Remixing Rawls: Constitutional Cultural Liberties in Liberal Democracies

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This article develops a liberal theory of cultural rights that must be guaranteed by just legal and political institutions. People form their own individual conceptions of the good in the cultural space constructed by the political societies they inhabit. This article argues that only rarely do individuals develop views of what is valuable that diverge more than slightly from the conceptions of the good widely circulating in their societies. In order for everyone to have an equal opportunity to autonomously form their own independent conception of the good, rather than merely following others, culture must be democratically controlled. Equal respect for members of a liberal democracy requires that all citizens have roughly equal opportunities to do things like make movies, publish novels, and exhibit paintings. This article contends that the contemporary American legal order fails to guarantee that all citizens have roughly equal opportunities to shape and influence their shared culture. Guaranteeing the liberty to do so would require reforms to many areas of law, including applying anti-discrimination law more broadly to the conduct of cultural organizations, expanding fair use protections in copyright law, limiting the ability of businesses to arbitrarily refuse service to customers, and restricting private control of capital in order to democratize the means of cultural production.

INTRODUCTION

When, in 2016, for the second year in a row, exclusively white actors were nominated for Oscar awards, protests erupted on social media and prominent actors and filmmakers announced that they would boycott the Academy Awards ceremony.[1] The #OscarsSoWhite protests did not argue that the First Amendment free speech rights of minority actors and directors had been abridged. Legally, minority actors and directors have the same rights as white directors to go out and make movies. The complaint of #OscarsSoWhite was that minority actors and filmmakers cannot use their rights to write and speak and create culture as effectively as white actors and filmmakers can. Minority filmmakers do not have equal access to Hollywood gatekeepers.

The argument of #OscarsSoWhite seems political in nature,

1 *See* Tim Gray, *Academy Nominates All White Actors for Second Year in Row*, VARIETY (Jan. 14, 2016, 7:16 AM), http://variety.com/2016/biz/news/oscar-nominations-2016-diversity-white-1201674903/ (discussing #OscarsSoWhite protests on social media); David Ng, *Spike Lee and Jada Pinkett Smith to Boycott Oscars; Academy Responds*, L.A. TIMES (Jan. 18, 2016, 7:50 PM), http://www.latimes.com/entertainment/movies/moviesnow/la-et-spike-lee-to-boycott-oscars-html-20160118-htmlstory.html (discussing boycotts of the Academy Awards Ceremony).

even though it is not about First Amendment rights or state action. #OscarsSoWhite protests are about systemic racism, but they are also about cultural elites refusing to let a diversity of approaches to film and storytelling into their prestigious institutions and about a failure of citizens to regard one another as equally capable of contributing to their shared culture. Some of the moral force of #OscarsSoWhite protests may be about employment discrimination, but the force of the protest is not confined to fairness in employment. Even if, counterfactually, minority actors and filmmakers could find work in Hollywood as easily as white actors and filmmakers, and even if winning Academy Awards were unimportant for the career prospects of actors and filmmakers, it would still be troubling for the Oscars to honor only white people. The trouble is that the whiteness of the Oscars signals that not all members of our society are, in the words of W.E.B. Du Bois, "co-worker[s] in the kingdom of culture."[2]

Liberal political philosophers have debated at length how citizens should treat one another as participants in politics, focusing on rights of political participation and reciprocity in describing the conditions of democratic legitimacy.[3] These philosophers have paid less attention to what obligations of justice arise from citizens' participation in cultural activity.[4] This article contends that rights of

2 W.E.B. Du Bois, The Souls of Black Folk: Essays and Sketches 4 (8th ed. 1909).

3 *See, e.g.*, Arthur Ripstein, *Authority and Coercion*, 32 Phil. & Pub. Aff. 2, 26–29 (2004).

4 *See, e.g.*, John Rawls, Justice as Fairness: A Restatement 43–44 (Erin Kelly ed., 2001) (arguing that "[i]n all parts of society" there should be "roughly the same prospects of culture and achievement for those similarly motivated and endowed" but excluding "prospects of culture" from the equal basic liberties protected by the lexically prior first principle of justice). In contrast with the emphasis on political liberties and the distribution of economic goods that take center stage in much contemporary liberal political philosophy, scholars of law and aesthetics who study free speech, copyright, intellectual property, remixes, and internet culture have increasingly argued that it is important for liberal democracies to promote and protect not just a democratic system of politics but also a democratic culture. *See* Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 Berkeley Tech. L.J. 229, 232 (2014). This article builds on the work of legal scholars who have developed theories that focus, among other things, on the satisfaction of cultural conditions necessary for the exercise of human capabilities or for human flourishing, *see* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1659, 1746–50 (1988), how to politically design an attractive culture, *see* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79

cultural participation and reciprocity also matter for a constitution's legitimacy. Specifically, a legitimate democracy must ensure that all citizens have a fair, roughly equal opportunity to shape their shared culture. Satisfying this requirement in the United States requires extensive changes to contemporary public and private law.[5]

Part I describes the philosophical argument for the norm that legitimate democracies must ensure that all citizens have roughly equal opportunities to influence the political process. Citizens of a democracy remain free and equal by mutually committing to an ideal of political equality, so that each person is both ruled and a participant in ruling.[6] In legitimate democracies, citizens equally share the burdens of living together in a community and regard one another as political equals, respecting one another's rights to participate in the democratic process by voting and holding office.[7] Liberal legitimacy also requires that citizens take one another seriously as contributors to political dialogue.[8] For instance, a society in which everyone had an unquestioned right to vote and run for office but where men made up their minds in advance that they would not seriously entertain any political arguments advanced by women could not be a legitimate democracy, for the members of such a society would fail to equally share the burdens and opportunities that come from living together in a community.

In describing the liberal argument for rights of political participation, this article focuses on John Rawls's argument that the "fair value" of the "equal political liberties" must be guaranteed to all citizens.[9] Rawls's argument provides a useful starting point

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N.Y.U. L. REV. 1, 3–4 (2004), what conditions must hold for individuals to act and express themselves autonomously, *see* Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449, 469–71 (1992), and how law affects a society's political culture, *see* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996).

5 In this article, the term "citizens" is used to denote equal participants in a scheme of political cooperation. However, the obligations and rights of reciprocity likely extend beyond those members of existing political societies who are presently accorded *legal* citizenship. *See* Sarah Song, *The Significance of Territorial Presence and the Rights of Immigrants*, *in* MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP 225, 233–34 (Sarah Fine & Lea Ypi eds., 2016); *see also* Sarah Song, *Democracy and Noncitizen Voting Rights*, 13 CITIZENSHIP STUD. 607, 608–11 (2009).

6 *See* JOHN RAWLS, POLITICAL LIBERALISM 4–6 (expanded ed. 2005).

7 RAWLS, *supra* note 4, at 191–92.

8 *Id.* at 91.

9 *Id.* at 149.

for theorizing about cultural rights for two reasons. First, Rawls's theory of justice provides a compelling and generative account of why the fair value of the political liberties matters for the legitimacy of a constitution.[10] Second, his method of "reflective equilibrium," which works back and forth between our judgments about specific cases and our general philosophical judgments about ethics until we reach justified conclusions, is particularly well suited for evaluating the concrete legal reforms needed to make a constitution legitimate.[11]

After describing the rationale for ensuring that all citizens have a fair, roughly equal chance to participate in politics in Part I, Part II argues that anyone who accepts a guarantee of the fair value of the political liberties as a condition of democratic legitimacy should also embrace a guarantee of cultural liberties. In a just society with a legitimate constitution, rights of cultural participation must be insulated from the distorting effects of wealth, social power, and persistent bias. Because culture is where citizens figure out who they are and what they value in conversation with one another, the urgency of cultural liberties is so great that their fair value is a constitutional essential. To be morally legitimate, a constitution must guarantee that all similarly talented and motivated citizens have roughly an equal chance to shape and influence the culture in which they live, just as they must have a roughly equal chance to shape and influence the government's laws and policies.[12] When some citizens can influence the cultural life of a society more than others, simply because of their wealth, racial or sexual privilege, or membership in elite cultural networks, equality of citizenship is undermined. If overwhelmingly white Academy Awards reflect a restriction of cultural influence to people who have racial or economic privilege, then the conditions of liberal legitimacy have not been satisfied. To diagnose and identify remedies for these failures of equal citizenship, this article develops a theory that I call semiotic justice because it focuses attention on how obligations of justice apply to collective practices of meaning-making.[13]

10 *See* Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 Fordham L. Rev. 1407, 1417–18 (2004); *see also* Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. Pa. L. Rev. 962, 990–91 (1973).

11 *See* Rawls, *supra* note 4, at 29–32.

12 Whether such constitutional provisions would need to be judicially enforceable is a separate question. For a discussion of this issue, see *infra* note 117.

13 "Semiotic justice" modifies John Fiske's phrase, "semiotic democracy." *See* John Fiske, Television Culture 236–39 (1987) (arguing that television

Guaranteeing the fair value of cultural liberties—ensuring that similarly endowed and motivated citizens have roughly the same chance to shape the culture in which they live—has broad implications for the interface of a society's political structure and its cultural order, giving rise to obligations related to anti-discrimination law, free speech law, copyright and property entitlements, and the state action doctrine. Because the fair value of liberties to participate in culture can be guaranteed with many different legal arrangements, the implications of semiotic justice for law and policy are most clearly illustrated by considering failures to ensure the fair value of the cultural liberties. Part III of this article considers several such failures: the whiteness of the Academy Awards, the ability of incumbent artists to use copyright to block the creation of appropriation art, and the ability of business owners to arbitrarily refuse to serve customers.

In response to these violations of the fair value of the cultural liberties, semiotic justice suggests that the state must organize its economic system so that citizens have free time to participate in culture, adequately fund public schools and universities so that citizens can acquire the skills they need to express their beliefs about the good life, narrow the scope of property rights to prevent the wealthy from turning economic power into cultural control, and provide public funding for the arts and humanities.[14] The fair value of liberties of cultural participation are among the equal basic liberties that must be guaranteed in a legitimate democratic society.

I. RAWLS'S JUSTICE AS FAIRNESS AND THE FAIR VALUE OF THE POLITICAL LIBERTIES

John Rawls's theory of *justice as fairness* has served as the

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fosters a "semiotic democracy" through its playfulness); *see also* WILLIAM W. FISHER III, PROMISES TO KEEP 28–31 (2004) (deploying the phrase "semiotic democracy" in a theory of intellectual property).

14 Many of these reforms are already suggested by Rawls's guarantee of the fair value of the political liberties or by the requirements of fair equality of opportunity, but semiotic justice goes beyond the reform agenda contained in Rawls's political liberties because it puts the fair value of cultural liberties on a level with the value of formal equal basic liberties. *See generally* Seana Valentine Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 FORDHAM L. REV. 1643, 1644 (2004). In this respect, my argument in this article has a close affinity to Seana Shiffrin's argument that the fair equality of opportunity should be "elevat[ed] . . . to a higher level of priority" in Rawlsian theory. *Id.* at 1644.

focal point for much liberal political philosophy in the past five decades and provides a prominent example of contemporary liberal thought about how citizens can live together as equal members of a democratic society.[15] This Part briefly sets out Rawls's theory of justice as fairness and explores why Rawls believes that a legitimate democracy must guarantee the fair value of the political liberties to its citizens.

For Rawls, the idea of society as a fair system of cooperation is "[t]he most fundamental idea in [the] conception" of justice as fairness.[16] This idea has, for Rawls, three essential features. First, social cooperation is more than mere activity coordinated by the dictates of a central government. Social cooperation is "guided by publicly recognized rules and procedures which those cooperating accept as appropriate to regulate their conduct."[17] Second, social cooperation is marked by a commitment to reciprocity, including "the idea of fair terms of cooperation" that everyone could "reasonably accept, and sometimes should accept, provided that everyone else likewise accepts them."[18] Third, social cooperation includes the idea that participants pursue their "rational advantage," which specifies what the social cooperators "are seeking to advance from the standpoint of their own good."[19]

Society regarded as a fair system of cooperation is composed of free and equal persons who have two fundamental "moral powers":

> (i) One such power is the capacity for a sense of justice: itis the capacity to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation.
>
> (ii) The other moral power is a capacity for a conception of the good: it is the capacity to have, to revise, and rationally to pursue a conception of the good. Such a conception is an ordered family of final ends and aims which specifies a person's conception

15 *See* Henry S. Richardson, *John Rawls* (1921–2002), Internet Encyclopedia of Phil., http://www.iep.utm.edu/rawls (last visited Mar. 27, 2019).
16 *See* Rawls, *supra* note 4, at 5.
17 *Id.* at 6.
18 *Id.*
19 *Id.*

> of what is of value in human life or, alternatively, of what is regarded as a fully worthwhile life. The elements of such a conception are normally set within and interpreted by, certain comprehensive religious, philosophical, or moral doctrines in light of which the various ends and aims are ordered and understood.[20]

These powers are not momentary but instead are realized over the course of a full life.[21]

To illustrate the political meaning of the two moral powers, Rawls constructs a thought experiment, which he calls the original position.[22] Hypothetical representatives of citizens who wish to come together to form a political society meet in the original position to agree on a conception of justice. In the original position, these trustees are situated behind a "veil of ignorance" and "are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent," although they know "the general commonsense facts of human psychology and political sociology."[23]

Within the original position, and given the conception of persons as having the two moral powers, Rawls argues that the representatives will select two principles of justice to guide constitution-making, legislating, and adjudication:

> (a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
>
> (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).[24]

20 *Id.* at 18–19.
21 *Id.* at 19.
22 *Id.* at 14.
23 *Id.* at 15, 101.
24 *Id.* at 42–43. The difference principle means that "unless there is a distribution that makes both persons better off . . . an equal distribution is to be preferred."

These principles are lexically ordered, meaning that the basic liberties guaranteed by the first principle cannot be traded off to provide more material goods, even to the worst off, pursuant to the second principle.[25] Political power can only be legitimately exercised in a liberal democracy when it is exercised in accordance with "a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason," where the constitutional essentials include the first principle of justice along with a "social minimum providing for the basic needs of all citizens."[26]

The basic liberties are those liberties that are essential to providing the political and social conditions necessary for free and equal persons to develop and exercise the two moral powers.[27] Rawls divides up the basic liberties into two categories. First, there are those that "enable citizens to develop and exercise [the moral] powers in judging the justice of the basic structure of society and its social policies," which are "the equal political liberties and freedom of thought."[28] Second, there are those liberties that "enable citizens to develop and exercise their moral powers in forming and revising and in rationally pursuing (individually or, more often, in association with others) their conceptions of the good."[29] Thus, securing the basic liberties should ensure that people who participate in a project of social cooperation can realize the two moral powers. Cooperators would not give up these basic liberties, or even risk doing so, because of the centrality of the moral powers to the conception of the person that Rawls presupposes.[30]

Rawls's difference principle may allow for significant social and economic inequality, provided that such inequality is to the advantage of the least well off.[31] There is a risk that such inequalities might distort equal access to the public political forum, turning the political liberties guaranteed by the first principle into empty formalities. For instance, if everyone had the same right to political speech but only a few could spend great sums on political campaigns,

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John Rawls, A Theory of Justice 76 (1971).

25 Rawls, *supra* note 4, at 43.

26 Rawls, *supra* note 6, at 137, 228–29.

27 Rawls, *supra* note 4, at 45.

28 *Id.*

29 *Id.*

30 *Id.* at 102.

31 *Id.* at 158; *see also* Shiffrin, *supra* note 14, at 1647.

the liberty of free political speech would be worth more to wealthy citizens than to the poor.[32]

To prevent the equal political liberties from becoming empty formalities, Rawls describes his first principle as including a "proviso" according to which "the fair value of the equal political liberties" (and only these liberties) must be guaranteed to every citizen.[33] This proviso responds to the objection that the equal liberties in a modern state are merely formal:

> [T]he worth of the political liberties to all citizens, whatever their economic or social position, must be sufficiently equal in the sense that all have a fair opportunity to hold public office and to affect the outcome of elections and the like . . . . The requirement of the fair value of the political liberties . . . is part of the meaning of the two principles of justice.[34]

Rawls reasons that the proviso "secures for each citizen a fair and roughly equal access to the use of a public facility designed to serve a definite political purpose, namely, the public facility specified by the constitutional rules and procedures which govern the political process and control the entry into positions of political authority."[35] Additionally, Rawls concedes that the difference principle is, by itself, insufficient to prevent the distortion of the value of the equal political liberties. The "public facility" of political institutions has "limited space," and "[w]ithout a guarantee of the fair value of the political liberties, those with greater means can combine together and exclude those who have less. . . . The limited space of the public political forum . . . allows the usefulness of the political liberties to be far more subject to citizens' social position and economic means than the usefulness of other basic liberties."[36]

For Rawls, the guarantee of the fair value of political liberties

32 RAWLS, *supra* note 6, at 358; *see also* Norman Daniels, *Equal Liberty and the Unequal Worth of Liberties*, *in* READING RAWLS 253, 254–58 (Norman Daniels ed., 1975); Liam Murphy, *Why Does Inequality Matter: Reflections on the Political Morality of Piketty's Capital in the Twenty-First Century*, 68 TAX L. REV. 613, 615–16 (2015) ("[T]he power that comes with great wealth, especially, seems to have a force in political life that no kind of legal regulation is likely to undo.").

33 RAWLS, *supra* note 6, at 149.

34 *Id.*

35 *Id.* at 150.

36 *Id.*

suggests that *Buckley v. Valeo*, in which the Supreme Court struck down limits on campaign expenditures in favor of individual candidates as contrary to the First Amendment,[37] violates justice as fairness. *Buckley* "seems to reject altogether the idea that Congress may try to establish the fair value of the political liberties" by limiting wealthy citizens' use of economic clout to influence the political process.[38]

Guaranteeing the fair value of the political liberties does not require that every single citizen have an equal chance of becoming president, that democracies conduct elections by lot, that every citizen should be equally provided with airtime on television to express their political views, or that the state handicap particularly eloquent political speakers to keep all citizens' chances of attaining political office roughly equal. Guaranteeing the fair value of the political liberties ensures that "citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class."[39] Rawls means that citizens who are equally gifted and motivated at politics must have an equal chance to influence policy and attain public office. Guaranteeing the fair value of the political liberties insulates a democracy's political life from non-political influences and guards against political outcomes that reflect inequalities of wealth or status rather than citizens' considered judgments about how best to achieve justice.

Rawls insists that the fair value of the equal political liberties extends only to the equal political liberties and no further, because securing the fair value of all of the basic liberties would be "either irrational, or superfluous, or socially divisive."[40] If such a requirement meant "that income and wealth are to be distributed equally," the requirement would be irrational because it would "not allow society to meet the requirements of social organization and efficiency."[41] If, on the other hand, such a condition would require that "a certain level of income and wealth is to be assured to everyone in order to express their ideal of the equal worth of the basic liberties" then it would be superfluous.[42] This is both because the difference principle requires the basic structure to be

37 Buckley v. Valeo, 424 U.S. 1, 45 (1976).
38 Rawls, *supra* note 6, at 360.
39 *Id.* at 358.
40 Rawls, *supra* note 4, at 150–51.
41 *Id.*
42 *Id.*

arranged in a way that will guarantee that every individual has the greatest level of wealth possible, consistent with the first principle of justice and the fair equality of opportunity,[43] and because a "social minimum" is among the constitutional essentials.[44] On the other hand, if guaranteeing the fair value of the basic liberties "means that income and wealth are to be distributed according to the content of certain interests regarded as central to citizens' plans of life, for example, religious interest, then it is socially divisive."[45] Allocating extra social resources to citizens who claim religious needs to erect magnificent temples would violate justice as fairness.[46] Thus, Rawls concludes that while the equal political liberties must provide all citizens roughly equal chances to influence public policy and hold public office, such a requirement cannot be extended to the other basic liberties.

II. CULTURAL LIBERTIES AND SEMIOTIC JUSTICE

Rawls argues that a legitimate constitution in a just society must ensure that rights of political participation are insulated from the distorting effects of money and social power.[47] The formal political liberties must be guaranteed their "fair value" for all citizens in a democracy so that "all have a fair opportunity to hold public office and to affect the outcome of elections, and the like."[48] In this Part, I argue that a just democracy must ensure that all citizens have a real chance to participate in the cultural life of their community and must protect citizens from having their views about the shape of their shared culture disregarded by other citizens for reasons that have nothing to do with what any individual citizens think culture should look like or that merely reflect unequal allocations of cultural capital.[49]

The political liberties are the subset of the equal basic liberties that are concerned with political participation, like the right

43 *See id.*
44 RAWLS, *supra* note 6, at 228–29.
45 RAWLS, *supra* note 4, at 151.
46 *See id.*
47 *See id.* at 150.
48 *Id.* at 149.
49 *See* Pierre Bourdieu, *The Forms of Capital*, *in* READINGS IN ECONOMIC SOCIOLOGY 280, 282–86 (Nicole Woolsey Biggart ed., 2002) (describing cultural capital as a variety of capital that takes the form of dispositions of mind and body acquired through education and which can be institutionalized through formal credentials such as academic qualifications).

to vote and the right to participate in political debates.[50] The *cultural liberties* are the subset of the equal basic liberties that enable citizens to participate in shaping their culture, like the right to contribute to artistic expression and to share one's views about what a good life looks like. Just as guaranteeing the fair value of political liberties is necessary for the development and exercise of the first moral power (the capacity for a sense of justice), it is necessary to guarantee the fair value of cultural liberties to ensure that people can develop and exercise the second moral power (the capacity for a conception of the good). I designate my theory of the fair value of the cultural liberties semiotic justice. Relying on arguments drawn from literary and cultural theory, I argue that the ability to participate in shaping what a culture looks like is a necessary element of expressing and developing one's own conception of the good, and I argue that many of the reasons that it is important to guarantee the fair value of the political liberties apply to cultural liberties as well. Ultimately, the urgency of cultural liberties is so great that their fair value is a constitutional essential: a legitimation-worthy constitution is one that guarantees the fair value not only of the political liberties but also of the cultural liberties.[51]

A. Semiotic Justice: The Fair Value of the Cultural Liberties

For Rawls, the equal political liberties appear on the list of the basic liberties because they, along with freedom of thought, allow citizens to develop their first moral power: "to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation."[52] Citizens' representatives in the original position would insist on guaranteeing the fair value of the equal political liberties because doing so is essential to protecting the indispensable first moral power.[53]

They would be equally unwilling, however, to gamble with the second moral power.[54] Liberty of conscience and freedom of

50 Rawls, *supra* note 4, at 44.

51 The locution "legitimation-worthy" is due to Frank Michelman. *See* Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 Int'l J. Const. L. 663, 674–75 (2008). This article will use "legitimate" and "legitimation-worthy" interchangeably.

52 Rawls, *supra* note 4, at 19.

53 *Id.* at 106–10.

54 Many or all of the basic liberties play important roles in the realization of both moral powers. However, the emphasis of the political liberties is on their

association are, Rawls says, connected with "the capacity for a (complete) conception of the good," and this explains their inclusion on the list of the equal basic liberties.[55] This Part argues that, like the political liberties, the cultural liberties deserve special constitutional protection from exercises of financial, political, or social clout in order to ensure that citizens can develop the second moral power. Citizens need a voice in what their cultural world looks like. If wealth or social prestige determines what television shows and novels get produced and published and talked about at bars and coffee shops, democracy is out of reach. Citizens' representatives in the original position would be unwilling to risk losing a voice in what their shared cultural world looks like and would, therefore, insist on a proviso of semiotic justice parallel to the proviso of the fair value of the equal political liberties.

1. The Political Economy of Culture

The argument for a semiotic justice proviso is rooted in the notion that trustees in the original position know certain "general commonsense facts" about culture, just as they know "the general commonsense facts of human psychology and political sociology."[56] These commonsense facts include an understanding of how political and economic realities predictably and systematically shape cultural production and consumption.

Culture is a public space in which members of a society articulate and develop their conceptions of the good and the meaning of life.[57] I take "culture" to mean this space rather than any particular set of conceptions deployed within it. What constitutes culture, like the basic liberties, is given by a list of practices that express what people value non-instrumentally.[58] Roughly speaking, culture is "all those practices, like the arts of description, communication,

connection with the first moral power while the emphasis of the liberty of conscience and freedom of association is their connection with the second moral power. *See id.* at 45.

55 *Id.* at 113.

56 *Id.* at 101.

57 *See* RAYMOND WILLIAMS, CULTURE AND SOCIETY, 1780–1950, at 34 (1958) (drawing from Wordsworth to argue that "Culture, the 'embodied spirit of a People', the true standard of excellence, became available, in the progress of the [Nineteenth Century], as the court of appeal in which real values were determined, usually in opposition to the 'factitious' values thrown up by the market and similar operations of society").

58 *See* EDWARD SAID, CULTURE AND IMPERIALISM, at xii (1993).

and representation, that have relative autonomy from the economic, social, and political realms and that often exist in aesthetic forms, one of whose principal aims is pleasure."[59] People use these mechanisms to share and learn about their own and other's conceptions of value, meaning, and the good. This list is vague because the precise contours of "culture" shift over time and from place to place. The list is expansive because limiting culture to certain varieties of human behavior risks treating culture as something that people do outside of and apart from their daily lives.[60] While the list is vague and expansive, it is restricted to activities that reflect peoples' views about what is non-instrumentally valuable or worthwhile. Culture does not include activities that are pursued only to accumulate wealth, political power, or social capital in order to pursue other

59 *Id.*; *see* Balkin, *supra* note 4, at 36 ("By 'culture' I mean the collective processes of meaning-making in a society. The realm of culture, however, is much broader than the concern of the First Amendment or the free speech principle. Armaments and shampoo are part of culture; so too are murder and robbery. And all of these things can affect people's lives and shape who they are."). The practices that constitute culture have only relative autonomy from politics. In many ways, culture is intensely political. *See, e.g.*, Edward W. Said, Humanism and Democratic Criticism 128–29 (2004). But while politics and culture connect in many ways, culture has a domain that is at least partially its own and that is meaningfully distinct from the domain of politics. *See* Pierre Bourdieu, The Field of Cultural Production 37–38 (Randal Johnson trans., 1993) ("[T]he literary and artistic field . . . is contained within the field of power . . . while possessing a relative autonomy with respect to it, especially as regards its economic and political principles of hierarchization.").

60 Selma James explains why culture cannot be narrowly delimited:

> The life-style unique to themselves which a people develop once they are enmeshed by capitalism, in response to and in rebellion against it, cannot be understood except as the totality of their capitalist lives. To delimit culture is to reduce it to a decoration of daily life. Culture is plays and poetry about the exploited; ceasing to wear mini-skirts and taking to trousers instead; the clash between the soul of Black Baptism and the guilt and sin of white Protestantism. Culture is also the shrill of the alarm clock that rings at 6 a.m. when a Black woman in London wakes her children to get them ready for the baby minder. Culture is how cold she feels at the bus stop and then how hot in the crowded bus. Culture is how you feel on Monday morning at eight when you clock in, wishing it was Friday, wishing your life away. Culture is the speed of the line or the weight and smell of dirty hospital sheets, and you meanwhile thinking what to make for tea that night. Culture is making the tea while your man watches the news on the telly.

Selma James, Sex, Race and Class 13 (1975).

distinct ends.[61]

Cultural space is not wholly defined by the political practices of the state. It also reflects informal networks and practices of cultural dissemination, which makes it somewhat more removed from the principles of political justice than the facility of political space.[62] However, cultural space is defined in important ways by the rules that the state institutes to regulate it and it is, in this way, part of the basic structure of society.[63] The expressions of conceptions of the good that occupy the space of culture powerfully shape the resources that citizens who partake of the culture have available to them when forming, revising, and pursuing their own conceptions of the good.

The public facility of culture is a limited space, as is politics, where "[n]ot everyone can speak at once, or use the same public facility at the same time for different purposes."[64] Public attention is a limited resource because humans have limited attention spans and can only take in so much information at a time. The limited nature of this space combined with its semi-autonomy from economics and politics makes it likely that differences of wealth and status that are permissible under Rawls's difference principle will be amplified. Wealth cannot be directly converted into academic credentials, professional reputation, and membership in networks of artists or authors, but it can facilitate the acquisition of these resources. In turn, these resources can provide their holders with an outsized voice in articulating conceptions of the good in the space of culture.[65]

The case of literature illustrates how representatives in the original position might understand culture to operate. In the domain of literature, "prestige is the quintessential form [that] power takes . . . the intangible authority unquestioningly accorded to the oldest, noblest, most legitimate (the terms being almost synonymous) literatures . . . ."[66] Domination in "world literary space" exists in a variety of forms, including "linguistic, literary and

61 Thus, "culture" in modern times could provide "the rickety shelter where the values and energies which industrial capitalism had no use for could take refuge . . . ." TERRY EAGLETON, AFTER HOURS THEORY 25 (2003).

62 *See* Bourdieu, *supra* note 49, at 283.

63 *See* RAWLS, *supra* note 4, at 10.

64 *Id.* at 111.

65 *See* PIERRE BOURDIEU, THE SOCIAL STRUCTURES OF THE ECONOMY 11 (Chris Turner trans., 2005).

66 Pascale Casanova, *Literature as a World*, 31 NEW LEFT REV. 71, 83 (2005).

political domination."[67] These three forms of domination "overlap, interpenetrate and obscure one another to such an extent that often only the most obvious form—political-economic domination—can be seen,"[68] but because literature has its own non-economic measures of worth, literary domination differs from political and economic domination. Nobel Prizes in literature, for instance, are not awarded exclusively to authors from wealthy countries but are awarded exclusively to authors whose writing engages in a particular manner with a chain of canonized literature going back to writings produced several hundred years ago in the Rhine Valley.[69] Because literary power can be accumulated semi-independently of economic and political power, inequalities permitted by Rawls's difference principle can grow into intractable domination in literary space, allowing those individuals—like authors and editors—and entities—like the Nobel Prize committee—who control access to literary prestige to act as gatekeepers, determining who can and cannot contribute their expression to world literary space.[70]

I take the foregoing description of the economics of literary production to be sufficiently abstract to count as general knowledge about political sociology available to the parties in the original position. Likewise, it seems apparent that something like this account can be extended to visual art as well.[71] Extending this theory of how bourgeois "high" art and literature operate to "low" cultural production is trickier. Does the production of, for instance, television programming allow individuals and institutions to accumulate power over time, gradually leading to the accentuation and exaggeration of inequalities? An optimistic view is taken by John Fiske, who argues that television is "a text of contestation which contains forces of

67 *Id.* at 72, 86.

68 *Id.* at 86.

69 *See id.* at 74–75, 83.

70 Such control is not just arbitrary; power can be accumulated in world literary space over time precisely because access to the literary center is determined by how literary texts relate to the existing world literary canon. If an author writes a novel that engages in the "right way" with the tradition that makes up the global literary center, the gatekeepers are supposed to grant the novelist admission, and they often actually do so. This is demonstrated by the entry of "post-colonial" authors from Jean Rhys to Salman Rushdie into the world literary canon. This non-arbitrary control is still a form of domination insofar as the standards for literary prestige are set by an elite cartel, rather than democratically. *See* Pascale Casanova, The World Republic of Letters 117–18 (M.B. DeBevoise trans., 2004).

71 *See* Bourdieu, *supra* note 61, at 40–41.

closure and of openness and . . . allows viewers to make meanings that are subculturally pertinent to them . . . ."[72]

Other cultural theorists, however, are not as sanguine about the "openness" of late capitalist cultural production. Max Horkheimer and Theodor Adorno argue that the "culture industry" dominates the field of popular production, and that accumulations of capital are necessary to develop mass culture.[73] Only "those who are already part of the system or are co-opted into it by the decisions of banks and industrial capital, can enter the pseudomarket [of culture] as sellers."[74] Liberties to write, to make music, or to make movies are not worth the same amount to everyone. Some people are far better positioned to make use of these liberties than are others.

One may wonder whether technological developments in the past-half century, and especially the internet, have fragmented "the culture industry." The development of networked information economies has increased the number of people who participate in cultural production and who can define what culture they consume and how they consume it.[75] Nevertheless, contemporary cultural theorists suggest that in spite of technological changes in cultural production, it is still dominated by heavily capitalized institutional actors that aim to satisfy highly conventional consumer preferences.[76] When the technological platforms on which cultural consumers and producers rely encourage users to create in a manner that is primarily lucrative for media corporations, the potentially "critical" cultural

72 FISKE, *supra* note 13, at 239.

73 MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTIC OF ENGLIGHTENMENT: PHILOSOPHICAL FRAGMENTS 131 (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., 2002).

74 *Id.*

75 YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 138–39 (2006).

76 *See* ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 137 (2017); *see also* Jessa Crispin, *Bookslut Was Born in an Era of Internet Freedom. Today's Web Has Killed It*, GUARDIAN (May 16, 2016, 8:50 EDT), http://www.theguardian.com/books/booksblog/2016/may/16/bookslut-was-born-in-an-era-of-internet-freedom-todays-web-has-killed-it (explaining that the literary website, *Bookslut*, closed because "[i]n order to make enough money to run a real publication [online], you have to write about books everyone has already heard of. You have to indulge in clickbait. You have to narrow your conversation down to the one that is already happening elsewhere. This reinforces the white male-dominated paradigm, where one type of voice is elevated above all others.").

speech of users is reabsorbed into preexisting media models.[77]

Furthermore, historical and empirical scholarship suggests that the disruptive effects of innovations like the development of the internet on cultural production may be short-lived. Tim Wu argues that innovations, including radio and film, initially disrupted culture industry incumbents but grew over time to be dominated by monopolists or cartels that centralized economic and cultural power.[78] Bradi Heaberlin and Simon DeDeo argue that when Wikipedia began it was characterized by a decentralized, democratic system of editing, but over time a "leadership class with privileged access to information and social networks" emerged that relies on norms created early in Wikipedia's existence and gradually institutionalized over time to sustain its power.[79] These findings suggest that there is a good reason to worry that even strongly consumer-driven internet culture is susceptible to risks of centralization of gate-keeping power in the hands of a small number of corporations or individuals.

This description of culture as a limited space relies on a premise that culture is, in some respects, a competitive space. Scholars of culture do not universally accept this premise.[80] However, there is at minimum a meaningful risk of the centralization and de-democratization of cultural power even in societies with democratic political institutions and technologies, like the internet, that lower barriers to entry into the ranks of cultural producers. However the basic structure of society is constituted, cultural space will tend to

77 *See generally* Eduardo Navas, *Culture and Remix: A Theory of Cultural Sublation*, *in* The Routledge Companion to Remix Studies 102 (Eduardo Navas, Owen Gallagher & xtine burrough eds., 2015).

78 Tim Wu, The Master Switch: The Rise and Fall of Information Empires 159–67 (2011).

79 Jennifer Ouellette, *Wikipedia Is Basically a Corporate Bureaucracy, According to a New Study*, Gizmodo (Apr. 25, 2016, 7:15 PM), http://gizmodo.com/wikipedia-is-basically-a-corporate-bureaucracy-accordi-1746955234 (quoting Simon DeDeo); Bradi Heaberlin & Simon DeDeo, *The Evolution of Wikipedia's Norm Network*, Future Internet (Apr. 20, 2016) https://www.mdpi.com/1999-5903/8/2/14/htm; see also Jinhyuk Yun, Sang Hoon Lee & Hawoong Jeong, Intellectual Interchanges in the History of the Massive Online Open-Editing Encyclopedia, Wikipedia, 93 Physical Rev. E 012307-1, 012307-9 (2016) (articles on English language Wikipedia that people are highly attracted to edit grow longer, which reduces the number of editors willing to participate and brings about inequality among the editors, which becomes more severe with time).

80 *See, e.g.*, Jonathan Riley, *Defending Cultural Pluralism: Within Liberal Limits*, 30 Pol. Theory 68, 78–91 (2002) (defending a liberal pluralist theory of culture).

be limited because it, like politics, is a shared public facility. There is, therefore, a risk that cultural power will tend to accumulate in a few hands when moderate economic inequality is tolerated.[81]

The picture of culture as a limited and competitive space is crucial to establishing that semiotic justice is required by Rawls's first principle. Anyone who denies that cultural power is distinct from underlying economic and political power is likely to think that any principle of political justice focused specifically on cultural liberties is superfluous. If cultural space does not systematically tend to allow accumulation of cultural power, then Rawls's two principles may produce the best outcomes for cultural liberties that can be achieved in a democratic society without incorporating additional protections specifically for the cultural liberties. Those who reject the view of culture presented here might, however, agree that it is important to protect the fair value of the cultural liberties as a constitutional essential, for the reasons presented in the following section, but locate the rationale for doing so in the need to protect the fair value of the political liberties.

2. Culture and the Good

Having established the "general commonsense facts" about culture that trustees in the original position possess, the second step in the argument for the proviso of semiotic justice is to establish that the shape of a culture is tightly connected to the ability of participants to form, revise, and pursue their own conceptions of the good. While the range of possible conceptions of the good is not strictly limited to the exact set of such conceptions in a culture in which one is born, the vast majority of conceptions of the good that persons exercising the second moral power will form over the course of a complete life will fall more or less in the range of conceptions of the good in the society or societies in which they live most of their lives.[82] Cognitive psychologists might describe this as the result

81 *Cf.* Daniels, *supra* note 32, at 257 ("If one thought that the mechanisms through which unequal wealth operates to destroy equal liberty were simple and insolatable, then perhaps constitutional provisions could be devised to solve the problem. Rawls . . . suggests constitutional provisions for the public funding of political parties and for the subsidy of public debate. . . . But there is little reason to believe that the mechanisms are so simple and that such safeguards would work.").

82 *See* Talcott Parsons, *The Place of Ultimate Values in Sociological Theory*, 45 INT'L J. ETHICS 282, 295–96 (1935); Ronald Fischer & Ype H. Poortinga, *Are Cultural Values the Same as the Values of Individuals? An Examination of Similarities in Personal,*

of an availability heuristic.[83] This availability may also harden, in certain circumstances, into something like "ideology," systematically foreclosing particular conceptions of the good.[84] Furthermore, culture is one of the vital fields in which conceptions of the good are presented, worked out, revised, and evaluated in public.

One of the central insights of democratic theories of culture developed by intellectual property scholars is the claim that decisions about how to organize public cultural spaces deeply impact individuals' ability to autonomously shape their own understandings of what a good life looks like.[85] As Jack M. Balkin argues,"[p]articipation in culture is important because we are made of culture; the right to participate in culture is valuable because it lets us have a say in the forces that shape the world we live in and make us who we are."[86] Try as one might to make oneself independent from others, one's ideas of what a good life looks like depend deeply on others.[87] An individual can build on others' ideas, but, at least for the vast majority of people, it is possible to diverge only so far from other people's conception of the good. Certain forms of life appear as "necessary" or "impossible" because of settlement of both politics and culture.[88]

For instance, imagine a society in which almost all cultural expression expressed the beliefs that "the relation of male to female is that of natural superior to natural inferior"[89] and that "a man's and a woman's courage and temperance differ."[90] If the cultural understanding of gender were thick enough, there would be no

Social and Cultural Value Structures, 12 Int'l J. Cross Cultural Mgmt. 157, 165–66 (2012).

83 *See* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 Cognitive Psychol. 207, 208–09 (1973).

84 *See, e.g.*, Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 Signs 515, 542–43 (1982) (describing how "male power" acts as an ideological "myth that makes itself true").

85 *See* Bracha & Syed, *supra* note 4, at 254–56.

86 Balkin, *supra* note 4, at 6.

87 *See* Frank I. Michelman, *The Priority of Liberty: Rawls and "Tiers of Scrutiny", in* Rawls's Political Liberalism, 175, 188–89 (Thom Brooks & Martha Nussbaum eds., 2015) (noting the importance of "open access to the conversation of humankind distant and close" to the "formation, revision, and pursuit of an individual conception of the good. . . .").

88 *See* Roberto Mangabeira Unger, The Self Awakened: Pragmatism Unbound 49 (2007).

89 Aristotle, Politics 1254^{b}13–15 (C.D.C. Reeve trans., 1998).

90 *Id.* at 1277^{b}20.

reason to see gendered differences in distribution as requiring any sort of special scrutiny. If the least advantaged members of a society turned out to be women, this would provide no reason for suspicion about the justice of the basic structure: from the standpoint of the hypothetical society, women are naturally ruled by men, so it should not come as any surprise if most government offices are held by men. Furthermore, people might see this difference as advantageous for women: their temperaments are fundamentally different from those of men, and they do not benefit from offices that require them to lead public lives.[91]

In such a society, claims about gender would not present themselves as political claims. The political discourse of the hypothetical society could be completely devoid of any discussion of gender, and such claims would present themselves as "general commonsense facts of human psychology."[92] Perhaps Rawls's political conception of the person in its articulation through the two principles of justice could solve much of this problem. The use of primary goods to measure welfare in the difference principle should guarantee women access to as many primary goods as men. Additionally, fair equality of opportunity will ensure that a system of "careers open to talents" prevails as part of the constitutional essentials and will ensure that women who wish to pursue the talents necessary for a career have access to the resources, like education, necessary to do so.[93] The first principle will also guarantee that all of the basic liberties are, at the least, formally open to women as well as men.[94] But ensuring that these liberties have their fair value to women seems much harder: women might not participate in public cultural expression, but, the hypothetical society might say, there is no reason that this is unfair; it simply reflects the lesser talent of women, who have the rights to write novels and act in plays but choose not to do so because of their feminine temperament or their lack of talent. If it so happens that, over time, it becomes harder and harder for women to participate in shaping the culture because networks that control access to cultural production are controlled

91 *See* CORDELIA FINE, DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE 67–77 (2010) (describing and debunking such theories).

92 RAWLS, *supra* note 4, at 101.

93 *See id.* at 47 ("[S]ome principle of opportunity is a constitutional essential—for example, a principle requiring an open society, one with careers open to talents . . . .").

94 *See id.* at 167.

by men who share the background cultural beliefs about gender, this may be no cause for concern, because the people getting shut out from cultural production are the people with less talent.

Perhaps such an accumulation of power would violate fair equality of opportunity. But in a society that operated with a definition of "native endowments" that saw gender as part of one's endowment of talent to accomplish particular aims, the hypothetical society's interpretation of fair equality of opportunity might be permissible.[95]

The difference principle might require that women have other opportunities open to them, but this is possible in the hypothetical society. Women might, for instance, have opportunities to excel in domesticity that men do not have. At the legislative stage, when the legislators make complex inferences about social and economic facts, it is difficult to see how justice as fairness could exclude the cultural background that shapes beliefs about the reality of gender. The thick cultural belief about gender that I described applies equally to all domains of the hypothetical society. Women could participate in government in this society—and could even think of themselves as political equals of men—but could remain committed to the social inequality of men and women.

Now, perhaps this hypothetical society is not so bad; at the very least, with all of its constitutional safeguards in place, it looks like the sort of decent hierarchical society that Rawls thinks liberal societies should tolerate.[96] However, it is hard to believe that such a society is made up of free and equal citizens.[97] This problem could be overcome with a constitutional guarantee of the fair value of the cultural liberties, clearly spelling out that the liberties of participating in culture must have roughly the same worth for all citizens. To avoid illegitimacy, all citizens must have a meaningful chance to challenge the culture that makes some social arrangements seem possible and others impossible. Any social arrangements that allow some citizens' cultural contributions to be disregarded because they are disliked by a clique of non-democratic elites, or because other citizens will

95 For Rawls, fair equality of opportunity requires that, "supposing that there is a distribution of native endowments, those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin . . . ." *Id.* at 44.

96 *See* John Rawls, The Law of the Peoples 62–70 (1999).

97 *See* Susan Moller Okin, Political Liberalism, Justice, and Gender, 105 Ethics 23, 29 (1994); *see also* Justin Schwartz, *Rights of Inequality: Rawlsian Justice, Equal Opportunity, and the Status of the Family*, 7 Legal Theory 83, 87 (2001).

not listen to the contributors' ideas due to the contributors' race, gender, class, or social position, fail to provide the fair equal access to culture needed for liberal legitimacy.[98]

If this picture of cultural power is correct, the ability of certain actors to accumulate cultural capital and exercise disproportionate power over the field of culture that prevents other citizens from participating in the give and take of cultural life, in turn, prevents citizens from forming their own conceptions of the good. Because of the extent to which conceptions of the good are endogenous to the articulations of these conceptions in cultural space, in order to fully develop and realize the second moral power, citizens must be able to participate in shaping culture, expressing their conceptions of good in the shared facility of culture.

3. A New Proviso and Its Meaning

It is possible that access to cultural space will be distorted by otherwise-permissible inequalities in wealth, power, and prestige in much the same way that political space would be so distorted without Rawls's proviso of the fair value of the equal political liberties. Such a distortion will similarly undermine the capacities of the parties to social cooperation to develop the two moral powers, particularly the second, over the course of their lives. To address the possibility of such distortions, it is necessary for Rawlsian political theorists to modify the two principles of justice with an additional proviso of semiotic justice. The proviso of semiotic justice provides the following:

> (1) The worth of all cultural liberties to all citizens, whatever their economic or social position, must be sufficiently equal in the sense that all have a fair opportunity to contribute to public cultural expression and to affect the content of artistic, literary, media,

98 Rawlsian liberals might worry that such a requirement slides toward compelled listening. A constitutional guarantee of the fair value of the cultural liberties does not suggest that citizens must be legally compelled to listen to one another's cultural contributions, as the constitutional essentials might be satisfied by a wide range of legal regimes. The suggestion made here is that citizens must not reject other citizens' cultural contributions because of their gender, just as citizens must not refuse to vote for candidates for public office because of their gender. *Cf.* RAWLS, *supra* note 4, at 166 ("If the so-called private sphere is a space alleged to be exempt from justice, then there is no such thing.").

> and other cultural production.

As with the proviso of the fair value of the equal political liberties, this idea "parallels that of fair equality of opportunity in the second principle."[99]

> (2) Furthermore, when the parties adopt the two principles of justice in the original position, they understand the first principle to include the proviso of semiotic justice.

When integrated into Rawls's account of justice, semiotic justice will lead to the inclusion in the first principle of justice of "a proviso that the equal political liberties [and the cultural liberties,] and only these liberties, are to be guaranteed their fair value."[100]

Rawls's proviso of the fair value of political liberties insulates a democracy's political life from non-political influences. It guards against political action that reflects inequalities of wealth or status rather than citizens' considered judgments about how best to achieve justice.[101] Similarly, semiotic justice protects a democracy's cultural life from unfair control by economically or politically powerful people. It insulates the judgments that citizens make about what is valuable or worthwhile in life from being shaped or unfairly influenced by inequalities of wealth or status that have nothing to do with citizen's autonomous, non-instrumental judgments about the good. This is not to deny that cultural liberties and political liberties overlap. Similar basic liberties, including rights of freedom of conscience and expression, enable citizens to participate in both the political life and the cultural life of their communities.[102] The novel feature of semiotic justice is that it protects the fair value of liberties that are not needed to realize the first moral power but are nevertheless needed to realize the second.[103]

99 *Id.* at 149.

100 *Id.*

101 *See id.* at 51.

102 *See* Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 Nw. L. Rev. 1053, 1054 (2016) ("Freedom of speech does more than protect democracy; it also promotes a democratic culture."); *see also* Rawls, *supra* note 4, at 169 (describing the role that free speech plays in the political life of liberal democracies).

103 Rawls might note that our shared culture shapes our understanding of what social arrangements are politically possible. Therefore, respecting the fair

There are two manners in which semiotic justice can be violated. First, semiotic justice is violated when attempts at cultural participation (e.g., submissions of manuscripts for publication, attempts to secure production money for screenplays, or efforts to sell records to consumers) are assessed other than on the basis of what individual citizens, in their role as primary evaluators of culture, believe to be culturally good or worthwhile.[104] When some citizens cannot participate in cultural production because they hold a view of the good that diverges from the view of the good held by non-democratic gatekeepers—such as when elite networks of tastemakers whose views of the good do not represent those of typical citizens control access to cultural markets—access to the second moral power is compromised.[105]

Second, even in the absence of non-democratic gatekeepers, semiotic justice is violated when the access of some citizens to a cultural voice is foreclosed because other citizens refuse to entertain their proposed contributions to the culture on the basis of features that do not reflect their cultural talent and motivation, such as their race, gender, class, or social position.[106] When citizens cannot have their voices heard about what a good culture looks like, not because others disagree with them about the nature of the good but because of who they are, the second moral power is compromised.[107]

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value of the political liberties already requires guaranteeing the fair value of cultural liberties. On this interpretation, the fair value of the political liberties would entail exactly the same reform agenda as semiotic justice. While I would be happy with this outcome, I argue directly from the two moral powers to a guarantee of the fair value of the cultural liberties because I regard culture as semi-autonomous from politics and so regard this strategy as overly reductive in its description of culture. *See supra* note 62 and accompanying text.

104 This claim raises questions about how minority tastes get developed and published. See *infra* note 140 and accompanying text for a discussion of the role of subcultural tastes in semiotic justice.

105 *See* RAWLS, *supra* note 4, at 18–19.

106 *Social position* is defined here to encompass socially salient ideological commitments about the good that are associated with membership in or control of institutions that manage or restrict access to a society's cultural space, like religion, as well as personal characteristics, like personal grooming, tone of voice, and physical appearance. *Cf.* Harris v. Capital Growth Inv'rs XIV, 805 P.2d 873, 874, 883, 897 (Cal. 1991) (defining "personal characteristics").

107 This relies on a background claim that racist judgments are not judgments about what is non-instrumentally worthwhile but are instead instrumental actions, aimed at reinforcing social hierarchies and subordination. A Nietzschean white supremacist might insist that his racist dismissal of cultural contributions actually is a non-instrumental judgment about the

Because the fair value of the cultural liberties can be compromised even in the absence of non-democratic gatekeepers, respecting the requirements of semiotic justice requires that citizens make their own autonomous judgments about the value of contributions to culture. Citizens must not outsource such judgments by relying on irrelevant social markers that bear no relationship to their own judgments about what is non-instrumentally good, like race or gender.

This is not to suggest that semiotic justice is violated simply by the fact that some people are popular or influential creators or critics of cultural goods. Just as Rawls's fair value proviso is not violated simply because one person happens to have a better chance than another of being elected president because they are a more charismatic political speaker, semiotic justice is not necessarily violated if one person publishes a novel while another does not.[108] Even if only a small number of people get their novels published or their movies produced, semiotic justice is not violated as long as the secondary markets through which those novels and films get made operate fairly.[109] If citizens all had roughly the same opportunity to influence which novels are published then it would not be a problem from the standpoint of semiotic justice if one person could not get anyone to publish their novel. On the other hand, semiotic justice might be violated if only novelists who had already published, or only novelists who wrote in the style endorsed by a small, non-democratic cartel of publishers, could publish. If citizens all had roughly equal economic resources, they could vote with their pocketbooks for the sort of novels that they think are worthwhile. When secondary markets efficiently aggregate the autonomous cultural judgments of economically equal citizens, they can provide a mechanism for the democratic control of culture. If, on the other hand, such markets are controlled by cultural elites who do not respond to economic incentives, or if citizens possess greatly unequal economic resources, then secondary markets cannot, by themselves, provide for semiotic justice.[110]

good, because a white culture is non-instrumentally valuable, but such a racist is already far beyond the bounds of liberal reciprocity. *See* Rawls, *supra* note 96, at 126.

108 I owe this point to Seana Shiffrin (personal conversation).

109 I owe this point to Robert D. Goldstein (personal conversation).

110 It might be worried that semiotic justice will lead to a decimation of "high culture," leading to an end to publicly supported art that is valuable but unpopular, since high concept poetry and avant-garde theater might be

The fact that semiotic justice may be violated if publishers only accept novels from novelists who inhabit elite social circles or who write in the style that the cartel of publishers endorses as acceptable does not suggest that blind review by publishers should be legally mandated. The laws required to ensure semiotic justice need not include the direct legal regulation of how publishers make decisions about what to print. There are a range of institutional configurations that can provide the conditions for the fair value of cultural liberties. The legal apparatus used to guarantee semiotic justice could function by limiting accumulations of wealth that tend to produce inequalities of status and power over time, by ensuring more competition among publishers, or by sponsoring publicly funded presses that are controlled by democratically elected officials.[111] At the same time, direct legal regulation of publishers' decisions cannot be flatly excluded on the grounds of free speech, because the fair value of cultural liberties is as primary as are the other equal basic liberties. When these liberties conflict in particular cases, "their claims must be adjusted to fit into one coherent scheme of liberties."[112]

Semiotic justice is neither exclusively about rights to participate in cultural production nor exclusively about rights to participate in cultural consumption. Semiotic justice aims to guarantee everyone a fair chance to have a say about the culture that they live in. Productive cultural activities, like writing poetry or making paintings, can obviously contribute to the shared culture that people inhabit. Consumptive choices also shape the culture, both by serving as a form of self-expression[113] and by incentivizing the production of certain cultural goods by creating a market for them. A reader who purchases a novel helps to create a market for the novel

thought to have little "democratic appeal." This concern is misplaced because people can have different higher and lower order cultural preferences and can reflectively endorse the difference between the two. A reader can want complex fiction with temporally discontinuous narratives to be funded and produced even if, more often than not, they would rather read "trashy" science fiction.

111 *See* Jen Kreder, *Should Government Publish Books?*, PRAWFSBLOG (Feb. 26, 2018, 9:45 AM), http://prawfsblawg.blogs.com/prawfsblawg/2018/02/should-government-publish-books.html (arguing in favor of public sponsorship of university presses on the grounds that "[t]he impact of writing . . . is in the dissemination of the ideas expressed to an audience—now or in the future" and "[i]t is the rare self-published book that finds a significant audience.").

112 RAWLS, *supra* note 4, at 104.

113 *See* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 567–68 (2004).

and others of its kind, and if they form their own interpretations of the novel as they read it, they may then discuss their interpretation with their friends and thereby help to shape the cultural reception of the novel. Semiotic justice requires a rough equality of access to all culture-shaping activities, both the productive and the consumptive, because these activities are the mechanisms through which individuals exchange views and coordinate with one another about conceptions of the good.[114]

Finally, semiotic justice is a statement of a constitutional essential that is integrated into the first principle of justice, rather than a clarification of the meaning of the principle of fair equality of opportunity and the difference principle, which apply to laws regulating culture in the legislative and judicial stages. The urgency of the cultural liberties is so great that they number among the constitutional essentials for a just society: if the fair value of liberties to contribute to public cultural expression and to affect the content of artistic, literary, media, and other cultural production is not guaranteed, citizens risk losing the opportunity to develop their second moral power, a risk that they must be unwilling to take, given Rawls's political conception of the person.[115] The constitutional essentials—those items necessary for a constitution to be legitimate—include the first principle of justice along with some narrow principle "requiring an open society, one with careers open to talents" and a "social minimum providing for the basic needs of all citizens."[116] The principle of an open society and the social minimum are much narrower than the principle of fair equality of opportunity and the difference principle, respectively, but the first principle in its entirety forms a constitutional essential. That the proviso of semiotic justice is a constitutional essential is not the same as saying that it should be judicially enforceable, however.[117] A

114 However, because productive activities tend to shape culture more significantly than do consumptive activities, semiotic justice will tend to require that all citizens have roughly equal ability to participate in culture as producers, not just as consumers.

115 *See* Rawls, *supra* note 4, at 105.

116 *Id.* at 47–48.

117 *See* Frank I. Michelman, *The Constitution, Social Rights and Liberal Political Justification*, *in* Exploring Social Rights: Between Theory and Practice 21, 26 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007) (noting that some constitutional norms are meant to be fully binding and obligatory for officials to whom they apply even though "we do not expect or wish our judiciary to get too much mixed up with enforcing compliance" with them).

constitution could include the proviso of semiotic justice, but this proviso might be accompanied by a "judges, keep out" sign leaving enforcement of the proviso up to the legislature, the executive, and the citizens themselves.[118]

In many respects, the requirements of semiotic justice are similar to those of fair equality of opportunity. Fair equality of opportunity, like semiotic justice, requires that positions of cultural prestige be open to all who are equally talented and motivated to contribute to culture.[119] However, for Rawls, fair equality of opportunity is not part of the constitutional essentials of a liberal democracy, so it must give way when and if it comes into conflict with guaranteeing the equal basic liberties of the first principle.[120] Seana Shiffrin has argued that fair equality of opportunity *should* be included among the constitutional essentials, even if Rawls failed to explicitly locate it there.[121] In Shiffrin's view, "insulat[ing] access to employment and positions of power from the influence of morally arbitrary factors, such as race, gender, and class position" makes "perfect sense" given the moral interests of parties to democratic social cooperation.[122] The argument for semiotic justice is compatible with, yet distinct from, Shiffrin's argument. While Shiffrin's argument focuses on the connection between *work* and the formation and pursuit of conceptions of the good,[123] semiotic justice focuses on the role that participating in culture, whether or not as part of one's occupation, plays in realizing the moral powers.

118 *See* Lawrence Sager, *Material Rights, Underenforcement, and the Adjudication Thesis*, 90 B.U. L. REV. 579, 580 (2010) ("[A] conscientious constitutional court will on some occasions stop short of fully enforcing the Constitution because of particular features of the judicial process, but . . . these institutional limitations on the judiciary do not mark the substantive boundaries of the Constitution."); Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 244 (2008); *see also* Rehan Abeyratne, *Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy*, 39 BROOK. J. INT'L L. 1, 7 (2014) (discussing the Directive Principles of State Policy in the Indian constitution in the framework of Rawlsian constitutional theory). *But see* Shiffrin, *supra* note 14, at 1675 (arguing that the vagueness of fair value rights is often no worse for judicial enforcement than is the vagueness of formal equal basic liberties).

119 *See* RAWLS, *supra* note 24, at 73 ("In all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed.").

120 *See* RAWLS, *supra* note 4, at 47.

121 Shiffrin, *supra* note 14, at 1672–73.

122 *Id.* at 1653.

123 *Id.* at 1666

B. Objections

Rawls might offer three objections to the argument that a guarantee of the fair value of the cultural liberties must be added to his first principle of justice. This section considers and responds to each of these objections.

1. Why Extend the Fair Value of Equal Basic Liberties Beyond Discrete Competitions?

In arguing that Rawls's rationale for guaranteeing the fair value of the political liberties also applies to the fair value of the cultural liberties, this article has assumed that Rawls's proviso of the fair value of political liberties should be broadly interpreted to protect the exercise of these liberties in a wide range of settings where citizens pursue their conceptions of justice, including elections, formal and informal debates about policy proposals, and also public discussions about the proper aims of government.[124]

An alternative reading of Rawls's proviso regards it as more narrowly focused on political contests, like elections, which are discrete events with clear winners and losers.[125] Under this reading, the purpose of the proviso is to insulate elections from the influence of money and so allow the outcomes of elections to be guided by citizens' political commitments weighted roughly equally, rather than by the political commitments of the wealthiest or most powerful citizens.[126] The "limited space of the public political forum" refers to the limited space of electoral discourse, where there are a small number of discrete options to be debated by citizens.[127] This interpretation of Rawls's proviso is attractive because the public facility consisting of elections and party politics is designed to "control the entry into positions of political authority," and this facility needs protection to ensure that equal citizenship is not undermined over time.[128]

Additionally, narrowing the scope of Rawls's proviso prevents it from becoming unworkable. Because beliefs about justice

124 *See supra* notes 39, 50 and accompanying text.

125 *See* Shiffrin, *supra* note 14, at 1670–71.

126 *See id.* at 1649.

127 *See* Rawls, *supra* note 4, at 150.

128 *Id.* at 149–50; *see* Robert C. Hughes, *Responsive Government and Duties of Conscience*, 5 Juris. 244, 245 (2014) (arguing that for a government to be democratic, "[c]itizens who regard the law as unjust and who diligently advance a sensible argument for changing it must be justified in believing that their efforts could, in time, help to bring about the change they seek.").

connect with so many other aspects of life, protecting the fair value of the political liberties under the broad reading might require guaranteeing, as a matter of the constitutional essentials, the fair value of all of the equal basic liberties. While we might worry about violations of the fair value of basic political liberties in contexts other than elections, proponents of the narrow reading might argue, such violations are unlikely to cascade into an entrenched advantage in the way that unfair control over electoral processes are. As long as the electoral processes remain fair, these processes can be used to reassert democratic control of other political institutions.[129] If Rawls's fair value proviso applies only to discrete political contests, it might be much less contentious than the proviso of semiotic justice, which cannot be limited in application to discrete contests because culture, for the most part, lacks contests with clear winners and losers.

In spite of its attractions, however, the narrow reading of Rawls's fair value proviso should be rejected in favor of a broader understanding of the settings to which fair value applies. One aim of guaranteeing the fair value of the political liberties "is to enable legislators and political parties to be independent of large concentrations of private economic and social power," but the rationale for protecting the political liberties extends beyond elections.[130] As donors seeking to influence elections have long realized, money can be used to help shape electoral outcomes even when it is not spent advocating for or against the election of particular candidates, but also when it is spent on ideological advocacy for certain political issues in the lead up to an election.[131]

If Rawls's fair value proviso applies only to elections and other contest-like political activities, it could still be interpreted

129 *See* ALEXANDER M. BICKETL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18–19 (2d ed. 1986).

130 RAWLS, *supra* note 4, at 150; *see* Meena Krishnamurthy, *Completing Rawls's Argument for Equal Political Liberty and Its Fair Value: The Argument from Self-Respect*, 43 CAN. J. PHIL. 179, 199 (2013) ("[T]hough equal political liberty requires that equal voting rights are ensured, the fair value of political liberty requires more than this, that is, if each of those holding votes are to have equally effective influence over political decision-making.").

131 *See* Floyd Norris, *A Fine Line Between Social and Political*, N.Y. TIMES, May 17, 2013, at B1 (noting that large numbers of "social welfare" nonprofits spent large amounts of money in the 2012 presidential election on advertisements "to promote issues" that "did not actually back a candidate" so that they "could qualify as . . . nonpolitical issue advertisement[s]").

expansively to limit the role that money can play in electioneering issue ads meant to influence the outcomes of elections. However, even this interpretation is insufficiently broad. The outcomes of elections can be influenced more indirectly. As Jane Mayer has documented, in the late twentieth-century United States, conservative organizations backed by wealthy donors sought to wage a battle of ideas to make libertarian free-market commitments more palatable to mainstream politicians.[132] Sophisticated conservative foundations sought to affect political outcomes not just by influencing voters but by injecting their ideological stances into universities, think tanks, and nonprofits.[133] Even if one rejects the empirical details of Mayer's account of the influence of conservative foundations on American politics, the possibility that a democracy's political culture can be reshaped by wealthy individuals or institutions suggests that the guarantee of the fair value of the political liberties should be expanded beyond elections and party politics. The exercise of the first moral power is just as imperiled by the possibility that a whole political culture can be influenced by money as by the possibility that elections can be influenced. Interpreting Rawls's proviso to constitutionally guarantee the fair value of the political liberties in all the domains of life in which political values are collectively formulated and contested ensures that a democracy's political culture cannot be compromised by the powerful.[134]

The broad interpretation of Rawls's proviso advanced here still regards politics as a competition about political values, where succeeding at the competition means having one's political values accepted by the community. Similarly, culture is a competition about access to a space that people pay attention to. In the limited public facility of culture, people compete to articulate their ideas of the

132 *See generally* Jane Mayer, Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right (2016).

133 *See id.* at 93, 102, 156; *see also* John J. Miller, Strategic Investment in Ideas: How Two Foundations Reshaped America 17 (2003), https://www.philanthropyroundtable.org/docs/default-source/guidebook-files/how_two_foundations_reshaped_america1.pdf?sfvrsn=9891a740_0 (praising the John M. Olin foundation for its success at bringing about long-term change in the United States' political culture by using its financial clout to establish "beachheads at the nation's elite colleges and universities").

134 The domain of politics still has "limited space" under this interpretation because there is a limited amount of attention that the members of a community can devote to politics and justice. *See* Rawls, *supra* note 4, at 150.

good and of how best to live together.[135] Just as the moral powers—especially the first—would be compromised if money shaped the political ideas that a community collectively paid attention to, so too the second moral power would be compromised if a wealthy foundation or religious organization used its material resources to systematically alter a community's beliefs about the good. To avoid this possibility, democracies should embrace the proviso of semiotic justice.

Of course, political communities do not inescapably coordinate about the good, as they must coordinate about the right and about government. However, in a community that is committed to ensuring that everyone has an equal opportunity to form their own values and judgments of the good, some degree of coordination about the good is required to ensure that arbitrary entitlements do not leave some citizens with a much greater chance than others to form their own conception of the good. For this reason, semiotic justice might be understood to require modifications to Rawls's political conception of the person. For Rawls, the person is conceptualized as a free rational person reaching an agreement with other free rational persons and is understood to reach a reciprocal agreement as a citizen with other citizens.[136] The reciprocal cooperation that the members of a cooperating society agree upon is cooperation as citizens. Elevating cultural liberties to the level of a constitutional essential reflects a concern with something other than citizenship; now a commitment to creating a space in which people can pursue and revise conceptions of the good *with each other* is on par with the political aims of Kantian persons.[137] Rawls's account of the parties to the original position as reciprocal cooperators might still be

135 Claiming that culture is a competition is not to suggest that culture is merely a struggle for elevated social recognition or for fame. The contest of culture involves taking up existing cultural materials and amplifying, transforming, or destroying them. Culture is competitive because our views of the good life are typically about a good life *together with other people* rather than alone in the wilderness, and because the cultural resources that we take up and transform are shared resources. As success in the competitive space of politics is marked not by achieving power but by achieving one's conception of justice, so success in the competitive space of culture is marked not by achieving fame but by achieving one's conception of the good. *See supra* notes 82–88 and accompanying text.

136 *See* RAWLS, *supra* note 4, at 16.

137 RAWLS, *supra* note 24, at 445 ("[T]he Kantian interpretation of the original position means that the desire to do what is right and just is the main way for persons to express their nature as free and equal rational beings.").

sustained, but the reciprocity cannot be simply reciprocity as citizens.

One might yet wonder whether culture requires the same sort of connection to the state that politics does: because of the role of the basic structure in allocating scarce resources and regulating interpersonal relationships, the first moral power cannot be pursued in isolation in a small enclave cut off from the state. Perhaps the second moral power, in contrast to the first, can be realized in a subculture or a dissident culture that is largely disconnected from mainstream politics and culture.[138] However, because pursuing a conception of the good typically requires access to material resources (cameras to make movies and the like), cultural source material to work with, and the capacity to impact others, the space of culture cannot be strictly segregated from the space of politics.[139] Furthermore, while affordances to participate in subcultures provide a way of exercising the second moral power, subcultural creation does not happen in a vacuum. The broader culture helps to shape what conceptions of the good are thinkable and unthinkable, even for the avant-garde.[140] As soon as the state is involved in shaping the broad cultural landscape by creating schools and universities, regulating school curricula, and funding the arts, humanities, and sciences, the possibility of cordoning culture off from politics is lost.

2. Why Make Semiotic Justice a Constitutional Essential?

Rawls might respond to semiotic justice by arguing that there is no need to turn this additional proviso into a constitutional essential. The fair value of the political liberties is a constitutional essential because of the usefulness of these liberties in making the whole basic structure function effectively and justly.[141] Rawls might highlight four features of justice as fairness: first, guarantees in the first principle of freedom of conscience; second, the likelihood that there would be some overlap in practice between semiotic justice and the guarantee of the fair value of the political liberties; third, the difference principle; and fourth, the principle of fair equality of

138 *See* Paul Gilroy, The Black Atlantic: Modernity and Double Consciousness 7 (1993); Paul C. Taylor, Black is Beautiful: A Philosophy of Black Aesthetics 14–15 (2016).

139 *See* Rawls, *supra* note 4, at 114 ("[A] sufficient material basis for personal independence and a sense of self-respect . . . are essential for the adequate development and exercise of the moral powers.").

140 *See* Rosalind E. Kraus, The Originality of the Avant Garde and Other Modernist Myths 162 (1986).

141 *See* Rawls, *supra* note 4, at 28.

opportunity operating at the legislative stage.[142] Rawls might ask why this set of factors is not good enough to ensure that the cultural liberties have their fair value. These guarantees, Rawls might insist, suffice to ensure that everyone has the best chance to participate in culture that they possibly could have, consistent with the other requirements of justice. For instance, fair equality of opportunity is precisely about the equal opportunity to fully and adequately develop and exercise the first and second moral powers.[143] Fair equality of opportunity would, therefore, likely require the legislature to adopt antitrust-like laws designed to counteract accumulations of cultural power. What difference does it make to put this into the constitution, rather than to leave it to the legislative stage?

To understand the importance of constitutionalizing semiotic justice, consider why Rawls insists that the fair value proviso for the equal political liberties needs to be part of the first principle, rather than postponed to the legislative stage. Rawls suggests that the political liberties are of special importance, because "unless the fair value of these liberties is approximately preserved, just background institutions are unlikely to be either established or maintained."[144] By guaranteeing the fair value of the political liberties at the outset, before the legislative stage is reached, a society can ensure that everyone will be able to fairly participate in the legislative process.[145] If all citizens are able to have their voices heard by the legislature, this will ensure that "the [other] basic liberties are not merely formal."[146] Like Chief Justice Warren's description of the right to vote freely as "preservative of other basic civil and political rights,"[147] or John Hart Ely's advocacy of "a representation-reinforcing approach to judicial review" that supports "the underlying premises of the American system of representative democracy,"[148] the fair value of the equal political liberties is particularly urgent because it makes the political system work, which in turn ensures that the other basic liberties will be realized. The legislative stage cannot take care of the fair value of the political liberties if access to that stage is not itself fair. The reasons for treating the proviso of the fair value of the

142 *See id.* at 44, 47, 61, 148.
143 *Id.* at 20.
144 RAWLS, *supra* note 6, at 327–28.
145 *Id.* at 330.
146 *Id.*
147 Reynolds v. Sims, 377 U.S. 533, 562 (1964).
148 JOHN HART ELY, DEMOCRACY AND DISTRUST 88 (1980).

political liberties as part of the first principle, and hence as part of the constitutional essentials, boils down to the claim that it is "more urgent to settle" the fair value of the political liberties than of the other basic liberties.[149]

My response to this objection has two parts. First, as I have argued above, the contours of culture shape what is politically possible. As the hypothetical society shot through with sex inequality that I describe above illustrates, an undemocratic culture can undermine the conditions necessary for democratic politics.[150]

Second, the fair value of the cultural liberties is particularly urgent because guaranteeing such liberties creates the conditions necessary for political philosophy to do its work. The political philosophizing that gives rise to the political conception of the person is worked up from the "public political culture of a democratic society, in its basic political texts (constitutions and declarations of human rights), and in the historical tradition of the interpretation of those texts."[151] If there are blind spots in the historical traditions in which justice as fairness goes to work, justice as fairness is likely to suffer from similar oversights.[152]

However, a commitment to making culture open and to allowing the conditions against which political philosophy grows up to be contested by all of the people of a cooperating society, provides an avenue to address these oversights. Interventions in culture can bring to light previously unrecognized ways of life,[153] providing resources with which individuals may develop their conceptions of the good and showing philosophers where political philosophy should play its "realistically utopian" role, "probing the limits of practical political possibility."[154] Cultural participation is the sort of expression that creates the conditions of awareness that political

149 Rawls, *supra* note 4, at 49.

150 *See supra* notes 89–98 and accompanying text.

151 Rawls, *supra* note 4, at 19.

152 One piece of evidence for this claim is that Rawls's theory of justice has frequently been criticized for failing to pay sufficient attention to global justice, *see, e.g.*, Thomas W. Pogge, World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms 104–08 (2002), women's rights, *see, e.g.*, Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 Fordham L. Rev. 1537 (2004), and disability, *see, e.g.*, Martha C. Nussbaum, *Capabilities and Disabilities: Justice for Mentally Disabled Citizens*, 30 Phil. Topics 133 (2002), all topics that have historically been overlooked in the history of elite American political discourse.

153 *See* Richard Rorty, Contingency, Irony, and Solidarity 94 (1989).

154 Rawls, *supra* note 4, at 4.

philosophy can then work to incorporate, seeking out voices that cannot be understood in the realm of political philosophy unless they are first articulated in cultural space. For instance, Julie Cohen discusses how the "to and fro" play of culture, which is "neither entirely random nor wholly ordered . . . supplies the unexpected inputs to creative processes, fuels serendipitous consumption by situated users, and inclines audiences toward the new."[155] The unpredictability of culture's movements in response to inputs provides a further resource for destabilizing and rethinking political theory.

Guaranteeing the fair value of the cultural liberties is of similar urgency to guaranteeing the fair value of the political liberties because the cultural background against which politics works, and which informs its conception of the person, determines what sort of institutional arrangements appear reasonable from the perspective of politics. Guaranteeing the fair value of the cultural liberties ensures that the ability to develop and pursue conceptions of the good is a real opportunity to do so, rather than merely an opportunity to endorse the prevailing conceptions of the good in a cooperative society.

3. Is Semiotic Justice Socially Divisive?

A third objection to semiotic justice is that guaranteeing the fair value of basic liberties other than the equal political liberties is socially divisive because it requires committing to a particular conception of the good.

To the contrary, semiotic justice does not articulate a preference for certain conceptions of the good over others within the space of culture that it opens up. This is not to say that semiotic justice is indifferent among all possible conceptions of the good; it excludes conceptions of the good that require a closed or static culture.[156] However, within the space of permissible cultural contestation, semiotic justice need not make controversial suppositions about the good life. Semiotic justice does not assume that participating in culture is necessarily an important and valuable part of individuals' lives, but instead supposes that citizens who wish to pursue their own conception of the good need a cultural environment that is

155 Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1191–92 (2007).

156 *See supra* notes 109–10 and accompanying text.

conducive to that pursuit.[157] Justice as fairness identifies certain "worthy" forms of life and provides sufficient space within itself for those ways of life while also excluding other forms of life.[158] This is permissible for Rawls because the exclusion of some ways of life is based on a political conception of justice that is, "or could be, shared by citizens generally regarded as free and equal" and "do[es] not presuppose any particular fully (or partially) comprehensive doctrine."[159] Semiotic justice's preferences for certain forms of life are likewise rooted in the political conception of the person as having the first and second moral powers, rather than in any commitment to a particular comprehensive conception of the good. Semiotic justice sets up a space of culture, and while it may foreclose the development of conceptions of the good outside of that space, it commits to allowing all of the different conceptions of the good that are able to fit within that space to play out against one another.

III. SEMIOTIC JUSTICE AND LAW

This article has argued that, given several plausible descriptive assumptions about the political economy of culture, Rawls's first principle of justice must guarantee semiotic justice.[160] Just as the fair value of the political liberties is among the constitutional essentials of a liberal society governed by justice as fairness, so too is the fair value of the cultural liberties. This emendation of the first principle is necessary to constitutionally guarantee that a nation's culture is controlled democratically, rather than by the wealthy or the powerful. In this Part, I turn to the question of what it means, in practice, to respect the fair value of the cultural liberties.

Adding items to Rawls's list of constitutional essentials is no simple matter, for Rawls's first principle requires not that each person have a right to each of the equal basic liberties but that each person have a right to "a fully adequate *scheme* of equal basic liberties" that is compatible with everyone else having the same scheme of liberties.[161] The items included among the constitutional essentials may trade off with one another and are treated as equally significant

157 *Cf.* Shiffrin, *supra* note 14, at 1667 (advancing a similar argument that guaranteeing the fair equality of opportunity in employment does not rely on "controversial assumptions about the nature of the good for individuals").

158 *See* RAWLS, *supra* note 4, at 155 n.30.

159 *Id.* at 141.

160 *See supra* Section II(A)(1)–(2).

161 RAWLS, *supra* note 4, at 42–43 (emphasis added).

when they come into conflict.[162] Any resolution of practical conflicts among the constitutional essentials that maintains a scheme of constitutional essentials that is as conducive as possible to every citizen's realization and development of the moral powers and that satisfies the demands of public reason meets the requirements of constitutional legitimacy.[163] Thus, it does not immediately follow from adding the fair value of cultural liberties to the list of constitutional essentials that a political community's laws must be revised in order to be legitimate. To determine what revisions to a partially just society's laws and political institutions would satisfy the requirements of semiotic justice, one must consider whether the totality of the society's laws adequately enable citizens to develop the two moral powers by providing them with a scheme that includes the each of the formal equal basic liberties, a basic social minimum, the fair value of the political liberties, and the fair value of cultural liberties, where all of these liberties are regarded as equally significant.[164]

Like justice as fairness, the constitutional requirements of semiotic justice are multiply realizable.[165] For this reason, the significance of semiotic justice for constitution-making, legislating, and adjudication can best be understood by examining cases that present failures of semiotic justice and considering the reforms that might bring a constitutional order into compliance with the requirements of justice as fairness, generally, and the semiotic justice proviso, specifically. Three cases are presented that illustrate failures of semiotic justice and discuss the range of policy reforms that might bring the constitutional order elucidated by each of these cases more closely into alignment with the requirements of semiotic justice. These cases highlight the range of disparate laws and institutions

162 *See id.* at 149. *But see* Shiffrin, *supra* note 14, at 1672 (arguing that "the idea that whether something is a constitutional essential or not is co-extensive with its place in the system of lexical priority" may be mistaken).

163 Michelman, *supra* note 87, at 195.

164 Here, I follow Frank Michelman in regarding not only written constitutions but also the "governmental totality" of "the entire aggregate of concrete political and legal institutions, practices, laws, and legal interpretations currently in force or occurrent in the country" as potentially relevant to assessing the legitimation-worthiness of a society's constitution. Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345, 347 (2003).

165 *See* RAWLS, *supra* note 4, at 138 (noting that the principles of justice can be satisfied in a range of economic regimes, including both "property-owning democracy" and "liberal socialism").

that play a role in guaranteeing or undermining the fair value of the cultural liberties. Together, these cases show how the requirements of semiotic justice intersect not only with constitutional law, but also with features of private law that often appear politically "neutral." A full evaluation of the reforms surveyed in response to each of these cases is beyond the scope of this Article, as is an assessment of the reforms' political feasibility; rather, the aim is to model how semiotic justice provides a "template against which to assess our achievements" and "a norm against to which to assess what we have neglected and failed to protect."[166]

A. #OscarsSoWhite: Race Discrimination and Cultural Accolades

In 2016, for the second year in a row, exclusively white actors were nominated for Oscar awards by the Academy of Motion Picture Arts and Sciences. A significant number of critically acclaimed films with minority directors and notable performances by black actors were eligible for the 2016 Oscars, including Creed, Straight Outta Compton, Chi-raq, and Beasts of No Nation.[167] Straight Outta Compton, directed by and starring African-Americans but written by a team of white screenwriters, was nominated only for Best Original Screenplay.[168] Protestors objected that the mono-racial Oscar nominations failed to honor the contributions of minority actors, directors, and writers to cinema in 2015.[169] The complaint of protestors was not that the Academy violated state or federal anti-discrimination laws, nor did actors and filmmakers who boycotted the awards ceremony seek interventions from lawmakers or politicians to address discrimination in Oscar nominations.[170] Nonetheless, the phenomenon of #OscarsSoWhite represents a failure of semiotic justice.

To see why the fact that the Academy of Motion Picture Arts and Sciences nominated exclusively white actors for Academy

166 Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 8 (2007).

167 Gray, *supra* note 1.

168 *See id.*

169 Jack Shepherd, *Oscars 2016: Everyone Who Boycotted the Academy Awards and Why, from Jada Pinkett Smith to Spike Lee*, INDEPENDENT (Feb. 28, 2016, 21:47 GMT), http://www.independent.co.uk/arts-entertainment/films/news/oscars-2016-everyone-boycotting-the-academy-awards-and-why-from-jada-pinkett-smith-to-spike-lee-a6902121.html; Ng, *supra* note 1.

170 *See* Ng, *supra* note 1.

Awards in 2015 and 2016 provides prima facie evidence of a failure of the constitutional order of the United States to guarantee the fair value of the cultural liberties, several additional premises are required. First, the Academy Awards serve as the most visible institutional gatekeeper of cinematic prestige in the United States.[171] Such prestige is connected to, but partially independent from, the economics of the film industry. For instance, the Academy does not simply respond to economic indicators when deciding which films and performances to nominate for Oscars—in fact, the films that make the most money at the box office often are not considered "Oscar material."[172] Winning or being nominated for an Oscar can help a film sell tickets, but these accolades also provide a special sort of cultural recognition and canonization for films, making it more likely that audiences and other filmmakers will pay attention to and be influenced by a film.[173] In this institutional and cultural context, mono-racial Oscar nominations constitute a failure of semiotic justice because the decision of the Academy not to nominate African-American filmmakers or actors both provides evidence of and causally contributes to the inability of minority filmmakers—relative to white filmmakers—to participate in shaping American cinematic culture.

It may be objected that no state action is involved—the Academy is a private association, conferring private honors—and so it is inapt to describe its failings as failings of justice. It might further be objected that even if the Academy's failings are failings of justice, they cannot affect the legitimacy of the United States' constitutional order.

While the Academy is indeed a private association, this is not

171 *See, e.g.*, Colleen Kennedy-Karpat, *Trash Cinema and Oscar Gold: Quentin Tarantino, Intertextuality, and Industry Prestige*, *in* ADAPTATION, AWARDS CULTURE, AND THE VALUE OF PRESTIGE 173, 187 n.2 (Colleen Kennedy-Karpat & Eric Sandberg eds., 2017) (treating Academy Awards as the primary marker of prestige in Hollywood).

172 *See* K.K. Rebecca Lai & Jasmine C. Lee, *Box Office Hit or Best Picture at the Oscars? You Can Rarely Have Both*, N.Y. TIMES (Mar. 4, 2018), https://www.nytimes.com/interactive/2018/03/03/movies/oscars-best-picture-box-office.html ("Hit movies rarely go on to become Oscar best picture winners, reflecting a difference in taste between moviegoers and film industry professionals. In the past 30 years, only four movies were named best picture while topping box office charts.").

173 *See* Colleen Kennedy-Karpat & Eric Sandberg, *Adaptation and Systems of Cultural Value*, *in* ADAPTATION, AWARDS CULTURE, AND THE VALUE OF PRESTIGE, *supra* note 171, at 1, 5.

enough to settle the question of whether its decisions in nominating films for Oscars can count as a failure of justice. The Academy's actions constitute one small part of the basic structure and thus only constitute a small part of the failure of semiotic justice in this case.[174] It is not the failure of the Academy by itself that constitutes a failure of constitutional legitimacy, but the total arrangement of laws and political institutions that make it possible for the Academy to exercise a great deal of gatekeeping power over cinematic prestige together with the revealed preference of the Academy's members to exclude minority actors from access to the prestige-conferring Oscars. Even if the Academy is not part of the basic structure, the failure of the Academy to nominate minority actors provides evidence of a failure by the state to respect semiotic justice. A culture in which minority actors and filmmakers do not have fair equal access to the main markers of cultural prestige in the film world is a culture that fails at reciprocity, and failures of reciprocity indicate that a constitutional order is illegitimate.[175]

Consider the following three reforms that the legal and political institutions of the United States (e.g., Congress, legislatures, state and federal courts, and state and federal agencies) could implement in response to #OscarsSoWhite in order to bring the American constitutional order closer to legitimation-worthiness.

First, Congress and state legislatures or state and federal courts could extend anti-discrimination laws to prohibit racial discrimination in the provision of offices and awards held out to the public as honors to be respected.[176] Congress and state legislatures

174 Some of the most prominent actors and filmmakers to boycott the 2016 Oscars, including Jada Pinkett-Smith and Spike Lee, invoked the memory of Martin Luther King in explaining their decision to boycott. *See* Shepherd, *supra* note 169. King, whose campaigns served as an exemplary touchstone for Rawls's conceptions of justice as fairness and political liberalism, targeted economic elites, social organizations like churches, and ordinary citizens "because he conceived of justice as a virtue of persons and civil society, as well as the state or the 'basic structure' of society." Brandon M. Terry, Critical Race Theory and the Tasks of Political Philosophy: On Rawls and "The Racial Contract" 29 (n.d.) (unpublished manuscript on file with the author). As King recognized, the basic structure of society is inextricable from the organization of private institutions and the dispositions of private citizens. *See id.*

175 *See* Rawls, *supra* note 6, at 137.

176 For instance, California could amend its Unruh Civil Rights Act, which states that all persons are "entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of any kind whatsoever" regardless of their race. Cal. Civ. Code § 51(b) (Deering

could, at the same time, modify anti-discrimination laws to allow disparate impact—rather than disparate treatment—to establish a violation of these laws.[177] This strategy would aim to ensure that the Oscars honor more diverse filmmakers and actors in order to avoid liability for violating state or federal anti-discrimination law.

Second, the federal or state governments could provide a universal basic income,[178] institute more progressive property and income taxes,[179] provide reparations for slavery to the descendants of slaves,[180] and increase investments in arts and humanities education in public schools and universities so that the writing and artistic skills needed to contribute to film are more widely accessible.[181] This suite of reforms would aim to change the behavior of the Academy Awards indirectly. By helping to equalize the purchasing power of minority and white movie audiences, these wealth transfers would address the possibility that the decision of the Academy to honor predominantly white filmmakers reflects audience preferences, with white audiences exercising disproportionate influence because of their greater disposable incomes that enable them to spend more on movie tickets, rentals, and purchases.

2019). The California legislature could add a clause entitling all persons to full and equal privileges from "all organizations offering offices and awards that are held out to the public as honors to be respected." Alternatively, the California courts could interpret "all business establishments of every kind whatsoever" to include the Academy of Motion Picture Arts and Sciences' Academy Awards and interpret "full and equal . . . privileges" to include nomination and selection for Academy Awards. *See id.*

177 *See* Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1135–36 (2010) (describing the importance of disparate impact claims); *see also* Ann C. McGinley, Ricci v. DeStefano*: Diluting Disparate Impact and Redefining Disparate Treatment*, 628 NEV. L.J. 626, 629–35 (2012) (describing the distinction between disparate impact and disparate treatment in contemporary federal anti-discrimination law).

178 *See* PHILIPPE VAN PARIJS & YANNICK VANDERBORGHT, BASIC INCOME: A RADICAL PROPOSAL FOR A FREE SOCIETY AND A SANE ECONOMY 5–28 (2017) (articulating a concrete proposal for implementing a universal basic income).

179 *See* Thomas Piketty, *Property, Inequality, and Taxation: Reflections on Capital in the Twenty-First Century*, 68 TAX. L. REV. 631, 638–41 (2015); *see also* C. Ronald Chester, *Inheritance and Wealth Taxation in a Just Society*, 30 RUTGERS L. REV. 62, 66–72 (1976).

180 *See* BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 8–29 (2d ed. 2003); *see also* Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 294–308 (2003).

181 *See* SEFAN COLLINI, SPEAKING OF UNIVERSITIES 193–205 (2017).

Third, Congress could establish and fund a National Endowment for Film with a mandate to honor and promote excellence in the cinematic arts and directions to establish an annual awards program for excellence in filmmaking and acting.[182] This strategy would aim not to change the behavior of the Academy of Motion Picture Arts and Sciences but instead to change the Academy's role in the culture of the contemporary United States, displacing it as the primary gatekeeper of cinematic prestige so that its failure to honor minority actors would not prevent minority actors from having a roughly equal opportunity to participate in the shared culture. This reform strategy would not render a failure of the Academy to honor diverse actors morally permissible, but it would help to establish a more legitimate constitutional order.

These three reform strategies demonstrate how semiotic justice, like justice as fairness more generally, is multiply realizable: there are different points of intervention in the legal-constitutional schema, each of which would have a somewhat different effect on the legitimacy of the constitution. Because semiotic justice elevates the fair value of the cultural liberties to the level of a constitutional essential, the fair value of the cultural liberties has the same priority as the formal basic liberties, including the right to free speech.[183] The first reform option mentioned above, which involves expanding anti-discrimination law to directly regulate the Academy's decisions of which movies to honor, might be objected to on the grounds that it interferes with the Academy's freedom of speech (or with the freedom of speech of its members). However, because the formal liberty of free speech and the fair value of the cultural liberties both number among the constitutional essentials according to semiotic justice, this objection is not decisive. In Rawls's view, the Supreme Court erred in *Buckley v. Valeo* when it struck down the Federal Election Campaign Act of 1971's limits on election spending as violating the First Amendment.[184] While the limits on election spending restricted the formal liberty of free speech, such limits advanced the fair value of the equal political liberties by ensuring that citizens have roughly equal opportunities to influence electoral outcomes, regardless of wealth.[185]

182 *Cf.* Fisher, *supra* note 13, at 200 (discussing direct government funding for the production of public goods).

183 *See* Rawls, *supra* note 4, at 46–47, 104–06.

184 Buckley v. Valeo, 424 U.S. 1, 58–59 (1976); Rawls, *supra* note 6, at 359–63.

185 Rawls, *supra* note 6, at 449; *see Buckley,* 424 U.S. at 23. Because the equal

Likewise, treating the formal liberty of free speech as settling the question of whether the Academy's decisions of which films to honor can be regulated by anti-discrimination laws would be to privilege formal rights over other rights—namely, the fair value of the cultural liberties—that are equally important for the two moral powers. Restricting the formal free speech rights of the Academy might be precisely what is needed to ensure that citizens have roughly equal opportunities to accrue cinematic prestige and recognition. On the other hand, the formal liberty of free speech might require that the second or third reform strategy be adopted instead of the first, at least insofar as the first strategy restricts freedom of expression that is valuable for the first and second moral powers.[186] The different reform strategies that I have sketched entail different baskets of formal basic liberties and substantive political and cultural liberties; settling on which reform schemes semiotic justice endorses requires determining which schemes, if any, adequately guarantee access to *all* the equal basic liberties.

Fair equality of opportunity would propose exactly the same sort of legal reforms that semiotic justice suggests, except that the legal reforms proposed by the fair equality of opportunity might be more tightly constrained by the need to respect the formal equal basic liberties, including the freedom of speech. However, Rawls's principle of fair equality of opportunity fails to treat the case of #OscarsSoWhite as involving the issue of *legitimacy*.[187] This is a mistake on Rawls's part, because, like the fair value of the equal political liberties, the fair value of the cultural liberties is a field in which the failure of reciprocity can have widespread downstream effects, infecting our very ability to theorize a good culture.[188] Furthermore, while the #OscarsSoWhite case concerns discrimination along the lines of a protected category (i.e., race), semiotic justice demands equal access

basic liberties should be understood in association with one another, the point might also be put in another way: on the best understanding of the formal liberty of free speech, the right of free speech does not include a right to make unlimited campaign expenditures. A right to free speech that does not include such a right to make campaign expenditures is not a "compromised" formal right of free speech—it is simply the best understanding of the *meaning* of free speech.

186 *See* RAWLS, *supra* note 4, at 41, 45.

187 *See, e.g.*, THOMAS W. POGGE, REALIZING RAWLS 164–65 (1989). Shiffrin's reading of fair equality of opportunity is a notable exception. Shiffrin, *supra* note 14, at 1660.

188 *See supra* note 70 and accompanying text.

on the ground of the right at issue, rather than on the basis of the classification that forms the basis for the discrimination. In this sense, the constitutional question posed by semiotic justice is more one of "fundamental rights" than one of "suspect classifications" in the vocabulary of American constitutional jurisprudence.[189]

B. Copyright Law and Appropriation Art

The following cases about an appropriation artist will help to further distinguish the reform agenda of semiotic justice from that of Rawlsian fair equality of opportunity[190]:

> Morgan, a semi-professional Los Angeles artist, creates a screen-printed T-Shirt riffing on an iconic photograph of a surfer catching a wave, taken a decade ago by Quinn, one of Morgan's favorite professional photographers. Morgan uses a digital image of the photograph as a reference image when she designs her T-shirt but modifies it heavily, removing much of the detail present in the photograph and adding visual elements that call attention to what Morgan regards as the typically overlooked influence of punk rock on Quinn's photographic aesthetic, as well as other images and text referring to the history of street art in Los Angeles. Morgan makes twenty copies of the T-shirt and sells half of them, for thirty dollars each, at a semi-commercial street-art festival. Quinn happens to attend the festival and sees Morgan's T-shirt; the following day, Quinn's attorney contacts Morgan demanding that she cease production of the T-shirts, destroy her existing inventory, and turn over her profits plus a $5,000 licensing payment to Quinn. Morgan believes that her T-shirt constitutes

189 *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (striking down a law prohibiting inter-racial marriage on the basis of both the suspect nature of racial classifications and a fundamental right to marry).

190 Appropriation art "takes over pre-existing images to re-employ them unchanged in a different context or with a different purpose in mind, thus altering [their] meaning." Edward Lucie-Smith, The Thames & Hudson Dictionary of Art Terms 17 (2d ed. 2004); *see also* Simon Wilson & Jessica Lack, The Tate Guide to Modern Art Terms 20–21 (1st ed. 2008) (offering a similar definition of appropriation art but noting that appropriation can involve not just existing works of art but any "real object").

a fair use of Quinn's image,[191] but after speaking with a lawyer, she learns that determining whether her T-shirt is a fair use is a fact-intensive inquiry that would likely be settled only after discovery if Quinn were to sue.[192] Moreover, she learns that if a court determined that her T-shirt were not a fair use, Quinn could be awarded both a disgorgement of her (miniscule) profits and statutory damages, perhaps in the tens of thousands of dollars, if it proved difficult for him to establish actual damages.[193] Quinn might even be awarded attorney's fees and costs, on top of damages.[194] Morgan believes that there is a ninety percent likelihood that she would prevail at trial on a fair use defense, but because of the cost of retaining a lawyer and the risk of losing a trial and being bankrupted, Morgan decides she does not want to chance it.[195] She offers to license the image from Quinn for a reasonable fee, and even to turn over all profits from the shirt to Quinn, since she is more concerned about disseminating her art than making money from it. But Quinn refuses to entertain the possibility of a license, telling Morgan, through his attorney, "I decide when and where my art gets displayed. Anyway, punk is a crap aesthetic and I want

191 *See* 17 U.S.C. § 107 (2017) (fair use provision of U.S. copyright law).

192 *See, e.g.*, Sony Corp of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 n.31 (1984) (describing fair use as "an equitable rule of reason"); DC Comics, Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982) ("The four [fair use] factors listed in [17 U.S.C.] Section 107 raise essentially factual issues and . . . are normally questions for the jury.").

193 *See* 17 U.S.C. § 504(b) (2017) (providing for actual damages for copyright infringement in addition to disgorgement of infringer's profits); 17 U.S.C. § 504(c)(1) (providing that a copyright owner may elect to receive statutory damages rather than actual damages, to be awarded in an amount between $750 and $30,000 per work); 17 U.S.C. § 504(c)(2) (providing that statutory damages may be increased up to the amount of $150,000 per work in the case of copyright infringement "committed willfully").

194 *See* 17 U.S.C. § 505.

195 *Cf.* Meir Feder, Edwin Fountain & Geoffrey Stewart, *What's Wrong with the Copyright Regime*, *in* William W. Fisher, Frank Cost, Shepard Fairey, Meir Feder, Edwin Fountain, Geoffrey Stewart & Marita Sturken, *Reflections on the Hope Poster Case*, 25 HARV. J. L. & TECH. 243, 298–305 (2012) (noting that jury trials can be particularly risky for copyright defendants asserting a fair use defense because of jury bias against people who copy the work of others).

> nothing to do with it." Feeling that she has no other choice, Morgan negotiates a settlement with Quinn's lawyer, agreeing to cease production of her T-shirt, destroy her inventory, turn over all of her profits from selling the shirt, and issue a public apology.[196]

This case might initially seem less like a violation of semiotic justice than the case of #OscarsSoWhite. In the Oscars case, Academy members failed to take minority actors and filmmakers seriously as contributors to cinematic culture: where reciprocity requires a serious engagement with the cultural contributions of minority actors and filmmakers, there was instead racial bias. In this case, the problem is not that Quinn is unwilling to entertain Morgan's contribution to artistic culture. He does not like her T-shirt's "punk aesthetic," but his rejection of a licensing agreement does not result from racial or gender discrimination against Morgan. To see why this story about appropriation art also demonstrates a failure of semiotic justice, we need to consider the broader socio-legal context of the interaction between Quinn and Morgan.

Copyright law confers on creators an exclusive, property-like entitlement "to prepare derivative works based upon" the work in which they hold a copyright.[197] In the case described above, Quinn exercises this right to regulate the conditions under which later entrants can contribute to the culture, restricting Morgan from making a T-shirt highlighting what she sees as the continuities between punk and Quinn's photographic style. The failure of semiotic justice does not come from the one-off interaction between Morgan and Quinn, or even from the Copyright Act in isolation. Rather, the combination of many elements, including the breadth of copyright entitlements, the fact sensitivity of fair use determinations, the cost of hiring intellectual property lawyers and defending a lawsuit to the point of summary judgment, the absence of a strong welfare net providing insurance against the risk of a massive civil damages award, and the potential non-dischargability of copyright damages

196 While this case is hypothetical, its general shape is taken from a copyright dispute in which the author represented an appropriation artist in settlement negotiations. Some elements of the hypothetical are also drawn from the "Hope Poster" case, Fairey v. Associated Press, No. 09-01123, 2009 WL 319564, (S.D.N.Y. Mar. 11, 2011), in which, as a law student, the author served as a member of Shepard Fairey's pro bono legal team.

197 17 U.S.C. § 106 (2017).

in bankruptcy,[198] collectively confer a broad discretionary power on incumbent creators as a class to control which creative works that appropriate or riff on the incumbents' works can legally be distributed to wide audiences. As a result, the formal rights of cultural participation are more useful to the class of incumbent creators, the group most likely to compose a non-democratic cultural elite, than to the class of new artistic creators, violating the guarantee of the fair value of the cultural liberties.

It might be objected to semiotic justice that any system of copyright law gives an entitlement to incumbent creators, and that semiotic justice reaches too far in claiming that fact patterns like the vignette about Morgan and Quinn provide evidence of an illegitimate constitution. However, the problem with American copyright law, from the standpoint of semiotic justice, is not just that it provides incumbent artists with the right to be compensated for uses of their works—the problem is the arbitrary control conferred on incumbent creators. The present system of copyright law fails to respect the capacity of new creators (relative to incumbent creators) to make contributions to culture. This failure of respect is clearest in cases in which conferring an entitlement on copyright holders does nothing to incentivize creative activity.[199]

Consider the following five reform strategies, which illustrate the range of legal reforms—some, but not all of which directly involve copyright law—that might be adopted in responses to cases like that of Morgan and Quinn to make the American constitutional order more legitimate.

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198 *See* Star's Edge, Inc. v. Braun (*In re* Braun), 327 B.R. 447, 450 (Bankr. N.D. Cal. 2005) ("Statutory damages for copyright infringement are also indicative of injury and, therefore, are nondischargeable in bankruptcy."); Feder, Fountain & Stewart, *supra* note 195, at 312.

199 In *Eldred v. Ashcroft*, the Supreme Court upheld the Copyright Term Extension Act, which extended the duration of copyright from "creation until 70 years after the author's death." 537 U.S. 186, 195–98 (2003). Congress extended the term in spite of the fact that "from a rational economic perspective the time difference among these periods makes no real difference." *Id.* at 255–56 (Breyer, J., dissenting). The majority did not disagree with Breyer's assessment of economic rationality, but simply stated that it was deferring to Congress on the matter. *Id.* at 207 n.15. At the same time, extending the copyright term by twenty years makes it significantly harder for authors to engage with and make use of works that would otherwise have fallen into the public domain. *See* NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 175 (2008). Such transfers of cultural power to incumbent actors that do not directly incentivize further creativity are likely to undermine the fair value of the cultural liberties.

First, Congress could reform damages provisions of copyright law, eliminating statutory damages for copyright infringement involving appropriation art.[200] At the same time, Congress could direct courts not to award attorneys' fees to successful copyright plaintiffs in cases involving appropriation art and could encourage artists to assert fair use rights by establishing a presumption that courts will award costs and attorney's fees to appropriation artists who successfully assert fair use as a defense.[201] This reform strategy would not alter which exclusive rights accrue to copyright holders under the Copyright Act, or even change what uses count as "fair use," but would aim to make it less risky for non-incumbent creators to assert fair use rights and so to limit the degree to which incumbent creators can make use of the fact-sensitivity of fair use determinations to control appropriation art.

Second, Congress could institute compulsory licensing for appropriation art, modeled on existing compulsory licenses, such as compulsory licenses for making recordings of nondramatic musical compositions.[202] Under such a program, artists like Quinn would retain an exclusive right to create derivative works but, when copyright owners were unwilling to bargain for a license or demanded unreasonably high licensing fees, creators of appropriation art like Morgan could obtain a license at a rate set by the Copyright Royalty Board, just as musicians can now obtain a compulsory license to create a "cover" of a song when a composer refuses to negotiate.[203] In combination with this compulsory licensing scheme, Congress could institute a system of progressive taxation and wealth transfers to the poor to ensure that poor creators are not financially excluded from the possibility of purchasing compulsory licenses.[204] This strategy would leave incumbent creators with exclusive rights to produce derivative works but would limit their discretionary control to deny licenses. Artists like Quinn would receive compensation for appropriation art that made use of their copyrighted work but could not refuse to grant licenses on the grounds that they dislike the aesthetic qualities of an appropriative work.

200 17 U.S.C. § 504 (2017); *see* Netanel, *supra* note 199, at 192–93.

201 17 U.S.C. § 505; *see* Feder, Fountain & Stewart, *supra* note 195, at 311.

202 17 U.S.C. § 115; *see* Fisher, *supra* note 13, at 252–58.

203 *See* 17 U.S.C. § 115.; U.S. Copyright Office, Compulsory License for Making and Distributing Phonorecords (2018), https://www.copyright.gov/circs/circ73.pdf; *see also* Fisher, *supra* note 13, at 41.

204 *See supra* notes 184–87.

Third, federal courts could amend their interpretations of fair use to more clearly and explicitly privilege appropriation art. While the statutory codification of fair-use doctrine lists four factors for courts to evaluate when determining whether a use is "fair," this determination often boils down to the question of whether a use is "transformative."[205] Courts presently adopt a range of interpretations of transformativeness, but they could adopt a uniform interpretation according to which a work is transformative "if it either constitute[s] or facilitate[s] creative engagement with intellectual products."[206] This strategy, which would not require legislative action, would narrow the scope of the copyright entitlement enjoyed by incumbent creators by restricting copyright holders' rights to control the preparation of derivative works, eliminating the need for appropriation artists to secure licenses to ensure that their work is non-infringing.[207] The class of incumbent creators would lose the ability to exercise the sort of control that Quinn seeks over Morgan's work.

Fourth, state legislatures and insurance commissions could make it easier to insure against awards of damages in copyright lawsuits, requiring, for instance, that liability insurance provided through homeowners' and renters' policies cover damages awards for copyright infringement when an infringing work is *creative*.[208] At the

205 17 U.S.C. § 107 (2017); *see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

206 William W. Fisher III, *How to Handle Appropriation Art*, *in* Fisher et al., *supra* note 195, at 323 (internal quotation marks omitted) (quoting Fisher, *supra* note 4, at 1768); *see also* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 654 (1997) (arguing that "fan fiction" should be uniformly protected as fair use "because it gives authors and readers meaning and enjoyment, allowing them to participate in the production of culture without hurting the legitimate interests of the copyright holder").

207 17 U.S.C. § 106 ; *see* Tushnet, *supra* note 206.

208 *See Evaluating Homeowners and Renters Insurance Policies*, DIGITAL MEDIA LAW PROJECT, http://www.dmlp.org/legal-guide/evaluating-homeowners-and-renters-insurance-policies (last updated 2014) (surveying common homeowners insurance policies and concluding that "copyright [and] trademark infringement . . . do not appear to fall within most homeowners insurance policy definitions, and it is therefore unlikely that your homeowners insurance will cover you if you are sued for copyright or trademark infringement."); *cf.* Myoda Comput. Ctr. v. Am. Family Mut., 909 N.E.2d 214, 216 (Ill. App. Ct. 2009) (enforcing a commercial insurance policy that expressly provided for coverage of injury arising out of "infringement of copyright, title, or slogan"); Christopher French, *Debunking the Myth that Insurance Coverage Is Not Available or Allowed for Intentional Torts or Damages*, 8 HASTINGS BUS. L.J. 65, 69 n.20

same time, state bars could relax rules restricting who can practice law, increasing the supply of lawyers and thereby decreasing the cost of retaining counsel to defend against copyright infringement lawsuits.[209] This set of reforms would not involve any changes to title 17 of the United States Code but would give a group of repeat players in the courts (i.e., insurance companies) a strong financial incentive to litigate fair use cases and advocate for clearer judicial statements of which uses are fair. It would also, like the first set of reforms, make it less risky for non-incumbent creators to assert fair use rights, limiting the ability of artists like Quinn to restrict the contributions of artists like Morgan to our shared culture.

Fifth, Congress could eliminate copyright and replace it with a system combining financial prizes for artists, authors, and musicians who make popular works of art with grants for artists, authors, and musicians administered by the National Endowment for the Arts and National Endowment for the Humanities.[210] This more radical reform would eliminate the risk of incumbent creators controlling what later creations can enter culture by bringing all creative works into the public domain and incentivizing the creation of such goods through direct payments from the government rather than by granting limited-term monopolies.

The five reforms surveyed here illustrate the range of legal domains involved in respecting semiotic justice.[211] Any of a number of highly divergent, even orthogonal, reform strategies can bring the overall constitutional order more closely into conformity with the requirement to guarantee the fair value of the cultural liberties.

In evaluating the different reform strategies that could address the failure of semiotic justice in cases of appropriation art, one must keep in mind the role that copyright law serves in a given legal order.

(collecting cases where liability insurance policies for advertising injury provided coverage for copyright infringement).

209 See William D. Henderson, Legal Market Landscape Report: Commissioned by the State Bar of California 19–20, 27–28 (2018), http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf.

210 *See* Fisher, *supra* note 13, at 200–03 (proposing an alternative compensation system to replace copyright protection for many cinematic and musical creations).

211 Fully assessing reform strategies requires considering not only how copyright law intersects with other areas of law but also how copyright law intersects with material affordances and constraints on creativity. For instance, technologies that make it easier to create high quality sound recordings in a garage may change the relationship between copyright law and creativity.

If part of copyright law's function is to make it easier for citizens who are not wealthy to make a living as creative artists by enabling them to monetize their artistic, musical, literary, and cinematic creations,[212] restricting the rights accorded to copyright holders too severely might itself run afoul of semiotic justice. Because privileging creative copying as a fair use is unlikely to significantly affect the economic incentives to create new works,[213] the first four strategies surveyed here—each of which would marginally reduce the profits available to copyright holders—could, individually or together, satisfy the requirements of semiotic justice. However, if restricting the ability of creators like Quinn to extract statutory damages and attorneys' fees for unauthorized creative uses of their art reduced incentives to create too substantially, semiotic justice might require that the system of copyright be replaced by or supplemented with an alternative compensation system of the sort entertained in the fifth reform strategy.[214]

212 *See* Matthew Barblan, *Copyright as a Platform for Artistic and Creative Freedom*, 23 GEO. MASON L. REV. 793, 800 (2016). *But see* Raymond Shih Ray Ku, Jiayang Sun & Yiying Fan, *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669, 1672 (2009) (empirical study finding that greater protections for copyright do not lead creators to produce more work but rather "the historic growth in new copyrighted works is largely a function of population"); Ruth Towse, *Copyright and Artists: A View from Cultural Economics*, 20 J. ECON. SURVS. 567, 578 (2006) (surveying empirical studies and finding that "the main benefits of copyright are enjoyed by the 'humdrum' side of the cultural industries rather than the creators and . . . the distributions of royalties to artists other than the top few stars show how relatively little they get through the copyright system").

213 *See* Tushnet, *supra* note 113, at 541.

214 It might be objected to my application of semiotic justice to copyright that making it harder for artists to create appropriation art would actually encourage *more* artistic creativity, because artists who cannot rely on creative copying will instead come up with their own, more original creations. *See* Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1336 (2015). This objection relies on an empirical claim about the nature of creativity and the relationship between appropriation art and originality which some prominent copyright scholars reject. *See, e.g.*, Fisher, *supra* note 4, at 1769 (arguing that privileging creative copying as fair use would "create more opportunities for Americans to become actively involved in shaping their culture"). Evaluating this empirical debate is beyond the scope of this Article. Setting aside the empirical question, democratic control of culture is not merely about how much total creativity is present in a culture. Democratic control of culture requires that every citizen have an equal opportunity to help shape the culture. Even if Fishman's claim is correct—if some subset of citizens is most likely to contribute to the culture through appropriation art or

Considering the application of semiotic justice to appropriation art helps to show that semiotic justice entails different legal reforms than does Rawls's proviso of the fair value of the equal political liberties. Rawls's proviso might entail that all citizens must have a fair equal opportunity to create appropriative art that engages in social and political commentary,[215] but semiotic justice suggests that *all* contributions to culture should enjoy this protection in order to ensure that all citizens can participate in the collective articulation and working-out of views about what the good life and a good culture consist in.

C. Businesses' Right to Refuse Service

The significance of semiotic justice comes into even clearer relief if one considers not an area of law explicitly concerned with culture and creativity, like copyright, but an area of private law that does not, on its face, aim to regulate cultural participation, such as property law. Consider the following cases concerning the power of business to choose their customers and control their premises:

> A. Neha, the sole proprietor of an art supply shop, refuses to sell high quality paints and canvases to Juan because she thinks that Juan's art "exemplifies one of the most nihilistic styles in contemporary art."
>
> B. Khanhvy, a grocer, refuses to sell cheese to George because George has a tattoo of a snake on his neck, which Khanhvy dislikes.
>
> C. The Green Hill Apartment Complex, Inc., refuses to allow the Green Hill Tenants' Association to distribute its monthly newsletter (which is often critical of the Green Hill Apartment Complex's management) by slipping the newsletter under tenants' doors.[216]

fan fiction— respecting these members of the community as equal participants in the culture may require implementing one or more of the reform strategies discussed above.

215 *See* Cass R. Sunstein, Democracy and the Problem of Free Speech 152 (1993) (suggesting that "art and literature that have the characteristics of social commentary" deserve heightened protection under the First Amendment).

216 This hypothetical is loosely based on the facts of *Golden Gateway Ctr. v. Golden*

> D. The East Valley Feminist Reading Group meets weekly at JavaStop Coffee Shop to discuss works of feminist theory. Some of their discussions involve explicit descriptions of sexual activity. The JavaStop manager tells the reading group that they are no longer welcome to meet at JavaStop because JavaStop management is "uncomfortable" with their discussions and tells them that if they return to JavaStop he will call the police.
>
> E. Cakemaster, LLC refuses to sell a wedding cake to Tina and Lisa because Cakemaster "doesn't do same sex wedding cakes."[217]

The first four of these cases involve the typically absolute right of businesses (other than innkeepers and common carriers) to choose their customers, provided that they do not run afoul of civil rights statutes.[218] In almost all jurisdictions in the United States, businesses can arbitrarily exclude members of the public, refusing to allow them to engage in speech on the premises of the business and refusing to sell them goods or services, provided that the exclusion is not based on one of several grounds specifically proscribed in a public accommodation statute (such as race, gender, age, sexual orientation, marital status, and employment by the military).[219] The fifth case represents a broader assertion of free speech rights by businesses, asserting a right to refuse service to customers even when that right comes into conflict with the requirements of civil rights statutes.[220] Even scholars who think that businesses should not be able to claim exceptions from generally applicable anti-discrimination laws often think that businesses *should* have a right to

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Gateway Tenants Ass'n, 29 P.3d 797 (Cal. 2001).

217 This case is abstracted from the facts of *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

218 *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1291 (1996).

219 *Id.* at 1290–91. California provides a notable exception. *See infra* note 231.

220 Such a right was asserted by the petitioner in *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1726. The Supreme Court decided in favor of the plaintiff on narrow grounds without reaching the issue of whether the free speech rights of businesses can justify exemptions from generally applicable antidiscrimination laws. *See id.* at 1732 (Kagan, J., concurring).

arbitrarily refuse service because conferring such a right of arbitrary refusal on business owners advances the value of autonomy and makes business owners less likely to be alienated from their work.[221]

However, these cases present *prima facie* evidence of a failure of semiotic justice. They do so not as isolated cases, but as instances of a broader pattern. Conferring a right of arbitrary exclusion on business owners grants owners of capital greater power than non-owners of capital to control the shape of our shared culture. Conferring a right on art shop proprietors to marginally discourage artists whose style they do not like from making art, allowing small business owners to marginally discourage individuals from getting tattoos or wearing certain styles of clothes or encourage particular grooming habits, and enabling apartment building owners to regulate the sort of cultural communication that tenants engage in with one another in the hallways of apartment buildings all grant business owners as a class disproportionate power to control who can contribute to culture and how they can do so.[222] This represents a failure of constitutional legitimacy in that the legal order confers on owners of capital the ability to transform the material resources that they control into cultural clout. When the legal system endorses the free speech rights of petit bourgeois small business owners to arbitrarily refuse service, it makes formal rights of free speech less valuable for the rest of us when we wish to influence the shape of our shared culture.[223]

The violation of semiotic justice represented by the five scenarios described above might be partially remedied by any of the following three reform strategies:

First, states could adopt expansive public accommodations statutes that deny businesses the right to arbitrarily refuse service.[224] Among American jurisdictions, California stands out for its broad Unruh Civil Rights Act, which prohibits all arbitrary discrimination

221 *See, e.g.*, Amy J. Sepinwall, Commercial Complicity 41–42 (Feb. 18, 2018) (unpublished manuscript) (on file with author).

222 A different case—and one that is less obvious, from the standpoint of semiotic justice—would be presented if the businesses described here sought to exclude customers not because of the preferences of the owners of the business, but because the businesses were seeking to maximize profits and responded to the wishes of other customers. *See supra* Part II.A.3.

223 *See supra* notes 107–14 and accompanying text.

224 *See* Singer, *supra* note 218, at 1448 (arguing that a right of access should be extended to all places open to the public).

by "all business establishments of every kind whatsoever."[225] While the scope of the Unruh Civil Rights Act's protections has been curtailed by courts in the past thirty years,[226] California's public accommodation law continues to prohibit the exclusion of individuals from businesses for arbitrary reasons.[227] California courts could reinvigorate the statutory right of access to public businesses, barring businesses from refusing to sell to customers whose style, aesthetic sensibility, occupation, or politics they dislike,[228] and state legislatures and municipal governments in other jurisdictions could adopt California's broad statutory language guaranteeing individuals a right to be free from arbitrary discrimination by businesses. This reform would leave in place the economic inequalities that allow

225 Unruh Civil Rights Act, CAL. CIV. CODE § 51(b) (Deering 2019) ("All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."); *see In re* Cox, 474 P.2d 992, 995 (Cal. 1970) (holding that Unruh Civil Rights Act prohibits "all arbitrary discrimination by a business enterprise"); Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 120,122 (Cal. 1982) (noting that Unruh Civil Rights Act's list of protected categories, such as sex, color, race, religion, ancestry, and national origin, is illustrative rather than restrictive).

226 *See* Harris v. Capital Growth Inv'rs XIV, 805 P.2d 873, 880–83 (Cal. 1991) (narrowing the concept of arbitrary discrimination under the Unruh Civil Rights Act "to discrimination based on personal characteristics similar to the statutory classifications of race, sex, religion, etc." such as "a person's geographical origin, physical attributes, and personal beliefs" but not including "financial or economic status"); *see also* Sande L. Buhai, *One Hundred Years of Equality: Saving California's Statutory Ban on Arbitrary Discrimination by Businesses*, 36 U. S.F. L. REV. 109, 126–30 (2001) (arguing that recent decisions of lower courts in California have limited the broad protections afforded by the Unruh Civil Rights Act).

227 *Cox*, 474 P.2d at 994–95, 1001 (business may not exclude a customer because it dislikes the customer's hair or unconventional clothing); *see Harris*, 805 P.2d at 879 (declining to overrule *Cox*); *see* Butler v. Adoption Media, LLC, 486 F. Supp. 2d. 1022, 1029–32 (N.D. Cal. 2006) (noting that *Cox* remains good law in spite of its narrowing in Harris).

228 *See* Buhai, *supra* note 226, at 110, 140–41 ("[C]ourts should find a way to construe the Unruh Act to protect the rights of all persons to participate in a society free from arbitrary discrimination."); *see also id.* at 140–41 (arguing that courts should interpret Harris as subjecting discrimination on the basis of "personal characteristics" to heightened scrutiny and requiring "legitimate business reasons" for any discrimination other than on the basis of personal characteristics).

some people to own capital while others do not—which Rawls's difference principle may permit[229]—but would interrupt the link between economic power and cultural influence that comes from an arbitrary right to exclude, reasserting democratic control over the grounds on which market relationships can be refused.

Second, state and federal courts could expansively interpret constitutional guarantees of free speech to restrict the judicial enforcement of private property rights. This strategy would pare down the bundle of rights held by property owners,[230] restricting their ability to exclude individuals from speaking and being present in places open to the public.[231] Some state constitutions contain free speech provisions that encompass restrictions on free speech by private parties, as well as the state.[232] While state courts have often interpreted such rights of free speech against private parties narrowly,[233] they could limit the ability of capital owners to exercise

229 *See* Rawls, *supra* note 4, at 138–39.

230 For a discussion of the bundle theory of property rights, see, for example, Shane Nicholas Glackin, *Back to Bundles: Deflating Property Rights, Again*, 20 Legal Theory 1, 2 (2014) (defending a deflationary theory of property as a bundle of rights); Hugh Breakey, *Property*, Internet Encyclopedia of Philosophy, https://www.iep.utm.edu/prop-con/ (last visited Sept. 13, 2018) (describing the bundle theory of property rights).

231 *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972) (finding that privately owned shopping center was entitled to exclude pamphleteers from its premises).

232 Cal. Const. art. I, § 2(a) ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right."); Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979) (applying the California Constitution's free speech provision to a privately-owned shopping center), *aff'd* 447 U.S. 74 (1980); *see* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n., 29 P.3d 797, 826 (Cal. 2001) (Werdegar, J., dissenting) ("[T]he original state free speech clause, as originally enacted and as it appears today . . . grants a right of free speech running against private parties as well as state actors"). In 2001, a plurality of the California Supreme Court sought to impose a state action requirement on the California Constitution's free speech clause. *Golden Gateway Ctr.*, 29 P.3d at 810–11. However, a majority of the court has never adopted a state action requirement. Subsequent opinions have applied the California Constitution's free speech right to privately owned retail establishments without raising the question of state action. *See* Fashion Valley Mall, LLC v. Nat'l Labor Relations Bd., 172 P.3d 742, 743 (Cal. 2007) (holding the California Constitution's free speech rights includes the right to urge customers to boycott a store located in a privately-owned mall).

233 *See Golden Gateway Ctr.*, 29 P.3d at 810 (holding a tenants' association has no right under article I, section 2 of the California Constitution to distribute its

control over the shared space of culture by adopting more expansive interpretations, holding, for instance, that the same free speech rights that restrict the ability of publicly owned commercial entities to exclude individuals also restrict the judicial enforcement of private property rights by all businesses open to the public.[234] Courts in jurisdictions that lack constitutional free speech guarantees that directly apply to private parties could achieve the same outcome by expanding *Shelley v. Kraemer*'s conclusion that judicial enforcement of racially restrictive covenants constitutes state action to encompass *all* judicial enforcement of rights in real property.[235] This reform strategy would leave in place the economic inequalities that gave rise to the violation of semiotic justice in the five cases described above but would seek to take democratic control of the grounds on which police and courts can be asked to enforce prohibitions on trespassing.

Third, state or federal governments could expropriate some or all capital from private individuals and corporations, adopting an economic system of liberal socialism.[236] This strategy would require a radical rethinking of constitutional restrictions on takings, specifically,

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newsletter by slipping it under tenants' doors in a large apartment complex); Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8, 290 P.3d 1116, 1120 (Cal. 2012) (restricting the free speech right recognized by *Pruneyard* to the common areas of large shopping centers where shoppers are invited "to stop and linger and to leisurely congregate for purposes of relaxation and conversation").

234 *See* ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1094 (9th Cir. 2002) (holding that publicly-owned pedestrian mall constitutes a public forum for First Amendment purposes); *see also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 719, 723–24 (1961) (holding that Equal Protection Clause applies to a private business leasing public property); Mark Cordes, *Property and the First Amendment*, 31 U. RICH. L. REV. 1, 27 (1997); *cf.* Balkin, *supra* note 4, at 3 ("Freedom of speech is rapidly becoming the key site for struggles over the legal and constitutional protection of capital in the information age.").

235 Shelley v. Kraemer, 334 U.S. 1, 20 (1948). In the federal courts, adopting this strategy would require overruling *Lloyd Corp. v. Tanner*, which held that protesters were not entitled to exercise free speech rights guaranteed by the First Amendment on the property of a privately owned shopping center, 407 U.S. 551, 562–63 (1972), and a return to the constitutional jurisprudence of Amalgamated Food Emps. Union v. Logan Valley Plaza, 391 U.S. 308 (1968), and Marsh v. Alabama, 326 U.S. 501 (1946).

236 *See* DAVID SCHWEICKART, AGAINST CAPITALISM 282–92 (1993); *see also* RAWLS, *supra* note 4, at 138 (describing liberal socialism and property owning democracy as the two types of economic system that might satisfy the requirements of justice as fairness).

and, more generally, of the state's role in the market.[237] Unlike the first two strategies, this strategy of state socialism could leave free speech and public accommodation law unchanged. By limiting the capacity of individuals and classes to amass economic control of institutions that provide opportunities for citizens to contest shared conceptions of the good, restricting private ownership of capital would interrupt the entrenchment of economic and cultural power that threatens to rob the cultural liberties of their fair value.[238] To satisfy semiotic justice, such public control of capital would need to be connected to effectively functioning political systems of democratic control in order to prevent political elites from simply taking over control from economic elites.[239] If, as some cultural theorists argue, a psychological tendency to defer to owners is so bound up with the history of private property that such deference is inextricable from the idea of property,[240] this strategy of liberal socialism might provide the only reform agenda that can fully satisfy the demands of semiotic justice.

The wide range of possible reform strategies—from

237 *See* U.S. Const. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation."). Such a rethinking might involve a radical expansion of the public trust doctrine, treating capital as a public resource held in trust by the government for the people, such that any legal framework that the state adopts allocating capital to private individuals may subsequently be rescinded. *Cf.* Ill. Central R. Co. v. Illinois, 146 U.S. 387, 455 (1892) (holding the state of Illinois lacked authority to transfer title to lands under Lake Michigan held in public trust as navigable waters); Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 53–54 (N.J. 1972) (holding modern changes in use of tidelands justify expanding the historical public trust doctrine).

238 This is not to suggest that minority cultures cannot develop in an illegitimate political order. *See* Stuart Hall, *Notes on Deconstructing "the Popular"*, *in* Cultural Theory and Popular Culture: A Reader 442, 446–48 (John Storey ed., 2d ed., 1998). What is compromised is not the possibility of countercultures but the realization of equality. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. Civ. Rts.-Civ. Liberties L. Rev. 323, 335 (1987).

239 *See* David Beetham, *Beyond Liberal Democracy*, 18 Socialist Reg. 190, 203–05 (1981); *see also* Owen M. Fiss, *Why the State?*, 100 Harv. L. Rev. 781, 787 (1987) ("[T]he state might act wrongfully, and thereby restrict or impoverish rather than enhance public debate . . . but . . . this same danger is presented by all social institutions, private or public, and that there is no reason for presuming that the state will be more likely to exercise its power to distort public debate than would any other institution.").

240 *See generally* David Graeber, *Manners, Deference, and Private Property in Early Modern Europe*, 39 Comp. Stud. Soc'y & Hist. 694 (1997).

expanding anti-discrimination laws, to narrowing the scope of private rights conferred by property ownership, to adopting a socialist organization of the economy—illustrates the range of options open to a community that wishes to make its constitution legitimate. As in the cases of #OscarsSoWhite and appropriation art, evaluating these reform strategies requires considering the relationship between the formal equal basic liberties and the fair value of the cultural liberties. Restrictions on political campaign expenditures constitute, in some respect, a restriction on formal liberty of speech but preserve the *value* of the right to engage in political speech for all citizens.[241] Similarly, the first and second reforms discussed here restrict the formal speech rights and associational rights of business owners in order to promote the fair value of the right to participate in cultural expression. The third reform strategy is the most economically radical of the three, but it provides a mechanism by which a state could enhance the fair value of the cultural liberties without curtailing formal free speech rights. Fully assessing these reforms would require evaluating the ways in which the different formal and substantive liberties promote the exercise of the two moral powers.[242]

It may be objected to semiotic justice that the logic that motivates the first two reform proposals discussed here threatens to undermine the state action doctrine of American constitutional law,[243] for it is not just business owners who turn economic resources into cultural clout. What about owners of large houses who regularly host literary salons, inviting friends and influential authors to gather for dinner? Does conferring the right on homeowners to exclude unwanted guests impermissibly grant a cultural power to a particular class (homeowners) that other citizens are denied?[244] I agree that

241 *See* RAWLS, *supra* note 6, at 361.

242 *See* RAWLS, *supra* note 4, at 149–50.

243 *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 923 (1982). *See generally* Terri Peretti, *Constructing the State Action Doctrine, 1940–1990*, 35 L. & SOC. INQUIRY 273 (2010) (providing a historical survey of the state action doctrine in U.S. courts).

244 *See* LAURENCE TRIBE, 2 AMERICAN CONSTITUTIONAL LAW 1691 (2d ed. 1988) ("[E]xempting private action from the reach of the Constitution's prohibitions . . . stops the Constitution short of preempting individual liberty—of denying to individuals the freedom to make certain choices . . . . Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution's demands."); Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 503–04 (1962).

the case of the salon host has the same structure as the case of the businesses arbitrarily excluding customers. If a state's constitutional order lets some citizens control much larger residences than others, and if citizens can convert such residential resources into cultural capital, the guarantee of the fair value of the cultural liberties may be violated. This is not to suggest that the remedy is for the police to refuse to help homeowners keep unwanted guests out of dinner parties. Assessing what to do requires balancing the formal rights guaranteed by the first principle of justice together with the fair value of the political and cultural liberties. If ensuring access to the scheme of equal basic liberties to all citizens requires conferring the right to exclude unwanted guests from dinner parties on bigoted private individuals, then other features of the constitutional order may need to give way.[245] For instance, inequalities in wealth that enable some individuals to control much larger residential spaces than others may be impermissible under semiotic justice. This example illustrates the significance of elevating the fair value of the cultural liberties to the level of the constitutional essentials. The question of whether homeowners can exclude unwanted guests is not settled by lexical priority of the formal liberty of freedom of association above the fair equality of opportunity; rather, we must balance competing constitutional rights to determine whether homeowners may legitimately claim such a power.[246]

The problem of businesses' abilities to arbitrarily exclude highlights the divergence of semiotic justice from Rawls's proviso of the fair value of the political liberties. While Rawls's proviso might require the expansion of rights to engage in political protests and to petition on private property, guaranteeing the fair value of the cultural liberties requires denying owners of capital the power to control who contributes to our shared culture.

IV. CONCLUSION

This article has argued that liberal theorists should endorse

245 *See* Mattias Kumm, *Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 German L.J. 341, 362–63 (2006) (arguing that "the application of constitutional rights to the private context does not undermine an important point of rights, which is to provide individuals with a private sphere within which they need not be concerned with being held publicly accountable").

246 In this respect, incorporating fair value guarantees into the first principle of justice limits the legal significance of the state action doctrine and pushes toward the full constitutionalization of private law. *See id.* at 368–69.

a constitutional guarantee of the fair value of the political liberties given their existing commitments to ensuring that individuals can develop and pursue their own conceptions of the good life. The cases described in Part III represent failures of the fair value of the cultural liberties. They also represent failures of citizens to reciprocally share the burdens and benefits of living together in a community. In the #OscarsSoWhite case, minority actors are treated as less than full contributors to elite cinematic culture. In the appropriation art case, new entrants to the art scene are treated as less entitled to mold the culture than are incumbent artists. In the cases of businesses refusing services and excluding speakers, members of the bourgeoisie are granted the entitlement to use material resources that other economic classes lack to impose their idea of what our shared culture should look like. Remedying this failure of reciprocity is necessary if we wish to build a legitimate constitutional order.

The discussion of the reforms that might help to bring about semiotic justice suggests that guaranteeing the fair value of the cultural liberties often requires the same sorts of reforms required by Rawls's proviso of the fair value of the equal political liberties but also often requires more. Depending on how we choose to resolve the conflict between formal liberties of free speech and association and the fair value of the cultural liberties, semiotic justice may require radical political and legal reforms, ranging from judicial modifications of copyright and property law to legislative revamping of our political and economic order. Because this article is concerned with articulating the normative reform agenda of semiotic justice, a consideration of the political likelihood and workability of the reforms suggested here is beyond the present scope.

However, this exploration of the reforms necessary to guarantee the fair value of the cultural liberties suggests that it may be much more difficult to achieve a legitimate constitution than we might previously have thought. Creating a constitutional order that embodies reciprocal respect among all citizens requires that we quarantine those economic and social inequalities authorized by the constitution to prevent them from undermining the democratic control of both culture and politics, a task that may seem impossible or nearly so in our present political moment. Building a legitimate constitution requires that we all come to see one another as "co-worker[s] in the kingdom of culture" and that our laws and

institutions embody this respect.[247]

247 Du Bois, *supra* note 2.