in a relative position of freedom and equality, rational, self-interested, then they would choose *X*, *Y*, *Z*), and those principles are to guide our actions and institutions here and now with very different antecedents (historical domination and subordination of some groups over others). Admittedly, Rawls aims to develop principles of justice for a "well ordered society" — a society in which there is strict compliance with the principles of justice and a public justification of such principles that everyone accepts. Thus, the principles he articulates in justice as fairness are not themselves designed to, nor intended to, address systemic injustice. In this sense, Rawls is engaged in ideal theory rather than non-ideal theory. As Charles Mills aptly describes the distinction:

> [W]hat distinguishes ideal theory is not merely the *use* of ideals, since obviously non ideal theory can and will use ideals also (certainly it will appeal to the moral ideals, if it may be more dubious about the value of invoking idealized human capacities). What distinguishes ideal theory is the reliance on idealization to the exclusion, or at least marginalization, of the actual.[31]

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28. *See* RAWLS, A THEORY OF JUSTICE, *supra* note 9.
29. *Id.*
30. John Rawls, *Justice as Reciprocity, in* JOHN RAWLS: COLLECTED PAPERS, *supra* note 8, at 190, 201-02.
31. Charles Mills, *"Ideal Theory" as Ideology*, 20 HYPATIA 165, 168 (2005).

In Mills's view, and in the view I am defending here, this form of ideal theory often functions in an ideological fashion in abstracting away from the actual conditions of inequality and injustice, an understanding of which is necessary for proper theorizing about justice. So, does this approach to justice embody the "male point of view" or the "objective stance" in the way that MacKinnon has argued serves to shield and perpetuate inequality, specifically the inequality of women? Recall that her criticism of the liberal state includes a criticism of the way in which it claims to arrive at principles of law (justice) from an aperspectival and distanced approach, when in fact it reflects the male point of view. Also recall that in her description of the feminist method, theorizing justice requires understanding the particular forms of injustice we have faced and continue to face, as women or as blacks or as gays or as lesbians, and so on. So, although political liberalism as an approach to political legitimacy may side step these criticisms, they may resurface at the level of methodology adopted for formulating principles of justice within political liberalism, specifically within justice as fairness.

Particularly problematic is that Rawls's methodology asks us to abstract away from relations of domination and subordination (including chattel slavery, the domination of Europeans over non-Europeans, the domination of men over women, for example) and asks: assuming domination is not a part of the fabric of our social lives, what would persons under conditions of relative freedom and equality choose as principles to regulate their conduct and social intuitions? In light of MacKinnon's critique of male power, we might say here that Rawls asks the wrong questions when it comes to theorizing justice, and the point of view that is supposed to be definitive most closely reflects the social position of white males historically. But, more importantly, Rawls's deliberators in the original position are not persons who have themselves been subjected to pervasive injustice and subordination, and they are not asked to consider what justice would require from the perspective of the oppressed. Eva Feder Kittay, for example, criticizes Rawls's approach to theorizing principles of justice as the idealization of the persons whom the representatives in the original position are representing. These persons are assumed to be fully and normally cooperating members of society over time.[32] Idealizing persons in this way theoretically shields questions of dependency (and inevitable human fragility) at the level of design.[33] In contrast to this methodological approach, MacKinnon (and many others) argues that the perspective of social subordinates is necessary for an accurate understanding of the injustices routinely faced on the basis of their group membership. And in turn, knowing the forms of injustice is crucial to remedying such injustice. For example, consider here MacKinnon's critique of dominant sex equality approaches.[34] Looked at from the imagined perspective of free and equal citizens (un-gendered persons, where no one is dominated or subordinated), Aristotle's formulation of equality — treat likes alike and unlike unalike — seems perfectly reasonable. Absent a critique of the way in which social power serves to construct differences, and in turn naturalizes them, we will miss the ways in which such a conception of equality perpetuates inequality.

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32. *See* EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY (1999).
33. *Id.* at 79-82. Thanks to Christie Hartley for this point.
34. *See* MACKINNON, SEX EQUALITY, *supra* note 19, at 3-56.

Now, if we reject the methodology of justice as fairness for determining principles of justice, where does this leave us vis-à-vis political liberalism? It is quite possible to defend political liberalism and reject justice as fairness, both in its methodology and in its specific formulation of principles of justice. After all, even Rawls acknowledges that once we embrace the idea that political legitimacy requires a political conception of justice and with it a commitment to public reason, it is clear that there can be a range of reasonable political conceptions of justice.[35] Rawls, of course, thinks justice as fairness is among them, and in fact "the most reasonable."[36] But one need not follow Rawls this far.[37] The key normative concept for political liberalism is the reciprocity condition — namely, that political principles are legitimate only insofar as they are reasonably justifiable to those to whom they apply. In my view, reciprocity entails a principle of non-domination, from which it follows that the state must adopt political principles and policies that serve to dismantle socially hierarchical identities through which social and political power are distributed unequally. In short, reciprocity as non-domination requires a substantive conception of equality. And MacKinnon has forcefully argued that developing a substantive conception of equality— and hence aiming at justice — requires theorizing from the perspective of the dominated; in short, it requires a feminist method. Political liberals would do well to heed this call in developing and a political conception of justice, but they must first recognize the limits of "justice as fairness."

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35. Rawls, *The Idea of Public Reason Revisited, in* RAWLS, *supra* note 8, at 573, 582-83.
36. JOHN RAWLS, POLITICAL LIBERALISM at xlvi (2d ed., 2005).
37. Notably, Martha Nussbaum identifies herself as a political liberal yet rejects justice as fairness, defending instead a capabilities approach grounded in a conception of human dignity.