

The Means to Social Justice: Accounting for Functional Capabilities in the Rawlsian Approach

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When thinking about democratic freedom and equality and the roles of government these necessitate, how should citizens be characterized? John Rawls argued that citizens should be discussed in generalized terms and should understand themselves as being free and equal. He argued that a person's "good" was the satisfaction of one's rational desire. Citizens required certain all-purpose means to express their ends (their "goods"). He identified rights, liberties, opportunities, power, income, wealth and the social bases self-respect as primary social goods (PSGs) and argued that a person's "advantage" could be gauged by the index of PSGs that person could expect. Though I find this starting point problematic, this essay defends the basic theory of John Rawls against two specific criticisms raised by capability theorists. Amartya Sen argues that PSGs will not act as means to everyone's ends because some do not have the functional capability to use these means to realize their ends. The least-advantaged will be misidentified as those with the lowest expectations of PSGs (income is Rawls's main example), rather than those who lack the functional capability to use PSGs as means to their ends (1997: 476–85). In addition, Martha Nussbaum argues that the assumption of fully capable persons in Rawls's "original position" means that those below normal ranges of capability are not represented in the selection of the

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“principles of justice” (2006: 66). This is problematic for a theory that seeks to increase the advantage of the least-advantaged members of society and advance a fair equality of opportunity.

The assumption of citizens in the normal range of capability raises two difficulties. It neglects to represent those with low levels of functional capability in the deliberation over the principles of justice. It misidentifies the least-advantaged citizens when moving from the theory to its application. Though I substantially agree with these criticisms, I argue that they do not negate the practicability of the Rawlsian scheme. The pressing question this paper attempts to illuminate is how Rawls’s theory should be generalized once the issue of capability has been raised.¹ Over a period roughly spanning a decade Rawls responded to the capability criticisms in two ways and at different “stages” of his argument. These, however, were never discussed together and this has led to some disagreement and confusion in regards to whether the Rawlsian framework can, or even should, accommodate the capability criticisms and how this might be done. I advance a Rawlsian-inspired response to these concerns and argue that not only can the capability criticisms be accommodated by the Rawlsian framework, but doing so improves Rawls’s theory as it would extend meaningful freedom and equality. There are important practical implications arising from this debate because considering these issues help us to determine what the public policy goals of liberal democracies ought to be. Before making this argument it may be helpful to briefly consider some features of Rawls’s work.

A Brief Account of Rawls

John Rawls was the main liberal democratic theorist of the past half-century. In order to develop his theory, “justice as fairness,” Rawls imagined an “original position” where impartial hypothetical representatives would deliberate over principles of justice to regulate the main institutions of a democratic society of free and equal citizens. A “veil of ignorance” is asserted in the original position and functions to hide the representatives’ knowledge of the particular circumstances of the lives of those they represent. Hypothetical representatives behind the veil of ignorance (to help model impartiality) are understood as unbiased in their deliberations regarding just principles to regulate society’s main political, social and economic institutions (the basic structure).

In order to characterize the original position and the aims of the parties within it, Rawls asserted what he called a “thin theory of the good.” Goodness is understood to be what it is rational to desire in a thing of its kind. A person’s good is the satisfaction of one’s rational desires given one’s circumstances. It is rational to desire more rather than less PSGs

Abstract. In developing his theory “Justice as Fairness,” John Rawls imagined a hypothetical initial situation designed to yield principles of justice to regulate society’s main institutions, or what he called the “basic structure.” The positing of citizens as fully capable in this hypothetical “original position” allowed Rawls to consider advantage in terms of the primary social goods (all-purpose means) a citizen held. Rawls reasoned that the representatives of free and equal citizens would design principles of justice that yield equal liberties and “a fair equality of opportunity,” while ensuring that permissible inequalities are those which “contribute effectively to the benefit of the least-advantaged” citizens (2001: 64). This essay considers two criticisms of the Rawlsian approach to distributive justice made by capability theorists (principally, Amartya Sen and Martha Nussbaum). Sen’s criticism is that primary social goods will not be equally usable by citizens because of variances in functional capabilities. Extending Sen’s criticism, Nussbaum argues that disadvantaged citizens are not represented in the selection of the principles of justice, and this is problematic for a theory that emphasizes a fair equality of opportunity, especially for society’s least advantaged members. This paper argues that the Rawlsian approach can successfully respond to and accommodate these concerns. The main ideas are as follows:

- (1) The representatives in “the original position” are to represent the *known* range of citizen capability rather than the *normal* range.
- (2) Rawls’s two principles of justice would still be chosen, but these would be preceded by a lexically prior principle of basic citizen capabilities, which Rawls characterized as the “two moral powers” (rationality and reasonableness).
- (3) The desirability of other functional capabilities (those which enable persons to use primary social goods to realize their ends) and their development are to be publicly debated.

Résumé. En développant sa théorie dans «La justice comme équité» John Rawls a imaginé une situation initiale hypothétique, conçue de telle sorte qu’elle produise des principes de justice régissant les principales institutions de la société, ou ce qu’il a appelé «la structure de base». Le positionnement des citoyens comme jouissant de toutes leurs capacités dans cette «position originelle» hypothétique a permis à Rawls de considérer la notion d’avantage en termes de biens sociaux primaires (moyens adéquats à tous les buts) détenus par le citoyen ou la citoyenne. Rawls maintenait alors que les représentants de citoyens égaux et libres concevraient des principes de justice produisant des libertés égales et une «juste égalité des chances», et ceci tout en s’assurant que les inégalités permises soient celles qui «bénéficient efficacement aux [citoyens] les moins avantagés» (2001 : 64). Cet article considère deux critiques faites à l’approche Rawlsienne de la justice distributive par les théoriciens des capacités (notamment Amartya Sen et Martha Nussbaum). La critique de Sen objecte que les biens sociaux primaires ne seront pas une égalité utilisable par les citoyens à cause des variations de leurs capacités fonctionnelles. Poursuivant la critique de Sen, Nussbaum montre que les citoyens désavantagés ne sont pas représentés lors de la sélection des principes de justice, ce qui est problématique pour une théorie qui met l’accent sur une juste égalité des chances, en particulier pour les membres les plus défavorisés de la société. Le présent article soutient que l’approche Rawlsienne peut répondre avec succès à ces objections et s’en accommoder. Les idées principales suivantes seront développées :

- (1) les représentants dans la position originelle sont censés représenter l’éventail *connu* des capacités des citoyens plutôt que l’éventail *normal*;
 - (2) les deux principes de justice de Rawls seraient toujours choisis, mais ceux-ci seraient alors précédés par un principe, lexicalement prioritaire, de capacités de base des citoyens, principe que Rawls a caractérisé comme les deux pouvoirs moraux (rationnel et raisonnable)
 - (3) La désirabilité des autres capacités fonctionnelles (celles qui donnent aux personnes la possibilité d’user de biens sociaux primaires afin de réaliser leurs fins) et leur développement sont des questions qui doivent être débattues publiquement.
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(the generalized means indicated above). The thin theory of the good is also used to define society's least-advantaged members. Finally, citizens' expectations are defined in terms of PSGs. With these ideas in mind, persons are to evaluate alternative principles of justice to regulate society's main institutions (1999: 433).

Rawls explained that: "the significance of the original position lies in the fact that it is a device of representation or, alternatively, a thought experiment for the purpose of public and self-clarification" (2001: 17). The original position is to be understood as being both hypothetical and non-historical. A "reasonable moral psychology" was asserted to make agreement possible.

Rawls asserted that citizens had "two moral powers," a capacity to form and revise a plan of life (rationality), and an effective sense of justice (reasonableness). Rawls saw the two moral powers as the bases of democratic freedom and equality and argued that PSGs were required to develop and use these basic citizen capacities.

Rawls argued that, given the veil of ignorance, it would be rational and reasonable for the representatives to choose principles of justice that guarantee the equal liberties of citizens and seek to maximize the minimum social position by ensuring that permissible inequalities are those to the advantage of the least-advantaged citizens. Rawls states:

The role of the principles of justice ... is to specify the fair terms of social co-operation. These principles specify the basic rights and duties to be assigned by the main political and social institutions, and they regulate the division of benefits arising from social co-operation and allot the burdens necessary to sustain it. (2001: 7)

Social co-operation has three features. It is guided by public rules. Participants are thought to reasonably accept these rules, which have a reciprocal character. Finally, Rawls states, "The idea of co-operation also includes the idea of each participant's rational advantage, or good" (2001: 6). A person's good is what is in his or her rational and reasonable advantage.

Free and equal citizens engage in fair terms of social co-operation in seeking their rational and reasonable advantage (their goods). The freedom and equality of citizens in Rawlsian thought is premised on the assertion of certain cognitive and moral capacities, which Rawls described as moral powers, and later also characterized as capabilities (2001: 169). Rawls stated:

Let's say they are regarded as equal in that they are all regarded as having to the essential minimum degree the moral powers necessary to engage in social co-operation ... at is, since we view society as a fair system of co-operation, the basis of equality is having to the requisite minimum degree the moral and

other capacities that enable us to take part fully in the co-operative life of society. (2001: 20)

We say that citizens are regarded as free persons in two respects. First, citizens are free in that they conceive of themselves and one another as having the moral power to have a conception of the good ... A second respect in which citizens view themselves as free is that they regard themselves as self-authenticating sources of valid claims. That is, they regard themselves as being entitled to make claims on their institutions so as to advance their conceptions of the good. (2001: 21–23)

Rawls asserted that all citizens had developed the two moral powers (rationality and reasonableness) to a “requisite minimum degree.”

Rawls explained that the fair value of political liberties (included in the index of PSGs), “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” (2001: 46). It is also important to note the relationship between PSGs and the two moral powers. Rawls stated: “The basic rights and liberties protect and secure the scope required for the exercise of the two moral powers (2001: 45). The fair value of political liberties is to enable citizens to maintain their free and equal status as specified by the two moral powers.

Norman Daniels explains the initial construction of the theory, justice as fairness, Rawls assumed citizens were fully capable and thus removed disability as a source of inequalities (2003: 242). With this assumption in place, Rawls argued that all-purpose means (PSGs) could indicate one’s advantage. Rawls originally defined primary goods are defined as:

things which it is supposed a rational man [or woman] wants whatever else he [or she] wants. Regardless of what an individual’s rational plans are in detail, it is assumed that there are various things which he [or she] would prefer more of rather than less. (1999: 79)

Specifically, Rawls identified rights, liberties, opportunities, power, income, wealth and the social bases self-respect as PSGs. The use and understanding of PSGs is straightforward with the exception of the social bases of self-respect, which is not considered here.² Rawls also wished to clarify whether primary goods were dependent on “the natural facts of human psychology or ... on a moral conception of the person” (1999: xiii). Rawls explained:

This ambiguity is to be resolved in favour of the latter: persons are to be viewed as having two moral powers ... and as having higher-order interests in developing and exercising those powers. Primary goods are now characterized as what persons need in their status as free and equal citizens, and as normal and fully co-operating members of society over a complete life. (1999: xiii)

A person's good is the satisfaction of her rational (and reasonable) desire. Rationality and reasonableness are the necessary moral powers for free and equal citizenship, which require primary goods for their exercise and development.

Rawls argued that citizens would be reasonable in two senses. Citizens would have goals that would be publicly justifiable in light of the principles of justice. Citizens would accept the principles of justice as fair and that those principles shape and constrain their public activities in a number of ways. Rawls's final statement of the principles of justice is as follows:

Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and 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). (2001: 42–43)

The principles of justice are to regulate the basic structure (society's main institutions, which further act to regulate society generally) and are the product of rational and reasonable deliberations of the representatives of democratic citizens (understood as free and equal) in the original position.

The Capability Criticism of the Rawlsian Approach

Before considering the capability criticisms, it is important to note that Rawls's argument comes in two stages. The first stage develops the theory; the second stage is concerned with the application of the theory.³ In developing the theory, Rawls discussed persons, their ends, and the means to these ends through the idea of a generalized citizen, assumed a fully capable, "normal co-operating member of society over a complete life." The positing of citizens represented as fully capable in the hypothetical original position allowed Rawls to consider advantage in terms of the index of PSGs a citizen could expect. One of the issues this paper is concerned with is whether it is too much to assume citizens are fully capable, normal co-operating members of society in theory, when it is readily observable in practice that this is not the case. Rawls began in the wrong place, but why this is so will not be apparent until the capability criticisms are considered.

The original capability criticism of the Rawlsian approach to social justice was made by Amartya Sen who argues that any distribution of means (PSGs) will not lead to a fair equality of opportunity for those with low levels of functional capability. Martha Nussbaum further argues

that disadvantaged persons (those with low levels of capability) are not represented in the original position, and that this is problematic from point of view of social justice (2006: 66).

Sen states, “The capability approach to a person’s advantage is concerned with evaluating it in terms of his or her actual ability to achieve various valuable functionings as part of living” (1997: 30). Sen defines functionings and capability in the following way:

Functionings represent parts of the state of a person—in particular the various things that he or she manages to do or be in leading a life. The *capability* of a person reflects the alternative combinations of functionings the person can achieve, and from which he or she can choose one collection. (1993: 31)⁴

Those with lower levels of functioning capability have a diminished opportunity to identify and pursue possible goals as compared to those with higher levels of functional capabilities. A fair equality of opportunity will not be established.⁵

Sen distinguishes “between *doing* something and being *free* to do that thing” (2005: 155). The issue with PSGs is that disadvantaged persons will not have the same opportunities as capable persons with the identical means. PSGs alone cannot establish a fair equality of opportunity among persons with very different capability sets. Sen argues that a theory of justice “has to be alive both to the fairness of the processes involved and to the equity and efficiency of the substantive opportunities that people can enjoy (2005: 156). Sen further states:

Rawls’s “first principle” of justice involves a process of fairness, through demanding that “positions and offices be open to all.” The force and cogency of these Rawlsian concerns (underlying his first principle and first part of the second principle) can neither be ignored nor be adequately addressed through relying only on the informational bases of capabilities... The remainder of the second principle, namely “the Difference Principle” ... is particularly concerned with the distribution of advantages. (2005: 156–57)

The capability approach may be viewed as a necessary supplement to (not a replacement) of the Rawlsian approach. Rawls’s “original position” informs a fair process; Sen’s functional capabilities fairly distribute advantage.

Extending Sen’s critique, Martha Nussbaum argues that the free, equal, capable, and independent idea of the citizen that Rawls articulated to develop his theory is problematic because it leaves those citizens who are not fully capable unrepresented in the deliberation of and agreement on the principles of justice (2006: 15).

In order to see the relevance this criticism, we must briefly revisit Rawls’s theory. Rawls stated, “The basis of equality is having to the requisite minimum degree the moral and other capacities that enable us to

take part fully in the co-operative life of society” (2001: 20). If some do not have the essential minimum development of the two moral powers, they cannot conceive of themselves as free and equal citizens. Though the assumption of capable citizens (normal co-operating members of society) is a useful theoretical simplification for Rawls, the assumption is too strong once the issue of disability has been raised when considering the application of the theory for “abnormal” cases.

Rawls’s principles of justice state that each citizen is to have equal basic liberties and social and economic inequalities must satisfy two conditions. They must be “open to all under conditions of fair equality of opportunity; and ... they are to be to the greatest benefit of the least-advantaged members of society (2001: 42–43). Sen and Nussbaum’s criticisms show that Rawls’s theory, as it currently stands, cannot adequately deal with issues of disability.

Given these difficulties, Nussbaum argues that the social contract argument should be abandoned in favour of a natural law approach. She argues a natural law approach yields the idea of human entitlements—which is how she conceives of functional capabilities (2006: 70). Nussbaum has developed a list of functional capabilities, which she argues satisfy the requirements of a dignified life. The list seeks to assure basic human functional capabilities, such as life, health, integrity, intellectual and emotional well-being, and political and economic rights. (2006: 76–78). The list is not without controversy, but it does indicate certain core human abilities and moral values.⁶

Sen disagrees with Nussbaum at this point. He argues that a central difficulty with such a list is that specifying functional capabilities to this extent at an early stage of the argument significantly defines the content of what a “good life” is. Sen’s reticence to advance a list of functional capabilities, or to fully endorse Nussbaum’s list, comes from “a disinclination to accept any substantive diminution of the domain of public reasoning” (2005: 157).

I agree with Nussbaum that neglecting to represent less than fully capable citizens in the original position is problematic for a theory that attempts to advance a fair equality of opportunity (particularly for society’s least-advantaged members) but disagree with her that this necessitates abandoning the contractarian approach embodied in the original position. What is rather required is a distinction between differing kinds of functional capabilities. Once this distinction is made, I argue that the Rawlsian and capability approaches to social justice can be fruitfully combined.

It is unnecessary to view the Rawlsian and capability approaches to social justice as fundamentally opposed. Functional capabilities can and should supplement the Rawlsian scheme both in terms of amending the theory, and in considering its application. From the point of view of social

justice, the capabilities for free and equal citizenship are of primary importance. Rawls's two moral powers (rationality and reasonableness) ought to be characterized as basic citizen capabilities, and distinguished from capabilities, like many of those on Nussbaum's list, which are related to well-being generally. The main concern as a matter of justice is free and equal citizenship (Rawls), not human flourishing (Sen and Nussbaum).

In the theoretical stage of his argument, Rawls assumed adequate development of the two moral powers (capacities to form and revise conceptions of the good and an effective sense of justice), which are understood as the capacities necessary for free and equal citizenship. These should not be assumed in the theory, but supported by an additional principle of justice. This does not, however, exhaust the capability criticisms. Capability theorists further argue that PSGs will not act as sufficient means to citizens' reasonable and rational ends, if citizens do not have the functional capability to use these means. Though this is true, these functional capabilities (related to well-being rather than free and equal citizenship) could be publicly debated through the institutions of the basic structure when considering how the theory should be applied. This may now be viewed as fair because the basic structure is regulated by the principles of justice, and the emendations to Rawls's theory would have disadvantaged persons represented in the deliberation over the principles of justice.

Combining the Approaches

Initially Rawls's theory may be viewed as providing a structure and priority to democratic intuitions. Quoting Rawls, Will Kymlicka states that general conception of justice:

consists of one central idea: "all social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution is to the advantage of the least favoured." (1999: 303)

Kymlicka explains:

Rawls ties the idea of justice to an equal share of social goods but adds an important twist. We treat people as equals not by removing all inequalities, but only those which disadvantage someone. (2002: 55)

One important source of inequalities/disadvantages (disability) was removed by Rawls to simplify the initial construction of his theory. Rawls thought these inequalities could be ameliorated in moving from the theory to its application (2001: 172). Rawls stated:

We must distinguish between two kinds of cases. The first case concerns differences among citizens' capabilities within the normal range... The second case involves those which because of illness and accident citizens fall for a time below the minimum essentials... [This idea] directs us to restore ... our capabilities when ... we fall below the minimum. (2001: 175)

Rawls held that the idea of a fully capable person (those with developed moral powers and the ability to make use of PSGs as means) was sufficient to work out the theory, and that issues of temporary disability could be attended to in the application of the theory.⁷ This, however, does not give an answer to the question of why it is fair to exclude citizens without adequate capability development in the deliberation over the principles of justice nor does it give direction in regards to those citizens whose disabilities are not temporary.

Disadvantaged persons ought to be represented in the deliberation over the principles of justice which will act to regulate society's main institutions and thus profoundly affect their life expectations. This being the case, the least-advantaged position must be correctly identified.

If it is assumed that citizens are in the normal range of capability, as Rawls did, then the disadvantaged will be those with the lowest expectations of PSGs. If, however, it is not assumed that all citizens fall within the normal range of capability, then the disadvantaged are a) those who do not have the capability to be free and equal citizens, and b) those who do not have the functional capabilities required to make use of PSGs, which are presented by Rawls as all-purpose means to citizens' rational and reasonable ends. Rawls does not give reasons to accept the assumption of citizen capability, other than it is theoretically useful. Sen and Nussbaum show the limitations of Rawls's theory in terms of how Rawls conceives of disadvantage and how he attempts to ameliorate these limitations. Rawls's identification of the disadvantaged (primarily those in the lowest income class) may turn out to be right most of the time, but Sen's understanding invites a consideration of why some are disadvantaged in the first place. The outcome of disadvantage will often be that one finds oneself in the lowest income class, but the reason for this will often be that one has low levels of functional capability. Social justice ought to be concerned with both the causes and the effects of disadvantage. Understanding disadvantage in terms of PSGs and functional capabilities provides a promising way to do this.

When considering disadvantage, however, it is important not to conflate Rawls and Sen; they have differing goals. Rawls's concern was to establish free and equal citizenship and advance a fair equality of opportunity among citizens. Sen's concern is to improve the well-being of disadvantaged persons. In combining these approaches, I acknowledge the potential unfairness that results from differing levels of functional capa-

bilities to make use of the means to our ends (PSGs), but maintain that the goal, from the point of view of social justice, is not to improve human well-being, but to reasonably ensure a capacity for free and equal citizenship.⁸ This requires a distinction between capabilities needed for free and equal citizenship and functional capabilities generally related to human well-being.

In following Rawls's lead, I argue that the basic capabilities required for free and equal citizenship ought to be reasonably supported by an additional principle of justice in the theoretical stage of the argument. Those functional capabilities related to overall well-being should be subject to public deliberation in the application of the theory.

Disabilities raise a problem for Rawls's theory. Disadvantages are understood as natural and social inequalities. Rawls stated, "Injustice ... is simply inequalities that are not to the benefit of all" (1999: 54). Not addressing issues of disability is an injustice. Commenting on Rawls's theory, Kymlicka states for example, that:

There are both intuitive and contract reasons for recognizing natural handicaps as grounds for compensation, and for including natural primary goods in the index which determines who is in the least well-off position... It may be impossible to do what our intuitions tell us is most fair. But Rawls does not even recognize the desirability of trying to compensate such inequalities. (2002: 72)

Once the issue of disability is raised, the assumption of capable citizens is too strong, and the presentation of what constitutes a disadvantage, or inequality is too narrow in Rawls's theory.

Rawls's theory can successfully respond to the disability/disadvantage issue raised by Sen, but this requires an additional principle of justice and, as stated earlier, distinctions between differing kinds of functional capabilities ought to be made. Rawls responded to the capability criticisms by noting a connection between primary goods and basic capabilities. Rawls stated:

It should be stressed that the account of primary goods does take into account, and does not abstract from, basic capabilities: namely the capabilities of citizens as free and equal persons in virtue of their two moral powers. It is these powers that enable them to be normal and fully co-operating members of society over a complete life... The equal political liberties ... are necessary for the development and exercise of the citizens' sense of justice.... The equal civil liberties ... are necessary for the development and exercise of citizens' capacity for a conception of the good.... Income and wealth are ... required to achieve a wide range of (permissible) ends ... and in particular, the end of realizing the two moral powers and advancing the ends of the (complete) conceptions of the good that citizens affirm or adopt. (2001: 169)

Rawls's index of PSGs was developed by asking what is required by citizens to secure their free and equal status. PSGs are necessary for the

development of the moral powers. Rawls assumed basic citizen capabilities (the two moral powers, rationality and reasonableness) but also indicated these could be secured by a prior principle of justice. Rawls stated:

The first principle [of justice] covering the equal basic rights and liberties may easily be preceded by a lexically prior principle requiring that citizen's basic needs be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties. Certainly, any such principle must be assumed in applying the first principle. (1993: 7)

The two principles of justice could “easily be preceded” by a prior principle of “basic needs” including the capability to make use of the “rights and liberties” entailed in his first principle. Though Rawls does not say this, the prior principle of needs can be understood as a principle of basic citizen capabilities.

The prior principle of citizen capability would be chosen under the constraints of the original position. The representatives would seek to maximize the expectations of the least-advantaged as Rawls had argued. The veil ignorance, however, would now also hide knowledge of the level of capability of the citizens being represented, but not the general knowledge that society has disabled or disadvantaged members. The rational and reasonable representatives would now represent citizens in the known range of capability, rather than the normal range. That is, it is no longer assumed that citizens are fully capable, but it is assumed that the hypothetical representatives are this. Once this principle is secured, the rest of the argument proceeds unaltered because of Rawls's sense of “lexical priority” (prior principles are assumed satisfied and cannot be violated by principles to follow). The task left is to indicate how this principle of citizen capabilities would be chosen and what it would look like.

The emendations to Rawls's theory should be efficient. Where possible, I follow Rawls's lead. I begin in the familiar Rawlsian way by modelling impartial representation, as the original position coupled with veil of ignorance does. Recall that Rawls had asserted the moral powers. Instead of asserting the capacities for free and equal citizenship and assuming citizens to be in the normal range of human capacity as Rawls had, I consider the known range of human capacity. This is done to ensure that society's least-advantaged members are identified not simply as those with the lowest expectations of PSGs, but also as those who do not have the basic citizen capabilities developed and those who cannot use PSGs to express their ends. Finally, by considering the known range of capability rather than the normal range, the least-advantaged are now represented in the deliberation over and agreement on the principles of justice.

Rawls had argued in favour of his two principles of justice by creating a rational construct subject to reasonable constraints (the original

position), which modelled impartial reasoning and fair representation (through the device of the veil of ignorance). The original position should be characterized in such a way that it yields principles of justice, which match considered democratic intuitions. The social contract is to be understood as a way of keeping track of the assumptions of the argument, and as Kymlicka states, “a device for teasing out the implications of certain moral premises concerning people’s moral equality” (2002: 61). Citizens are to be treated as morally free and equal. The original position is to model this and to help show what hypothetical and impartial representatives might rationally agree to. As Rawls had argued, hypothetical rational and reasonable citizen representatives would adopt the “maximin rule” to guide their deliberations. Rawls explained that the maximin rule,

tells us to identify the worst outcome of each available alternative and then to adopt the alternative whose worst outcome is better than the worst outcomes of all other alternatives... The parties have no reliable basis for estimating probabilities of the possible social circumstances that affect the fundamental interests of the persons they represent... It must be rational for the parties as trustees not to be much concerned for what might be gained above what can be guaranteed... Let’s call this best worst outcome the “guaranteeable level.” The worst outcomes of all the other alternatives are significantly below the guaranteeable level. (2001: 97–98)

Representatives are to “maximize the minimum,” or to maximize the least-advantaged social position because it might be occupied by one they are attempting to represent. (The veil of ignorance hides this information from the representatives in the original position to model fair representation.)

The maximin rule forces the hypothetical representatives to consider the fundamental interests of the citizens they represent (2001: 103). The first such fundamental interest must be to secure the necessary capacities to be free and equal citizens, if this is not already assumed as it now is in Rawls’s theory. The representatives would be moved to accept a prior principle of basic citizen capabilities, if it offers the “best worst guaranteeable level.”

When the original position, citizens, and their representatives are characterized as described above, what principle of capability would be chosen? Though a full consideration of this is beyond the scope of this paper, a few alternatives and rationales can be briefly sketched.

Again, following the Rawlsian approach, alternative principles would be proposed. One might, for example, propose a traditional understanding of basic needs—a principle offering a guaranteeable level of food, clothing, and shelter.⁹ Alternatively, one may propose a principle that reasonably assures citizens of adequate development of the two moral powers. These could be contrasted with Nussbaum’s more extensive list of functional capabilities, and so on.

A principle of basic needs understood as food, clothing and shelter would not satisfy the concern because fulfilling these needs will not ensure the capacities required for free and equal citizenship. Nussbaum's list likely entails too much controversy to be reasonably agreed upon, but even it could be endorsed by the representatives in the original position, the focus is misplaced at this stage of the theory. Nussbaum's list is concerned with capabilities related to human well-being generally. These are important capabilities, but the concern is to reasonably ensure the basic capabilities required for free and equal citizenship, not the broader category of capabilities related to human flourishing. Some principle assuring adequate development of the two moral powers appears the most likely of these to pass through the constraints of the original position where impartial, rational, and reasonable representatives of citizens adopt the maximin rule to aid in their deliberations. This new first principle of justice would be as follows (or something close to it): "Each person has a reasonable public claim to the development of basic citizen capabilities. These are understood as capacities to form and revise a conception of the good (rationality) and to have an effective sense of justice (reasonableness)." In other words, I have attempted to support with a principle of justice what Rawls asserted, but also indicated it could be supported in a lexically prior principle of justice and be consistent with his theory.

When moving from the theory to its application, democratic political processes obtain. Citizens (or more likely their elected representatives) would consider public policy options. They might debate, for example, which capabilities are important, what levels of development are required for citizens to advance their reasonable ends, and so on. Extensive lists of capabilities, such as Nussbaum's, which are related to overall well-being (as opposed to citizenship), could be publicly deliberated over at this stage.¹⁰ This debate is crucial because the suggested changes to Rawls's theory only deal with the capabilities required for free and equal citizenship, not those required to ensure that citizens have the basic functional capability to use PSGs as means to their reasonable and rational ends.

Obviously, the suggested emendations to Rawls's theory alter it in a few ways. To match intuitions regarding democratic fairness, everyone is to be represented in the original position. This change would mean one can no longer assume citizens have the capacities required to conceive of themselves as free and equal (the moral powers are no longer asserted). Since the moral powers (capacities for rationality and reasonableness) are no longer assumed, representatives will be moved to secure the development of these for those they represent. They will advance a principle basic citizen capability. PSGs and functional capabilities are to be viewed as companion ideas so that the least-advantaged are correctly identified

not simply as those who have the lowest expectations of PSGs, but also as those who do not have the functional capability to conceive of themselves as free and equal citizens capable of using these means to realise their reasonable and rational ends.

The adjustments to Rawls's theory suggested here would add a lexically prior principle to Rawls's principles of justice. The principles of justice would now read as follows:

1. Each person has a reasonable public claim to the development of basic citizen capabilities. These are understood as capacities to form and revise a conception of the good (rationality) and to have an effective sense of justice (reasonableness).

And as Rawls states:

2. Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.

3. And 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). (2001: 42–43)

The application of the theory requires public debate and deliberation regarding which capabilities are most urgent and what levels of them are desirable. These debates and deliberations are to occur through society's main institutions (what Rawls called the basic structure).

A socially just democracy ought to reasonably ensure that citizens will be capable of expressing their ends. It ought to fairly distribute *primary social goods*, and it should seek to ensure that people have the *functional capabilities* necessary to be free and equal citizens and to use the index of means (PSGs) afforded them. The capacities required for free and equal citizenship should be supported by an additional principle of justice. The capacities required to use PSGs as means to citizens varied ends should be discussed and advanced through public policy. Fair distributions of PSGs and reasonable development of functional capabilities ought to be the public policy goals of liberal democracies that seek to establish meaningful freedom and equality.

Having set out the main emendations to Rawls's theory I think are necessitated by the capability criticisms, I should now like to speak to some likely objections to these. In particular, two broad criticisms may be raised against this proposal to extend Rawls's theory to account for the issue of disability. First, in arguing that citizens are entitled to the development of the two moral powers, does my proposal require poten-

tially limitless expenditures on a few disadvantaged citizens resulting marginal gains? Second, what sorts of disadvantages are relevant from the point view of social justice? Are all natural inequalities, for example, subject to justice?

Briefly, in answer to the first objection, do the suggested changes to Rawls's theory require large public expenditures resulting in marginal gains for a few? No. The wording of the new principle is significant. It says, "Each person has a reasonable public claim to the development of basic citizen capabilities." The addition of "reasonable" here is deliberate and should be contrasted with Rawls's wording in the next principle, which is that citizens have an "indefeasible" claim to basic liberties. Rawls often used the term "reasonable" to mean publicly justifiable. It would not be publicly justifiable to spend potentially all of society's resources to ensure that some severely disadvantaged citizens will develop the moral powers. Such a policy would likely fail to gain public support, but even if it somehow did secure this, the policy would not work. It simply would not be possible for all citizens to have the moral powers (rationality and reasonableness) developed given that some are severely and permanently disabled. The claim, therefore, cannot be that all citizens must have the moral powers developed. Rather, the claim is that citizens have a reasonable entitlement to have the capabilities of rationality and reasonableness developed so that more rather than less citizens may conceive of themselves as free and equal.

This is consistent with both with Rawls's statement that his two principles of justice could be preceded by a prior principle and his reply to Sen where Rawls explicitly states that PSGs must take account of basic capabilities of free and equal citizenship (2001: 169). The changes to the theory suggested here do not require "redistributions" of capabilities; such a proposal would be practically impossible. The intelligence of one, for example, cannot be redistributed to another. What can be redistributed to the least-advantaged is part of the social product produced by capable citizens. Rawls argued the least-advantaged were those with the lowest expectations for PSGs. Sen's work invites a consideration of why some are in this position in the first place. PSGs should be distributed as the "difference principle" (the second half of Rawls's second principle) indicates, but this does not mean that the public has no role in capability development. Indeed, it would seem that citizens could view capability development as a reasonable set of policies. The public could deliberate, for example, over whether redistributing wealth in the form of social assistance is preferable to publicly funded skills training for disadvantaged persons. I have tried to avoid the "either/or" character of these types of debates by arguing that both sorts of policies are reasonable and could benefit the least-advantaged. I do, however, think a focus on capability development does more to ameliorate the

cause, rather than the effect of the disadvantage than redistributions of PSGs would.

There are two sorts of answers to the second kind of objection about which disabilities are matters of justice. It could, for example, be argued that the disabilities that justice should be concerned with are the ones which affect citizens' abilities to conceive of themselves as free and equal. This is one of the reasons why the paper suggests that Rawls should not have assumed that citizens had developed the two moral powers but rather ought to have supported these in the principles of justice themselves. The distinction between Rawls and Sen must be kept in mind here. Rawls was concerned with what people required in order to conceive of themselves as free and equal citizens. These are matters of concern for social justice. Sen was concerned with human well-being generally. Though the capacities which may enable human flourishing are of interest to citizens, from the point of view of social justice, the primary concern is in regards to the capacities required for free and equal citizenship.

In addition, one might argue that in a liberal democracy which disabilities and disadvantages should be compensated for, or made good, are matters for public debate. Through distinguishing between differing kinds of capabilities, the capabilities required for free and equal citizenship and the broader category of capabilities related to well-being generally, I have allowed for this possibility. The new first principle justice says people are reasonably entitled to have the capabilities for free and equal citizenship developed. Other functional capabilities related to well-being generally could be the subject the political deliberations of citizens and their representatives. A liberal democracy's public policies on this account are to be advanced and evaluated in relation to the production of free and equal citizens, and may, if they so choose, be concerned with the promotion of functional capabilities related to human well-being or flourishing generally.

Notes

- 1 Rawls's theory has been much discussed in relation to capability theory. Most of these discussions, however (some of which are indicated in footnotes to follow), have focused on the appropriate metric to gauge inequality and have either argued for or against PSGs or capabilities. This paper contends, however, that PSGs and functional capabilities (FCs) are best understood as companion ideas. There is evidence in the works of both Rawls and Sen (and Nussbaum to a lesser extent) to suggest that PSGs and FCs should not be viewed as fundamentally opposed. This paper seeks to overcome the "either/or" character of the debate, and argues that in doing so meaningful freedom and equality would be extended.
- 2 art II of this project considers the practical limits of Rawlsian pluralism by considering the two "supporting circumstances" for Rawls's primary social good: "self-respect," a secure sense of value in one's person and projects and having the confidence to express and pursue what one values.

- 3 Rawls called the theoretical stage of his argument the “constitutional stage” and the application stage was referred to as the “legislative stage.” I have not used these terms here because I think they can lead to certain unnecessary confusions for those unfamiliar with Rawls’s work.
- 4 For a critical appraisal of Sen’s definition of capability and his insistence that it is the proper metric to measure equalities, see Dowding (2006).
- 5 For a critical assessment of Sen’s view of equality see Cohen (1994); see Kaufman (2006) for a Sen-friendly reply.
- 6 Nussbaum views her list as “open,” but also indicates that she views it as both universal and essential. I do not follow her global approach. My aim is much narrower in that I confine my discussion to liberal democracies. For a critical assessment of the moral justifications of Nussbaum’s work on capabilities and how these have shifted see Jaggard (2006).
- 7 In *Justice as Fairness: A Restatement*, Rawls asserts a duty towards the disabled, and says, “At some point ... we must see whether justice as fairness can be extended to provide guidelines for these cases... If Sen can work out a plausible view for these ... it could be included in justice as fairness when suitably extended, or else adapted to it as an essential complementary part” (2001: 176, fn 59).
- 8 I am indebted to an anonymous reviewer for this clarification.
- 9 For a rejection of the capability approach to social justice in favour of the more traditional basic needs approach see Reader (2006)
- 10 For a discussion of how the capability approach can inform public policy see Brock (1997) and Robeyns (2006).

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