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The Ohio State University, Ph.D., 1977
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PREFERENTIAL TREATMENT IN ADMISSIONS TO EDUCATION:
AN APPLICATION OF A THEORY OF JUSTICE
BY JOHN RAWLS

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree Doctor of Philosophy in the Graduate
School of The Ohio State University

By

Howard Michael Sokolow, B.A., M.A.

* * * * *

The Ohio State University
1977

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CHAPTER I
THE PROBLEM OF PREFERENTIAL TREATMENT
IN ADMISSIONS TO EDUCATION

Preface

In recent years, with the rise of legal battles over discrimination, equality, reverse discrimination, and busing in education, philosophers of education have become increasingly involved with such issues in order to clarify such disputes, or to prescribe what course of action they take to be philosophically justifiable. One need only to look at the literature of philosophy of education to note the increasing concern over matters of social justice.* We may say at the outset that those who are concerned with such issues ought to at least cast a critical and resourceful eye towards the work being done in the field of social and political philosophy since that seems to be where the underpinnings of such issues lie.

Also in the past few years, a major work in social and political philosophy has come forth, which puts forth an intellectually intriguing and a quite substantial theory of justice. Of *A Theory of Justice*, although John Rawls has put forth a work that some have found to be inconsistent if not mistaken, almost all persons agree that it is a work which has added new life to the study of social justice in philosophy, and which must be dealt with by anyone endeavoring to do work in this field.

Furthermore, within the same time span, philosophers of education have begun to deal with the problem of justice in education known to some as "preferential treatment" in admissions, and to others as "reverse discrimination" in admissions. Yet, there has been a minimal effort devoted to the investigation of how Rawls' work may help to clarify the issues involved. It is this general task which this work hopes to accomplish.

In *A Theory of Justice*, Rawls, in the tradition of Locke, Rousseau, et al., takes the starting point of his theory to be the state of nature. It seems that such a device, or if you wish, such a perspective, gets at some fundamental questions of social and political philosophy which are: (1) How extensive can a justifiable state be?; (2) How coercive can a justifiable state be?; and (3) Can any state be justified? Clearly, such issues are fundamental.
Related to and intertwined with these matters are the problems of social justice, as Rawls tells us:

A set of principles is required for choosing among the various social arrangements which determine this division of advantages and for underwriting an agreement on the proper distributive shares. These principles are the principles of social justice: they provide a way of assigning rights and duties in the basic institutions of society, and they define the appropriate distribution of the benefits and burdens of social cooperation. (Rawls, p. 4)

The above passage assumes much of what we shall explain in Chapter Two of this work. For our purposes here, we can say that problems of social justice in social and political philosophy normally involve the issues of basic assignments of rights, duties and entitlements, and how these are to be assigned; or, how such assignments are to be justified.

Having said so much about the concerns of social and political philosophy, we may now note some elements of the position that Rawls holds with reference to the above issues. It seems that for Rawls, the state, or the principles of justice which underlie the state, may be quite extensive, in that they may go quite a long way in inhibiting or encouraging many of the actions of the citizens of the state. For instance, the difference principle (part of his second principle of justice) tells us that any gain by those persons in the group with the highest expectations in society (e.g., the richest) can only be justified if those in the group with the lowest expectations (e.g., the poorest) would be worse off if
it were not for such a gain. Such a principle of justice can hardly be characterized as libertarian. Yet, it may be a mistake to characterize Rawls on the basis of this one principle, since he also holds to other principles which are more libertarian. For instance, he tells us that the liberty of individuals may be curtailed only if the justification of such is based upon the fact that otherwise the liberty of those individuals would be lessened. We do not note these elements so superficially at the outset in order to summarize Rawls, but simply to bring to light some of his concerns.

Now, for educators, the above discussion may seem irrelevant, albeit quite interesting. To those concerned with preferential treatment in education, then, we ask now that they reflect upon the issues, questions, complaints, and arguments, given when the issue is discussed and disputed. Is not where the shoe pinches the point at which the assignments of rights, entitlements, duties, and justifications arise? That is, with respect to the problem of preferential treatment in education, we have for the past few years been arguing that it is right, or that it is wrong, or that only under certain conditions is it right. It seems then that when we encounter such disputes in education and ask, "why," that we are on our way towards seeking some fundamental principles and/or theory of justice. Rawls offers us some provocative principles upon which to reformulate and to clarify such positions as those found with respect to preferential treatment in admissions to education.
We shall use the words of Kant to summarize what this work aims at, in general:

"Human reason so delights building that it has several times built up a tower and then razed it to see how the foundation was laid. It is never too late to become reasonable and wise...." (Kant, p. 4)

With respect to preferential treatment in admissions to education, we shall attempt to raise the tower of issues and arguments that have been built in order to see the foundations of those arguments and positions. Further, by reviewing the theory of Rawls, and by seeing how it applies to such issues, we shall hopefully become much clearer about what is at issue.

In conclusion to this preface, we shall summarize below what this work shall attempt to accomplish. First, in the rest of Chapter One, we shall consider the following: (1) the concepts 'discrimination,' 'reverse discrimination,' and 'preferential treatment'; (2) what things seem to be at issue when particular disputes arise over preferential treatment in admissions; (3) how it is that preferential treatment in admissions is an educational problem; and (4) how it is that preferential treatment in admissions is a problem of justice.

In Chapters Two and Three, we shall summarize John Rawls' A Theory of Justice in a critical manner, attempting to coherently and concisely explain it, as well as to point out where some of its weaknesses lie. Chapter Two will be concerned with the theory of A Theory of Justice. Whereas,
Chapter Three will be concerned with the institutions of Rawls' well-ordered society, which he takes to be compatible with his theory of justice. In Chapters Four and Five, we shall attempt to take some of the major elements and concerns dealt with by Rawls, and explained in Chapters Two and Three, and to apply them to the problem of preferential treatment in admissions to education. Finally, in Chapter Six, we shall attempt to draw some conclusions both with respect to the problem of preferential treatment in admissions to education, and with respect to the knowledge and insights gained from Rawls' work as far as their utility to philosophers of education is concerned.

We close this preface with a caveat to the reader. Hopefully, the following work will not be an exercise in social philosophical casuistry. In other words, although there may be some who would desire that we show Rawls to be on one side of the fence or the other concerning preferential treatment in admissions, we shall not do so. Indeed, once one sees the complexity of the issue, as well as the complexity of Rawls' theory, it would be laughable for one to attempt to do so. Rather, we shall attempt to use Rawls' position in order to clarify the issues which arise in the problem of preferential treatment in admissions to education. In other words, we shall be concerned mainly with the task of clarification.
Let us now look to the problem of preferential treatment in admissions to education, and attempt to get clear about what is at issue, as well as to point out some related problems and issues.

Introduction

Before we begin to discuss Rawls' theory, there are a few things that we must first be clear about. To this end, we shall first discuss the concepts 'discrimination' and 'reverse discrimination,' since they frequently arise with respect to preferential treatment in admissions to education. Second, we shall briefly look at the concept 'preferential treatment' to clarify how we shall use the term in this work. Third, we shall then lay-out what seems to be at issue when disputes over preferential treatment in admissions to education arise, and shall note a number of issues which seem to arise once the major issue is portrayed in such a way. Fourth, before moving on to see how Rawls helps us to clarify such issues and problems, we shall explain how it is that preferential treatment in admissions is an educational problem. Finally, although one might agree that preferential treatment in admissions is an educational problem, one still might not be clear about its being a problem of social justice. As a close to this chapter, then, we shall point out how it is that preferential treatment in admissions to education is a problem of social justice.
'Discrimination' and 'Reverse Discrimination'

'Discrimination' seems to have two predominant uses in ordinary language. One use of the term is frequently seen where a choice has been made which is not only pertinent and appropriate to a particular situation, but which also showed quite a bit of acumen on the part of the person making the choice. For example, one might say that a wine taster showed great discrimination in his choice of wines. We may mark this sense of the term with the grammatical locution of 'discrimination between.' Often, this use of the term has a positive evaluative sense.

Yet, where the term is used in a social context as a demand that justice be done, or as a claim that justice is not being done, we see that 'discrimination' often has a negative evaluative sense. This seems to be the use of the term with which we are dealing when we are concerned with 'reverse discrimination' and we may mark this use of the term by the grammatical locution of 'discrimination against.' Quite plainly, we might say that under the circumstances where this locution might be used, someone (X) claims to have been discriminated against where X regards treatment accorded to him as unfair in relation to some other person or group. For example, the denial of Little League membership to a young girl seems to fit such a description.

Yet, to be more precise about the nature of the unfairness involved where we use 'discrimination', we may turn to a
definition of the term offered by William M. Newman:

Discrimination may be defined as any act of differential treatment toward a group or an individual perceived as a member of a group. Moreover, the intent and/or effect of differential treatment is to create a disadvantage of some sort. (p. 199)

After noting various problems with this definition, Newman tells us that his major point is that discrimination is an act, as opposed to prejudice which is something that people think.

For our purposes, we shall be most concerned with the evaluative sense of the term which, as we have noted already, is perjorative. Let us now briefly look at 'reverse discrimination'.

We may take our first clue to the use of 'reverse discrimination' to be the fact that rarely if ever are so-called minority groups said to suffer from reverse discrimination. In other words, we normally say that members of certain minority groups have been discriminated against when they have been treated unfairly. Yet, it seems that when we attempt to somehow correct or to compensate for such previous injustices, and when the supposed remedy seems to be unjust to a member of some group which has, on the whole, been treated fairly in the past, that cries of, "reverse discrimination" arise. Hence, what is being claimed when someone (X) says that he is suffering from reverse discrimination is that some action is being taken to alleviate a prior injustice to someone else, but that that action (or that differential
treatment) has resulted in a disadvantage of some sort to
(an injustice to) X.

The characterization given above of preferential treatment in education, we must note, is not a descriptive account. As we have already noted, 'discrimination' in the sense of 'discrimination against' has a negative evaluative sense. Furthermore, we can see in the above account that if we want to speak of compensation for supposed prior injustices, and of issues such as whether or not certain present inequalities are just, then we want to avoid, as far as possible, the term 'reverse discrimination'. For, the use of the term presumes injustice, and prejudices the inquiry. What we may do fruitfully, then, is to clarify the use of 'preferential treatment' which we shall employ in this study, and then lay-out descriptively what seems to be at issue when disputes over preferential treatment in admissions to education arise.

'Preferential Treatment'

Before we look to the issue of preferential treatment in admissions to education, we shall clarify what use of the term we shall be employing in this inquiry. There seem to be at least three uses of 'preferential treatment' in ordinary language. First, sometimes we use the term to mean that one has merely exercised one's preferences. For example, we might say that a younger person showed preferential treatment to an
older person by allowing the older person to enter the building before he did so. Using the term to describe such a whim or a courtesy does not leave us puzzled, and in fact we rarely ask for reasons or for justification when the term is used in this way. Contrariwise, there seems to be another use of the term which has a negative evaluative sense. For instance, Johnny, who is sixteen years old, might complain that his parents always show preferential treatment to his twin brother Joe by allowing Joe to stay out so much later than he on Saturday evenings.

Whether or not we could elaborate further on the above uses of the term is not important here. What does seem to be important is that we are clear by what we shall mean when, in this work, we use the term 'preferential treatment'. In ordinary language we use the term in a third way, by which we mean that of two people in a particular situation, one (X) has been treated differently than another, and that this different treatment has somehow been favorable to X. Notice that this description does not say that the other person (Y) has necessarily suffered because of the treatment to X, or whether the difference in treatment is right or wrong, good or bad, just or unjust. With reference as to an evaluation of the difference in treatment, the above description is silent. This seems to be just the sense of 'preferential treatment' that we shall find most useful to adopt for our inquiry. For, by adopting this use of the term we may then go on to ask such
questions as: (1) Is such a difference in treatment with reference to admissions in education just?; (2) Under what circumstances could such differential treatment be taken to be just or unjust in admissions?; (3) For what reasons might it be taken to be just or unjust?; etc. Hence, throughout this work, we shall take 'preferential treatment' to mean "according different treatment to one person (X) than to another (Y), where X and Y seem to be in similar circumstances, and where that treatment is favorable to X."

Finally, with reference to the above stipulated use of the term, we must note two points. First, we are now freed from any further ordinary language analysis of 'preferential treatment' and can now go on to lay-out descriptively what seems to be at issue in disputes over preferential treatment in admissions to education. Second, the definition legislated above frees us to view the justice or injustice of such actions in admissions to education independently of the use of the term. Let us now view the issue of preferential treatment in admissions to education descriptively.

Laying-Out the Issue of Preferential Treatment in Admissions to Education

In recent years, with the rise of questions of equality of opportunity in education and in issues of equality of education, questions have been raised as to how we ought to (assuming that we ought to, for the moment) go about making opportunity for education and sometimes even the results of
education equal. Among the various suggestions which arise, the suggestion comes up that we may somehow attain equality of educational opportunity or educational attainment by giving particular students, or students of particular groups, preferential treatment in admissions to higher education. Quite generally and superficially for the moment, the assumption seems to be that we can somehow "make-up" for so-called past differential treatment, which is taken to be, in some cases if not most, unjust, by now using a policy of differential treatment, which favors those who are of the group that suffered from the differential treatment previously. Notice that we are here still speaking descriptively in that we have not yet begun to examine whether the current differential treatment is seen as just or unjust.

Before we address that issue, let us look at the diagram below in order to become clearer on some of the elements involved in the issue of preferential treatment in admissions; i.e., let us lay-out the issue.

\[
\begin{align*}
\text{t}_1 & : X_{a-1} & Y_{a+2} & Z's_{-1} \\
\text{t}_2 & : & X_{b+2} & Y_{b-1} & Z's_{-1} \\
\text{t}_3 & : X_{c+1} & Y_{c+1} & Z's_{+?}
\end{align*}
\]

Where: \( t = \) time

\( X, Y, \) and \( Z = \) some genus or group

\( a \) and \( b = \) particular individuals in that group
sub \textit{x} = favorable or unfavorable treatment received by \textit{X}, \textit{Y}, or \textit{Z}'s.

Let us take the rectangle in the diagram above to represent the present issue of differential treatment to \textit{Xb} and \textit{Yb}. With this in mind, we may discuss the elements involved in disputes over preferential treatment in admissions to education, and can note a few particular questions which arise with reference to these elements. It seems then that someone arguing for the practice of preferential treatment in admissions might say that because \textit{Xa} suffered an injustice (−1) at \textit{t}_1, \textit{Xb} deserves preferential treatment (+2) at \textit{t}_2. Seemingly, there would be no question of the justice of this if there were unlimited resources at our disposal. For, in that case, we could give \textit{Xs} or \textit{Ys} whatever treatment they desired/deserved/required. Yet, given a limited amount of resources, e.g., a limited amount of admissions slots open in a college, this choice to give \textit{Xb} preferential treatment results in some denial (−1) to \textit{Yb}. First of all, then, we might want to ask if this choice is just. Or, we might want to ask if it can be justified, given the resultant loss to \textit{Yb}; and if so, how is it to be justified?

Once we make the move of questioning the preferential treatment accorded to \textit{Xb}, we have entered the realm of justification. We are now asking for arguments in support of or against the above decision. When this occurs, the other elements in the above diagram come into play. Notice that
someone might possibly attempt to justify the action taken at \( t_2 \) in one of the following ways. First, one might say that given that \( Xa \) suffered an injustice \((-1)\) at \( t_1 \), that \( Xb \) deserves preferential treatment \((+2)\) at \( t_2 \), based upon some principle of social justice. Or, someone might argue that an injustice \((-1)\) suffered at \( t_1 \) by \( Xa \) resulted in some loss for \( Xb \) at \( t_2 \), and that preferential treatment will remedy this; i.e., it weights the side of \( X's \) since they are competing at an unfair advantage, given the loss resultant from \( t_1 \). Third, someone might want to argue that given the denial to \( X's \) at \( t_1 \), and the resultant loss to \( X's \) at \( t_2 \), that preferential treatment accorded to \( X's \) at \( t_2 \) will bring about an equality between \( X's \) and \( Y's \) \((+1 \text{ each})\) at \( t_3 \). Finally, another way to argue for preferential treatment would be for one to point out that at \( t_1 \) and at \( t_2 \) some third group (\( Z's \)) has been and is still denied certain things which they ought to have, and that preferential treatment accorded to \( X's \) at \( t_2 \) will result in the alleviation of the denial or the injustices which \( Z's \) have suffered in the past at \( t_3 \).* An example of this type of argument is seen in the case where persons claim that by admitting certain types of people to

*I thank Dr. Gerald Reagan for pointing this out.*
medical schools, the rural population of America, long suffering a scarcity of doctors, will receive the necessary medical treatment which they need.

Now that we have looked at a few of the possible ways in which one might want to argue for preferential treatment in admissions to education, we may quickly summarize the elements involved in such disputes by noting that positions for or against the practice will involve any one of, or a number of, the following types of claims: (1) claims about the circumstances at $t_1$, $t_2$, or $t_3$, as well as some relationships which exist between these temporal circumstances; (2) claims about losses/denials of goods (skills, competencies, etc.) which have occurred; (3) claims about denials/losses of rights; (4) claims about the consequences of compensation given for losses of goods; and (5) claims which speak of rectification of denied rights.

Now that we have looked at the issue(s) of preferential treatment in admissions to education briefly, we shall note some questions which seem to arise when we enter the realm of justification with respect to the issue of preferential treatment. The first question to arise might be one which asked about the propriety of someone's counting $X$'s, $Y$'s, or $Z$'s as being in the same group, since we are speaking of them at three different times. In response to this, we offer the reader only the following warning:
Thus we have this general strategy for examining differences of opinion about whether two things are the same or different: Investigate the background purposes and kinds of decisions which turn on the question at hand... Sometimes... the determination of the background purposes is a value issue, and thus like the disputes about programmatic definitions... depends on settling the value question. (Ennis, p. 186)

That is, the issue of the connection between, say, Xa and Xb, may actually turn upon the principle of social justice which we adhere to in our decision of how to treat Xb as opposed to Yb. Let us go on, then, to look at some questions which have to do with the principles which might underlie a particular choice with reference to Xb and Yb at t2; i.e., let us look at questions of principle.

By looking at what we have above called "questions of principle" we mean that we shall look to certain questions which arise and which are concerned with principles of social justice which might be given in order to justify any action taken at t2. Although others such as educational administrators might be most concerned with questions which pertain to certain principles of efficiency, our concern is primarily with principles of social justice. Now, given the many ways that one could argue for or against preferential treatment in admissions, we could ask a number of questions of principle. We shall note a few important ones here, and shall then use them as a cutting edge later in order to summarize just what knowledge we have gained by applying A Theory of Justice to the problem of preferential treatment in admissions to
education. These questions of principle are the following:

1. What principles concerning the rights of Xs might feasibly underlie arguments for according preferential treatment in admissions to Xs at t₂?

2. What principles might underlie arguments which hold that the treatment to Yb at t₂ is unjust, given that preferential treatment is accorded to Xb at t₂?

3. What principles concerning the distributive shares of Xs or Zs might underlie arguments for according preferential treatment to Xs at t₂?

4. Are there any principles that, although they seem plausible initially, cannot be used to argue for or against preferential treatment in admissions? and,

5. Are there any special characteristics of the issue of preferential treatment in admissions to education that make the issue particularly difficult to resolve?

Again, these questions of principle are put forth neither as questions to be answered with finality by this inquiry, nor as hypotheses to be investigated by this work. They are put forth so that we may use them as a cutting edge when it comes time to summarize how we have become clearer about the issues and concerns involved in the problem of preferential treatment in admissions by applying the elements of A Theory of Justice.
Having looked at the issue(s) of preferential treatment in admissions to education descriptively, and having cited a multitude of issues and questions which motivate us to turn to the theory of Rawls for some insight into these problems, we shall now attempt to accomplish two final tasks in this chapter. First, we shall establish how it is that preferential treatment in admissions to education is an educational problem, and one with which a philosopher of education is rightly concerned. Second, we shall then establish that the problem of preferential treatment in admissions to education is indeed a problem of social justice.

**Preferential Treatment in Admissions as a Problem for Education**

In order to establish in what manner preferential treatment in admissions is a problem for education, and is one with which the philosopher of education is rightly concerned, we must first clear up the ambiguity of the term 'education', by making some prior distinctions.

First, Jonas F. Soltis has noted that 'education' functions both as a term with a positive evaluative meaning and as a term which is used descriptively. To point out the former use of the term we might note that people normally use it when they speak about learning or schooling which they take to be worthwhile or of value. For example, we might say of the safe-cracker that although he is schooled in ways of the world, he is not an educated person. The latter descriptive
sense of the term 'education' is the one with which we will be concerned in the following discussion. This use of the term can be seen many times where we wish to speak of learning, schooling, etc., (for etc., see the discussion below), in a descriptive manner; i.e., irrespective of whether we value such things. For example, we may speak of German education under Hitler.

Yet even after we have cleared up some of the ambiguity of the term 'education' by noting that it is the descriptive sense of the term with which we are concerned, there is a further problem of ambiguity. Even if we agree to use 'education' descriptively, there are at least four descriptive uses of the term, which we must be clear about if we are to discuss how it is that preferential treatment in admissions is an educational problem. The first use of the term which we shall mark is evident in the title, The Education of Henry Adams. In this use of 'education', we mean something akin to "the learning of Henry Adams," or "how/what Henry Adams came to learn." That is, many times we use the term 'education' where we could just as easily use the term 'learning'; e.g., The Higher Learning in America. Let us mark this use of the term for our purposes by calling it "education (1)."

As far as the second and third uses of 'education' are concerned, we may attempt to get at them by observing a distinction made by Richard Pratte in The Public School Movement. Here Pratte distinguishes between the public school movement
(PSM) qua social institution (si) and PSM qua ideology (i):

The PSM\textsubscript{i} has as its referent a way of looking at things; a set of ideas....PSM\textsubscript{s} - refers to the set of institutions which we commonly refer to as schools.

Analogously, it seems that many times we use the term 'education' to mean a particular set of ideas, assumptions, goals, an ideology (i), and at other times to mean a set of social institutions or institutional arrangements (si). The former use of the term may be seen by examining the use of 'education' in the phrase, "Democratic education is the foundation of our way of life." The person citing this slogan, if you will, has as his concern a particular set of ideals, goals, etc. and cares, at the moment, little about the institutional arrangements designed for carrying out such goals, etc. In other words, we might mark the above use of 'education' by calling it "education (i)." Furthermore, we do sometimes use 'education' in order to describe a set of institutions of learning, so to speak; to talk about schools and schooling. This may be exhibited by the phrase, "Higher education in the United States is suffering from the financial crunch." Let us mark this use of the term by calling it "education (si)."

The fourth and final use of 'education' which is not so important for our purposes here, but which we must at least be clear about in the discussion which follows, is the sense in which 'education' is used to stand for a field of study.
That is, many undergraduate students say that they are majoring in education, meaning that they have entered a field of study which has some common body of literature, a number of professionals working on at least distantly related problems, etc. We may mark this use of the term by calling it "education (fs)."

With these four uses of 'education' delineated, we may now return to the issue of our concern and ask how it is that preferential treatment in admissions to education is an educational problem, and how it is that it is one with which the philosopher of education ought to concern himself. First of all, it seems that it is not at all clear that preferential treatment in admissions is a problem for education (1). It may be that by giving preferential treatment to particular prospective college students, for example, it will improve or will inhibit the education (1) of those students or of other students. Since this is not our concern in this investigation, we shall only point out here that this issue is one for the sociologist and the psychologist, such as James Coleman, to look into.

Furthermore, in asking whether or not preferential treatment in admissions to education is a problem for education (si), we can reply that it certainly does seem that it is a large problem. Although this neither is the concern of this study, we may here say that the above answer is obvious when one looks to the revision of admissions policies in universities.
within the past few years, and at the problem of implementa-
tion of such policies. Notice that this issue vis-a-vis 
education (si) is an issue of institutional arrangement, ef-
ficiency and policy implementation, which seems to be rightly 
the concern of the educational administrator.

Third, it seems that preferential treatment in admissions 
to education is definitely a problem for education (fs). 
Since 'education (fs)' is both vague and highly ambiguous, its 
consideration has little importance to us here. Since we 
have already shown that preferential treatment in admissions 
is a problem for education (si) and for the educational ad-
ministrator to deal with, and since Educational Administration 
is a division of education (fs), we may leave this use of the 
term by saying merely that preferential treatment in admis-
sions is a problem for education (fs) in at least one way if 
not many more.

Finally, we may ask if preferential treatment in admis-
sions is a problem for education (i) and if it is, who is to 
deal with it. In other words, given that we sometimes speak 
of education in terms of a number of assumptions, goals, means, 
ends, etc., e.g., democratic education, in what way is pre-
ferential treatment in admissions a problem, and for whom is 
it a problem? The answer to this question seems to depend up-
on what it is that interests us about education as ideology. 
Hence, if one is concerned with preferential treatment in 
admissions with reference to particular ideologies in education,
and how these developed over a period of years, then it seems that what one has is a problem for the historian of education. Furthermore, if one is concerned with whether or not preferential treatment ought to be implemented in education, that is, whether or not it is just and is consistent with our education (1) which we in a democratic society supposedly hold to, then one ought to turn to a normative philosopher of education for arguments in this regard. Finally, if one is concerned with what is at issue in disputes over preferential treatment in admissions to education as far as education (1) is concerned, and if one is interested in some possible principles which underlie and possibly lead astray such positions, then one is concerned with a problem which is rightly one for the analytic philosopher of education to consider. Of course, it is this last problem that the present inquiry is concerned with.

What we have seen in this section is that the question, "Is preferential treatment in admissions a problem for education?" is ambiguous. The importance of clarifying this ambiguity is that we may, first of all, be clear about whether our problem is one of psychology, administration, history, philosophy, etc. Second, by clearing up this ambiguity we can also see what types of answers to expect from any one particular investigation. We would not expect the psychologist to expound upon the justice or injustice of preferential treatment in admissions, just as we would hardly expect the analytic
philosopher of education to speak of the administrative drawbacks to such a policy. In conclusion to this section, we can say that preferential treatment in admissions is a problem for education, and a problem for all of the types of professional people mentioned above to be concerned with; but not the same problem, by any means, for any one of them.

**Preferential Treatment in Admissions to Education as a Problem of Social Justice**

In this final section of this chapter, we shall investigate how it is that preferential treatment in admissions to education is a problem of social justice. This may at first seem to be trivial since many of us would probably agree that it is, of course, in at least some way a matter of social justice. Yet, it seems that we too often assume this without investigating why we do in fact take it to be a matter of social justice. The vagueness surrounding this issue is exhibited in the literature also:

> It might be that the general claim about preferential treatment's being a matter of justice has a flaw; but if there is one, it is not presently evident. (Heslep, p. 151)

Let us proceed to establish that preferential treatment is also a problem of social justice. Notice first, however, that we must again be clear about which sense of 'education' we are using. If one is speaking of education (si), then it seems that preferential treatment in admissions is a matter of efficiency rather than a matter of social justice. Further,
if one is speaking of education (1) then it seems that one is concerned with certain empirical matters. As stated earlier, the notion of education (fs) is highly ambiguous as it covers a number of different types of concerns and problems. Hence, what we are left with is education (i), and this does seem to be the sense of 'education' under which our concerns about social justice arise.

When we begin to talk about "democratic education," or for example, "existential education," we normally mean 'education' in the sense of education (i), (in the sense of ideals, goals, and in general, ideologies). Now, within such talk about education (i), it should not be surprising to us that there will arise talk about education (si), since most persons who expound upon education (i) want somehow to connect it to the real world of people (whether or not they in fact end up doing so). Now, the important point to note here is that when talk about education (si) arises within this context of someone's expounding upon education (i), the talk about education (si) will generally be teleological in nature. Whereas, those who speak within the context of education (si), are concerned with education (si), normally speak about education (si) in some causal or empirical way. An example may be instructive here. The Platonist expounds upon education (i) by saying such things as its being mere reminiscence. Further he may begin to tell us that in education (si) we ought to allow at least three hours per day
for the purpose of dialogue. Yet, the administrator who then speaks about education (si) says that we cannot implement such a plan since that would cause us to abandon the teaching of certain lessons which are required by the state code. The major point for our purposes below is that talk about education (i) will probably involve talk about education (si), but that the education (si) talk will be of a teleological nature, generally, within the context of talk about education (i).

Now, because one begins to speak about education (si) teleologically within the context of education (i), one speaks of such things as what it is that schools are to accomplish with reference to individual people, i.e., one speaks of the purposes of education (si) within education (i). Furthermore, at least some of those purposes usually turn out to be distributive purposes, with reference to certain social goods. In other words, one says such things as, "Schools ought to distribute (or attempt to distribute) such things as knowledge, skills, credentials, etc., according to criterion X."

Before we go on to speak of preferential treatment in admissions to education as a problem of social justice, it seems that we can already show that those people who get at least this far with their talk about education (i) are already face-to-face with problems of social justice. We may show this by merely noting what it is that problems of social justice seem to involve. We shall turn to some relevant
sources to do so. If we look to John Rawls, we see that he tells us that issues of social justice involve questions about the basic structure of a society; that is, the principles and institutions by which certain rights, interests, duties, shares, etc., of society are to be distributes/divided. Such principles and arrangements are necessary when we, as individuals, come together as a society, because of the following:

There is a conflict of interests since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share. (Rawls, p. 4)

So far as this is taken to be true, then, we need some basic arrangement or some basic principles to underlie our society:

A set of principles is required for choosing among the various social arrangements which determine this division of advantages and for underwriting an agreement on the proper distributive shares. These are the principles of social justice: they provide a way of assigning basic rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation. (Rawls, p. 4)

Given this view of the problems, issues, and concerns of social justice, one might say that there are a multitude of things to be distributed in society; e.g., rights, etc. Here we need only note that some of what is to be distributed comes under the category which Rawls terms "primary goods:" i.e., "...(T)hings that every rational man is presumed to want...." Furthermore, such things as intelligence, knowledge and skills are taken to be primary goods since they aid in the pursuit
of one's life plan, no matter what that life plan is.

Earlier in this work, we claimed that anyone speaking about education (i), insofar as they spoke about education (si) in terms of the purposes of schools in the distribution of learning, skills, credentials, and the like, had already come face-to-face with problems of social justice. Given Rawls' view of social justice, and given the above talk about the purpose of schooling with respect to certain primary goods, it seems that we have supported this earlier claim.

Before we go on to see how it is that preferential treatment in admissions is a problem of social justice, we shall make the above point on the basis of two other sources, lest there are those who would say that it is Rawls' theory or his definitions which allow us to make that point. Gregory Vlastos in his work, "Justice and Equality," presents us with an interesting analysis of equalitarian justice, within which he discusses four of its basic principles. Now, insofar as anyone who is concerned with education (i) must refute or apply his third principle, which follows, then that person must deal with problems of social justice:

(3) One man's prima facie right to well-being is equal to that of any other.... (Vlastos, p. 52)

Vlastos himself points out the connection between this third principle and the concerns of education (i):
Moreover, given (3), (one) could see in it the basis for various welfare-rights, such as the right to education.... (Vlastos, p. 52)

One final way in which we can make the point that those who are concerned about education (i), who speak of the purpose of schooling in some distributive sense, must come to face issues of social justice, is to turn to John Locke's *The Second Treatise of Government*. In Chapter V, Locke tells us:

> Whatsoever that he removes out of the State that Nature hath provided, and left it in, he hath mixed his labour with, and joyned it to something that is his own, and thereby makes it his Property... No Man but he can have a right to what that is once joyned to, at least where there is enough and as good left in common for others. (Locke, p. 329)

It is the last part of the above passage that is usually called "The Locken Proviso." Clearly, as many people have pointed out, there is a dire need for clarification of what Locke might have meant by "enough and as good." Yet, for our purposes we need not concern ourselves with this. Rather, it seems that no matter what counts as "enough and as good" that this is the same concern, given our previous discussion of primary goods, that those who are concerned about education (i) and who speak about the purpose of schooling (education (si)) in terms of a distributive function, must face.

Now that we have seen that those who are concerned with education (i) must confront problems of social justice when they begin to speak about purposes and education (si), and have also seen why this is so, if we merely look to what the issue
of preferential treatment in admissions to education involves, we will see that its being a matter of social justice follows as a corollary from the above discussion.

Earlier in this work, we spoke of the types of problems that arise when people begin to dispute about preferential treatment in admissions to education. We mentioned five questions which would work as summary guides to our application of Rawls' theory to the problem. Looking back to those questions, we see, first of all, a concern for the rights of particular persons, and a concern as to how such rights are distributed. This is clear given the problem of choice between Xb and Yb at $t_2$. Second there is also a concern for the previous distribution of goods, i.e., in this case primary goods, and how one might go about compensating for a previous, unjust distribution. Also, it seems that we have cited a concern for the reasons/conceptions/principles which might be given as the foundation for any choice we might make with respect to Xb and Yb.

From our previous discussion, as well as from the points made directly above, preferential treatment in admissions to education seems clearly to be a problem of social justice. For, the problem is one in which we have a concern for the distribution of certain primary goods in society. Furthermore, we are concerned that such a distribution, no matter what it is, to be taken not to violate the rights of persons or of groups of persons, and that it aid in establishing or maintaining
certain welfare-rights of other persons. Yet, as we said previously, that preferential treatment in admissions to education is a problem of social justice seems to follow as a corollary from our discussion of how it is that problems of education (i) are, or run into, problems or social justice. As such, then, it seems to be no longer vague as to why preferential treatment in admissions is a problem of social justice; nor are the reasons for why this is so.

Summary

We began this chapter by noting in a general way that many of the concerns of social and political philosophy could help to shed some light on problems of social justice which arise in the realm of education. From there, we went on to stipulate a use of the term 'preferential treatment' which we would use in this study and to give reasons why we would avoid the term 'reverse discrimination'. We then layed-out the issue of preferential treatment in admissions and noted some questions of principle which we eventually hope to cast some light upon by our work in this investigation. Finally, we elucidated how it is that preferential treatment in admissions is a problem for education, for the philosopher of education, and is a problem of social justice. With these preliminary matters out of the way, let us begin our investigation by turning to A Theory of Justice.
Footnotes


CHAPTER II
A CRITICAL SUMMARY OF THE THEORY OF
A THEORY OF JUSTICE

Introduction

In this chapter, we shall critically summarize A Theory of Justice by John Rawls. We must note at the outset, though, that in the last chapter the reader was cautioned that this work would not be an endeavor in social philosophical casuistry. What that claim means practically for this chapter and for the ones that follow is that we must review the respective theory of justice as a theory. And theories, as Rawls tells us are normally justified in a special manner:

... (J)ustification rests upon the entire conception and how it fits in with and organizes our considered judgments in reflective equilibrium. As we have noted before, justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view. (Rawls, p. 579)

The importance of the above remark here is merely that if we are to investigate how Rawls' theory of justice bears upon the issue of our concern, it would be ill-advised to select elements from the theory for application while disregarding the theoretical context within which they arose, and from which they derive their meaning and utility. This is not
to say that we cannot apply Rawls' theory where he has not applied it, but is only to say that we must exercise some intellectual caution and rigor in doing so.

First, then, we shall review some general remarks about Rawls' theory which hopefully will lay some foundation as to: what it is at which Rawls aims with the construction of his theory; what it can be used to account for; how Rawls views the construction of the theory; what use he thinks it may be put to; etc. Second, after having reviewed such general considerations, we shall then attempt to critically summarize the theory of *A Theory of Justice*, in order to become clearer about what the elements of the theory are, and how they fit together.

Finally, we must, by way of introduction, explain the title of this chapter in that it has been labelled "a critical summary." The reason for this title is that we shall herein attempt a task that is two-fold. First, and foremost, we shall attempt to summarize the theoretical elements of *A Theory of Justice* into a coherent whole, by rearranging and discussing elements that are scattered throughout the work. Yet, second, we shall not summarize these elements blindly. That is, where there are important problems to be noted in Rawls' position, we shall point them out. Contrary to popular opinion, we shall attempt to show that Rawls' position is coherent and easily understandable in the main, although
there are problems with it. Let us now turn to some general remarks about Rawls' position.

General Remarks about Rawls' Theory

In our attempt to employ Rawls' theory in looking at preferential treatment in admissions, we shall begin by noting the general direction and motivations of that theory. We begin in this way since Rawls' work is not only quite extensive, but is also quite confusing at some points, as Brian Barry tells us:

This is one of the things I had in mind when I said that the reader who sets himself to comprehend the precise relation between the elements in Rawls' theory should not be surprised if he notices steam coming out of his ears. (Barry, p. 84)

Given the above forewarning, then, we do best to start by looking at some general features of Rawls' theory.

First, since the word 'justice' is ambiguous we might do well to ask, with respect to what sense of 'justice' Rawls is proposing a theory. Are we to be concerned with 'justice' in the sense of retributive justice, or distributive justice, or with some other sense of the term? Rawls tells us clearly that his theory is primarily concerned with what is called "social justice," and that the principles of justice which his theory attempts to support are principles of social justice:
The primary subject of the principles of social justice is the basic structure of society, the arrangement of major social institutions into one scheme of cooperation. We have seen that these principles are to govern the assignment of rights and duties in these institutions and they are to determine the appropriate distribution of the benefits and burdens of social life. The principles of justice for institutions must not be confused with the principles which apply to individuals and their actions in particular circumstances. (Rawls, p. 54)

In the above passage, we see that Rawls is most concerned with principles which will govern social institutions. Yet, we do not yet know what Rawls counts as an 'institution,' although we shall find out presently:

Now by an institution I shall understand a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for certain penalties and defenses, and so on, when violations occur...It seems best to say that it is the institution as realized and effectively and impartially administered that is just or unjust. (Rawls, p. 55)

Hence, we can say at the outset that, quite generally, one of the major concerns of Rawls' theory is to identify and support some principles of social justice; i.e., some principles which are the underpinnings of the institutions of society.

Having said so much in a very general and superficial way about the principles of justice, we now move on to our next general point about the theory, which arises if we ask what type of society are these principles arrived at supposed
to be underpinnings of. Are these principles of social justice being claimed to be the underpinning of all types of societies, whether they be just, unjust, or partially just? Here too, Rawls clearly gives us the answer that his theory is most concerned with those principles which would underlie what he calls the "well-ordered" society:

The other limitation on our discussion is that for the most part I examine the principles of justice that would regulate a well-ordered society. Everyone is presumed to act justly and to do his part in upholding just institutions. Though justice may be, as Hume remarked, the cautious, jealous virtue, we can still ask what a perfectly just society would be like. (Rawls, p. 8)

This brings us to another general feature of Rawls' theory which we must keep in mind throughout our investigation; that is, the key distinction between what Rawls calls "ideal theory" and "nonideal" theory." The point here is that Rawls is mostly concerned with ideal theory, although he admits that the pressing matters of the day lie in the realm of non-ideal (or the partial compliance part of nonideal) theory:

Thus I consider primarily what I call strict compliance theory as opposed to partial compliance theory. The latter studies the principles that govern how we are to deal with injustice...Also included here are questions of compensatory justice and of weighing one form of institutional injustice against another. Obviously the problems of partial compliance theory are the pressing and urgent matters. These are the things that we are faced with in everyday life. The reason for beginning with ideal theory is that it provides, I believe, the only basis for the systematic grasp
of these more pressing problems... The point to keep in mind is that a conception of justice for the basic structure is worth having for its own sake. It should not be dismissed because its principles are not everywhere satisfactory. (Rawls, p. 8-9)

Now, especially for the purposes of our investigation, this quote is quite revealing for two reasons. First, the above passage implies that Rawls takes his ideal theory as a necessary yet not a sufficient condition for solving problems of partial compliance theory. Whether or not Rawls is correct on this point is irrelevant here. What does seem pertinent is that he sees a gap between his ideal theory and its application to the everyday problems of (in)justice with which we are faced. This ought to make us exercise some intellectual caution in our application of his theory. Second, we can now note that this is the reason that the discussion of the application of Rawls' theory to preferential treatment, in Chapters Four and Five, has been split into the three parts of "More Direct Applications," "Less Direct Applications," and "Non-Applications." That is, since we acknowledge this gap between ideal and nonideal theory, we shall try to accord to it all the intellectual respect to which it is due.

The third general remark to be made about Rawls' theory before we can begin to specifically discuss it, is that it has a specific direction and motivation underlying its development. In order to understand the theory we must bring to light this direction and the reasons behind it. Quixotically,
Rawls does not do this explicitly until the latter part of his work. The direction of his theory can be elucidated by what Rawls says of the contrast between a teleological theory and a contract theory:

In view of these reflections, the contrast between a teleological doctrine and the contract doctrine may be expressed in the following intuitive way: the former defines the good locally...which is to be maximized over some totality; whereas the latter moves in the opposite fashion by identifying specific structural forms of right conduct each set within the preceding one, and in this manner working from a general framework for the whole to a sharper and sharper determination of its parts. (Rawls, p. 566)

For Rawls, then, the vector of social justice begins by the selection of principles which are to underlie the institutions of the well-ordered society; and proceeds to the applications of these principles as realized by the selection of a just constitution:

Thus the four-stage sequence (§ 31) formulates an order of agreements and enactments designed to build up in several steps a hierarchical structure of principles, standards, and rules, which when consistently applied and adhered to, lead to a definite constitution for social action. Now this sequence does not aim at complete specification of conduct. Rather the idea is to approximate the boundaries, however vague, within which individuals and associations are at liberty to advance their aims. (Rawls, p. 566)

Now that we have seen what the general direction of Rawls' theory is, we may ask what the general intellectual motivation is behind this direction. Although a thorough answer to this question would require that we had already
rigorously reviewed Rawls' theory, a general answer to this question will aid us in such a review which will follow shortly. In general we may address this question of the intellectual motivation underlying the direction of Rawls' theory by saying: first, Rawls' theory is a contract theory; and, second, that it is of greatest importance in such a theory that right is taken to be prior to good. Ultimately, as we shall see in the next section of this work, this all seems to rest upon Rawls' acceptance of the Kantian interpretation of the self. Yet, for now, it is enough that we see that the direction of Rawls' theory is motivated intellectually by this essential importance of embedding the priority of right to good in his theory of social justice:

Rather, their (men's) desires and aspirations are restricted from the outset by the principles of justice which specify the boundaries that men's systems of ends must respect. We can express this by saying that in justice as fairness the concept of right is prior to that of the good...The priority of justice is accounted for, in part, by holding that the interests requiring the violation of justice have no value. Having no merit in the first place, they cannot override its claims. The priority of the right over the good in justice as fairness turns out to be a central feature of the conception. It imposes certain criteria on the design of the basic structure as a whole...

(Rawls, pp. 31-32)

This notion of right being prior to the good brings us to our fourth general remark about Rawls' theory. Before we attempt to understand the specifics of what Rawls is doing, we must first mention that his theory is a contract theory and must say a few words in general about what the intentions of
this type of a theory are. Traditionally such theories have
been seen as taking their starting point from some such
questions as: "Given hypothetically some state of nature in
which individuals were free and autonomous, what agreement
would they agree to/contract into, each for his own advantage,
and in order to overcome the disadvantages of the state of
nature?" Of course, this question is a bit too simplistic
given past contract theories, and also given the vast com­
plexities of the representation of the state of nature
(i.e., its disadvantages, etc.). Yet, such a portrait is much
too simplistic, also, because as Rawls sees it, the great
potential of the contract doctrine is that it can yield for
us a common conception of right (of justice) to which we may
ultimately appeal:

The intuitive idea is this: the concept of some­
thing's being right is the same as, or better,
may be replaced by, the concept of its being
in accordance with the principles that in the
original position would be acknowledged to apply
to things of its kind...In other words, explica­
tion is elimination: we start with a concept
the expression for which is somehow troublesome;
but it serves certain ends that cannot be given
up. An explication achieves these ends in other
ways that are relatively free of difficulty. Thus
if a theory of justice as fairness, or more gener­
ally of rightness as fairness, fits our considered
judgments in reflective equilibrium, and if it en­
able us to say all that on due examination we want
to say, then it provides a way of eliminating cus­
 stomary phrases in favor of other expressions. So
understood one may think of justice as fairness
and rightness as fairness as providing a definition
or explication of the concepts of justice and right.
(Rawls, p. 111)
Rawls also makes this point of the usefulness of contract theory in yielding a common conception of justice (right), in his discussion of an individual’s conception of justice as different from the concept of justice:

Men disagree about which principles should define the basic terms of their association. Yet we may still say, despite this disagreement, that they each have a conception of justice. That is, they understand the need for, and they are prepared to affirm, a characteristic set of principles for assigning basic rights and duties and for determining what they take to be the proper distribution of the benefits and burdens of social cooperation. Thus it seems natural to think of the concept of justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of principles, these different conceptions, have in common...Clearly, this distinction between the concept of justice and the various conceptions of justice settles no important questions. It simply helps to identify the role of the principles of social justice. (Rawls, p. 5-6)

In order to pursue this further we must wait until we deal with the specifics of Rawls' theory. Our general point here is that Rawls employs contract theory in order to arrive at some common concept of justice which those in a well-ordered society would take as the common basis in the adjudication of their conflicting claims: "In this case while men may put forth excessive demands on one another, they nevertheless acknowledge a common point of view from which their claims may be adjudicated...One may think of a public conception of justice as constituting the fundamental charter of a well-ordered human association." (Rawls, p. 5)
Our final general remark has not so much to do with Rawls' theory as it does with the way in which we shall deal with Rawls' theory. Since one of the tests of any theory under consideration is that it can account for all the phenomena that its competitors can, and can do so in a more useful, elegant, or compelling way, one of the ways in which Rawls tries to justify his theory is by comparing it to utilitarian theory, in order to show the merits which the former has over the latter. For our purposes we shall not concern ourselves with this comparison, nor with utilitarian theory except where it may incidentally arise. Of course, we must admit that the above comparison is of great importance to the justification of Rawls' work, as he labors quite rigorously to lay out important contrasts between the two theories at many different places in his work. Yet, we shall be concerned here only with what Rawls' theory of justice is, what arguments (non-comparative) he takes to support that theory, and later in this work, what application the theory and its support have to the issue of preferential treatment in admissions to education. If there are those who are curious as to how the contrasts of Rawls' theory with utilitarian theory would influence our judgments about preferential treatment, they are welcome to pursue their curiosities after having seen the results of our investigation.
Now that we are familiar with the setting of Rawls' theory, its direction, and some of the motivation behind it, let us review the specifics of his theory of justice.

Summary of Rawls' Theory

Anyone familiar with *A Theory of Justice* probably understands that giving a summary of this work is a task in itself. Yet, what we shall attempt to accomplish in this section is to give a summary by discussing the major elements of Rawls' theory and how these elements relate to one another. We can begin this task with an optimistic attitude by saying that just because others have quite rightly criticized Rawls' theory as abstruse and at time inconsistent, that does not mean that we cannot express and summarize clearly what Rawls expresses abstrusely.

Let us, then, begin by discussing what Rawls has called, the original position.

A. The Original Position

Earlier, in our general remarks, we mentioned quite simplistically that contract theories normally take as their basis some such question as: "Given hypothetically some state of nature in which individuals were free and autonomous, what agreement would they agree to/contract into, each for his own advantage, and in order to overcome the disadvantages of the state of nature?" Furthermore, we noted that for Rawls, the importance of this approach is that it has the potential
to yield a common conception of right/justice, where there are usually little more than individual conceptions. Given that we could show that those in the original position would agree to some particular principles of justice, we could say that we had arrived at an explication of the ordinarily messy concept of 'right', which would be much clearer and more useful than the ordinary concept: "In other words, explication is elimination: we start with a concept the expression for which is somehow troublesome; but it serves certain ends that cannot be given up. An explication achieves these ends in other ways that are relatively free of difficulty." (p. lill)

Although the above remarks seem clear enough, they beg all of the major questions which any theory of social justice must confront. With respect specifically to Rawls' theory, we must ask the following questions: (1) What are the elements of the original position?; (2) Why are these the elements?; and, (3) Why does this device of the original position with these elements embedded within it work to give us a technique for explicating the concept of 'right'/'justice'? Again, we would ask similar questions of any theory of social justice. Having asked these questions, we must now turn specifically to Rawls' discussion of the original position (which is scattered throughout his work) in order to answer them.
The first of the three questions asked about the original position seems the easiest to answer, and we shall do so forthwith. The elements of the original position are to be seen as the following: (1) the persons are to represent genetic lines (i.e., they are "continuing persons"); (2) what is to be chosen by them is the basic structure of society; (3) they shall choose from a list of traditional theories of social justice (e.g., Utilitarianism, Intuitionism, etc.); (4) it is a situation which may be entered into at any time provided that we reason according to the other restrictions of this position; (5) there is a moderate scarcity of goods; (6) formal conditions on the principles chosen are those of generality, universality, publicity, and finality; (7) the persons in this position are under what Rawls has called a "veil of ignorance"; (8) they are also mutually disinterested with respect to each other's plans of life, wants, etc.; (9) they are rational in that they can hold unified expectations, can take effective means to ends, and can base their judgments on relevant probabilistic information; (10) the agreement reached will be unanimous and will stand perpetually; (11) the agreement shall be strictly complied with; and finally; (12) general egoism shall be taken as the "no agreement point" in this position. (Rawls, pp. 146-147)

Now that we have answered the first question posed above by at least labeling the elements of the original position (be assured that sufficient discussion of the most important
of these elements will follow in a moment), we may now turn to the question of why these are the elements of the original position (which will of course involve discussion of the elements themselves, as well as some other related topics). In order to answer the above question, let us again turn to what it is that the original position/initial situation is to accomplish. We have already noted that it is to somehow facilitate our arriving at a common concept of justice. But Rawls is quite clear in many places about what the specific purpose of building these elements into the original position is to accomplish:

The idea here is simply to make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice and therefore on the principles themselves... One excludes the knowledge of those contingencies which set men at odds and allows them to be guided by their prejudices... Obviously the purpose of these conditions is to represent equality between human beings as moral persons, as creatures having a sense of good and capable of a sense of justice. (Rawls, pp. 18-19)

Perhaps a metaphor reminiscent of Frege's digestive metaphors may be instructive in explaining the role of the original position. What the original position is may be seen as a system to which we may feed certain principles or theories of social justice. If we are confident that we have built into the system all of the requirements for (restrictions for) good theories, or even the best theory, of social justice,
then upon feeding different theories or principles of social justice to our original position system, we would expect it to spit-out one particular theory which would be better than any of the others fed to it. Let us abandon the metaphor now and note that Rawls expresses the same idea literally in terms of pure procedural justice. In order to show this, we must first define "pure procedural justice":

By contrast, pure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed...A distinctive feature of pure procedural justice is that the procedure for determining the just result must actually be carried out; for in these cases there is no independent criterion by reference to which a definite outcome can be known to be just...A fair procedure translates its fairness to the outcome only when it is actually carried out. (Rawls, p. 86)

The example Rawls notes here is that of gambling. That is, if the betting procedure entered into is fair, these background circumstances transfer their fairness to whatever outcome results from the procedure.

As stated above, Rawls attempts to develop an original position containing certain elements or restrictions which we would impose on arguments for theories of social justice, so that whatever outcome results (i.e., adoption or rejection of the theory), after having viewed the theory from the perspective of the original position, will be the correct outcome:
The original position is defined in such a way that it is a status quo in which any agreements reached are fair. It is a state of affairs in which the parties are equally represented as moral persons and the outcome is not conditioned by arbitrary contingencies or the relative balance of social forces. Thus justice as fairness is able to use the idea of pure procedural justice from the beginning. It is clear, then, that the original position is a purely hypothetical situation. (Rawls, p. 120)

Now that we more fully understand the purpose of devising the original position as well as the importance of the elements chosen to characterize it, let us return to our first question asked about it in order to both take a closer look at those elements and to see why these are the elements of the original position. This discussion will lead us to an answer to the third question asked above. We can first say that the first four elements of the original position mentioned above are pretty easily understandable or are accounted for by what has been said to this point. Since contract theory proceeds in a particular direction with a particular motivation, it seems that the first thing to be chosen, given this, is the basic structure of society. Further, the persons in the original position take some interest in those of the next generation, and choose from some alternative list of conceptions. Also, since we have seen what the original position is supposed to accomplish, it is obvious that it is hypothetical and as such can be entered into by anyone, by merely reasoning in accordance with further restrictions.
Hence, our discussion arrives at the fifth element of the original position, which is moderate scarcity. This element is one of the elements which falls under the category which Rawls calls the circumstances of justice. Now, the circumstances of justice are those "conditions under which human cooperation is both possible and necessary." (Rawls, p. 126) As Gustav Bergmann would say, we must explicate this aphorism. To do this we can merely note that Rawls holds to a Humean view of society in which there is both a conflict and an identity of interests. Thus principles of justice are needed to underwrite the appropriate arrangement of institutions which distribute advantages. "The background conditions that give rise to these necessities are the circumstances of justice." (Rawls, p. 126)

Another way to put the aforementioned point is that for problems of social justice to arise, there must be, or at least there must be assumed to be, some condition of scarcity:

Finally, there is a condition of moderate scarcity understood to cover a wide range of situations. Natural and other resources are not so abundant that schemes of cooperation become superfluous, nor are conditions so harsh that fruitful ventures must inevitably break down. (Rawls, p. 127)

Hence, the element of moderate scarcity is built into the original position as a circumstance of justice; a condition which makes human cooperation both possible and necessary, and as such brings about problems of social justice.
We now pass to the eighth element of the original position, which is the notion that the individuals are mutually disinterested in the interests of each other. This element, too, Rawls takes to be a circumstance of justice; albeit a subjective circumstance:

The subjective circumstances are the relevant aspects of the subjects of cooperation, that is, of the persons working together. Thus while the parties have roughly similar needs and interests, or needs and interests in various ways complementary, so that mutually advantageous cooperation among them is possible, they never the less have their own plans of life... Moreover, although the interests advanced by these plans are not assumed to be interests in the self; they are interests of a self that regards its conception of the good as worthy of recognition and that advances claims in its behalf as deserving satisfaction. I shall emphasize this aspect of the circumstances of justice by assuming that the parties take no interest in one another's interests. (Rawls, p. 127)

Although the above passage does help to clarify why mutual disinterest is an element of the original position, it only gives us part of the story. As Rawls later tells us, this element also allows that the principles of justice eventually arrived at will not be based on strong assumptions about men's conduct where issues of social justice arise but will be strong enough to incorporate some expression of men's conduct and motives where such issues arise:

But the postulate of mutual disinterest in the original position is made to insure that the principles of justice do not depend on strong assumptions...A conception of justice should not presuppose, then, extensive ties of natural sentiment...Finally, when it is supposed that the parties are severally disinterested,
and are not willing to have their interests sacrificed to the others, the intention is to express men's conduct and motives in cases where questions of justice arise...Thus justice is the virtue of practices where there are competing interests and persons feel entitled to press their rights on each other. (Rawls, p. 129)

Therefore, Rawls concludes the following with reference to the fifth and eighth elements of the original position:

Thus, one can say, in brief, that the circumstances of justice obtain whenever mutually disinterested persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity. Unless these circumstances existed there would be no occasion for the virtue of justice, just as in the absence of threats of injury to life and limb there would be no occasion for physical courage. (Rawls, p. 128)

With respect to the sixth element of the original position, the veil of ignorance, and the seventh element, the formal conditions on the principles, we shall not fully be able to understand why these are elements of the original position until later when we attempt to see why Rawls takes the original position to be a device for explicating the concept of 'right'/'justice'. Yet, for now we may view a few of the reasons that Rawls cites for building these two elements into the original position. First, the intuitive notion behind the veil of ignorance is that although those persons in the original position will have knowledge about general facts and laws concerning human beings, as well as whatever general knowledge is necessary for them to choose between
different conceptions of justice, they will not have knowledge of the particular situation (e.g., natural capabilities, socio-economic level, etc.) which they will find themselves in after the choice of the principles has been made and the society has been set-up. Since the construction and use of the original position is based upon pure procedural justice, it is clear that if we were to build in knowledge of particulars with reference to certain individuals, the choice procedure would yield principles which were biased to particular individuals. As Rawls tells us:

Now the reasons for the veil of ignorance go beyond mere simplicity. We want to define the original position so that we get the desired solution. If a knowledge of particulars is allowed, then the outcome is biased by arbitrary contingencies. As already observed, to each according to his threat advantage is not a principle of justice. If the original position is to yield agreements that are just, the parties must be fairly situated and treated as equally moral persons. The arbitrariness of the world must be corrected for by adjusting the circumstances of the initial contractual situation. (Rawls, p. 141)

We shall assume that the above discussion gives us at least an intuitively plausible explanation as to why the veil of ignorance is an element of the original position (until we answer the question as to why the original position yields an explication of 'right'/ 'justice'), and shall now turn to the element of the formal conditions on the principles to be chosen. Now, given the notion of pure procedural justice,
and the notion that the veil of ignorance prohibits the transference of any bias based upon knowledge of particular contingencies, it should not be very difficult for us to understand the formal constraints that are placed upon whatever principles of justice are to be chosen. Hence, whatever principles are chosen, they must be general in that they do not mention proper names or "rigged definite descriptions" (Rawls, p. 131):

The naturalness of this condition lies in part in the fact that first principles must be capable of serving as a public charter of a well-ordered society in perpetuity... Thus, to understand these principles should not require a knowledge of contingent particulars, and surely not a reference to individuals or associations. (Rawls, p. 132)

Furthermore, the principles chosen must be universal in application, and must, third of all, serve as a public conception of justice. With reference to universality, Rawls tells that this condition imposes an upper bound on how complex the principles may be, as well as working to take the consequences of everyone's complying with the principles into account (as is obvious here, we shall discuss the Kantian influence in a moment). Third the principles chosen are to serve as a public conception of justice. It seems that the reason for including publicity as an element of the original position is two-fold. First, again, whatever principles are chosen are to serve as a charter for the well-ordered society. Moreover, the principles ought to contribute
to the stability of that society. (Rawls, p. 133)
Although we shall later in this chapter discuss the problems of stability and congruence, it seems that for now, if we take 'stability' in its ordinary language sense, it will be sufficient in giving us an understanding of why publicity is included as a constraint on the principles to be chosen.

The two final constraints on the principles to be chosen are that they impose an ordering on conflicting claims and that they serve as a final court of appeals to which arguments may be addressed. (Rawls, p. 134-135) Again, the ordering restriction is included for the purpose of avoiding such situations as the resolution of claims by resorting to force or the infliction of pain. Since the principles of justice are accepted to avoid such situations, by including an ordering constraint, appeals to force and the like will fare least well on a list of alternative actions to take where there are conflicting claims. With respect to finality, it seems obvious that since the principles are to serve as the fundamental charter of society, and are taken to be the principles of right and justice, that their adoption, whatever they are, in the original position ought to be undertaken with the view that they are to serve as the final principles to which arguments in support of claims can be addressed.

That the parties in the original position are taken to be rational, ninth, seems to be an obvious enough element to be included. Yet, this element of the rationality of the
parties is more complicated than we would think at first
sight. What is essential for us to understand here is that
both the direction of Rawls' theory, discussed earlier in
General Remarks, and Rawls' thin theory of good underlie
this notion of rationality. Recall, then, that we said
earlier that in Rawls' theory right is prior to good, meaning
that the principles of justice/right are to be agreed upon
first and foremost. Further, Rawls' thin theory of good (or
more simply, his understanding of good), therefore, need be
only an instrumental theory of good, since what is generally,
by us, considered to be morally bad, has been eliminated
from the realm of possible choices by our prior agreement to
the principles of justice. Hence, for Rawls, 'good' is
morally neutral, in and of itself.

Now, without delving too deeply into the third section
of A Theory of Justice, we may cite the words of Rawls in
order to make clear how his notion of 'good' underlies the
element of the rationality of the parties in the original
position:

Having defined a person's good as the suc-
cessful execution of a rational plan of life,
and his lesser goods as parts thereof, we are
in a position to introduce further definitions...
But before doing this we should note the assump-
tion that the primary goods can be accounted for
by the thin theory of (the neutral notion of--
H.M.S.) the good. That is, I suppose that it is
rational to want these goods whatever else is
wanted, since they are in general necessary for
the framing and the execution of a rational plan
of life. The persons in the original position
are assumed to accept this conception of the
good, and therefore they take for granted that they desire greater liberty and opportunity, and more extensive means for achieving their ends. With these objectives in mind, as well as that of securing the primary good of self-respect...they evaluate the conceptions of justice available to them in the original position. (Rawls, p. 433)

It seems a bit heavy-handed to pack all of this into the element of the rationality of the parties, albeit, as Rawls tells us, this notion of rationality is the standard notion of rationality found in social theory:

Thus even though the parties are deprived of information about their particular ends, they have enough knowledge to rank the alternatives. They know that in general they must try to protect their liberties, widen their opportunities, and enlarge their means for promoting their aims whatever these are. Guided by the theory of the good, and the general facts of moral psychology, their deliberations are no longer guesswork. They can make a rational decision in the ordinary sense.

The concept of rationality invoked here, with the exception of one essential feature (i.e., that the rational individual does not suffer from envy--H.M.S.), is the standard one familiar in social theory. (Rawls, p. 143)

Since the final three elements of the original position are easily understandable by what has been said previously or by that which shall follow, we shall not here go on to explicate them. Rather, we shall now turn to our third question stated previously which is: "Why does this device of the original position with these elements embedded in it work to give us a technique for explicating the concept of 'right'/'justice'?" It seems that the most appropriate answer can
only be given to this question by turning to what Rawls has
called "The Kantian Interpretation." As Rawls tells us:

The notion guiding the entire construction
is that of the original position and its
Kantian interpretation: this notion con­
tains within itself the elements that select
which information is relevant at each stage,
and generate a sequence of adjustments ap­
propriate to the contingent conditions of the
existing society. (Rawls, p. 566-567)

In the section entitled "The Kantian Interpretation of
Justice As Fairness," (Rawls, pp. 251-257) Rawls tells us
that Kant held that moral legislation was to be agreed to
under conditions that characterize men as free and equal
rational beings, and that the principles chosen are to be the
most adequate expression of his nature as a free and equal
rational being. Hence, Rawls tells us:

Assuming, then, that the reasoning in favor
of the principles of justice is correct we
can say that when persons act on these prin­
ciples they are acting in accordance with
principles that they would choose as rational
and independent persons in an original position
of equality. (Rawls, p. 252)

Further, Rawls tells us that by acting on the principles of
justice chosen in the original position, we are acting from
categorical imperatives in the sense that they apply to us
whatever our particular aims are.

The above is sufficient to show that the original posi­
tion can be interpreted in terms of Kant. Yet, for the key
to how the original position serves as a device in order to
explicate the concept of right, we must turn to Rawls' dis­
cussion of the Kantian notion of self. In this discussion
Rawls notes that Sidgwick took Kant's distinction of realizing one's true self by acting in accordance to moral law, as opposed to permitting one's actions to be determined by sensuous desires (the law of nature) to come to naught:

"Kant never explains why the scoundrel does not express in a bad life his characteristic and freely chosen selfhood in the same way that a saint expresses his characteristic and freely chosen selfhood in a good one." (Rawls, pp. 254-255)

Furthermore, as Rawls tells us, the problem here is that what Kant must show is that acting from the moral law expresses the nature of the self as a free and equal rational being in ways that acting from contrary principles does not. Also, as we see in the passage quoted below, it is just this gap that the conception of the original position is supposed to fill:

Kant did not show that acting from the moral law expresses our nature in identifiable ways that acting from contrary principles does not.

This defect is made good, I believe, by the conception of the original position...my suggestion is that we think of the original position as the point of view from which noumenal selves see the world...Now if the agreement of the contract doctrine is correct, these principles are indeed those defining moral law... The description of the original position interprets the point of view of noumenal selves, of what it means to be a free and equal rational being...The original position may be viewed, then, as a procedural interpretation of Kant's conception of autonomy and the categorical imperative. The principles regulative of the kingdom of ends are those that would be chosen in this position, and the description of the situation enables us to explain the sense in
which acting from these principles expresses our nature as free and equal rational persons. No longer are these notions purely transcendent and lacking explicable connections to human conduct. For the procedural conception of the original position allows us to make these ties. (Rawls, pp. 255-256)

Here, then, is the answer to our third question. The original position with these elements built into it works to give us a technique for explicating the concept of 'right'/'justice' because it, first of all, interprets what it means to be a free and equal rational being, and second of all, may be seen as a procedural interpretation of what acting from our nature as free and rational beings means with reference to our conduct, at least as far as the well-ordered society is concerned. For it is by the use of the device of the original position that we arrive at the principles of social justice, which serve as the charter of the well-ordered society.

In conclusion to this section on the original position, we might be struck, at first, by the heavy reliance upon Kant. Indeed, one might go as far as Brian Barry and say:

Indeed, I think it is possible to put the point more strongly and say that something's being chosen in the original position would definitely not of itself guarantee that the thing chosen would be just. (Barry, p. 16)

Now that we understand what the original position entails, and why it supposedly leads to an explication of 'right'/'justice,' let us go on to discuss Rawls' two principles of justice.
B. The Two Principles of Justice

The major task of this section will be merely to illustrate what Rawls' two principles of justice are, and to explicate how he construes them. The reasons/arguments why he believes they would be chosen in the original position are discussed in the section entitled, "The Choice." Yet, before we go on to look at the two principles we must make one point clear, which has arisen in the discussion above, and which will continue to arise wherever Rawls' theory is discussed. According to Rawls, natural capacities, endowments, and the like, which are acquired by way of birth, are to be viewed as undeserved and are to be dealt with by the principles of justice:

No one deserves his greater natural capacity nor merits a more favorable starting place in society...The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts. (Rawls, p. 102)

Now this may be seen, if one wishes, as an assumption of Rawls theory. Yet, given our discussion in the last section of this work it would seem more appropriate to say that this is merely another way of portraying the viewpoint of free and equal rational beings. Whichever way one chooses to speak about the above passage, we here bring it out into the light of day since it is an important point in understanding Rawls' two principles and his arguments.
Since much of the discussion of the two principles is a working discussion, in that Rawls' attempts to take us step by step (or leap by bound) through his reasoning and derivation of the two principles, we are faced with many different versions of the two principles when we decide to take a close look at them. Some versions of the principles are specifically cited by Rawls as a first, second, etc. formulation of the principles while others are found in more general form, which begin with terms such as, "The intuitive idea is...." We shall view Rawls' two principles of justice by first looking at a general summary of the two principles and then by moving through Rawls' discussion of them to later formulations.

We first note Rawls' initial general summary of his two principles of justice:

I shall maintain instead that the persons in the initial situation would choose two rather different principles: the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society...The intuitive idea is that since everyone's well-being depends upon a scheme of cooperation without which no one could have a satisfactory life, the division of advantages should be such as to draw forth the willing cooperation of everyone taking part in it, including those less well situated. (Rawls, pp. 14-15)

It is obvious that in citing the above passage that we have included within it not only a general formulation for the two principles but also some bits of the argument for
them. We have done this at the outset in order to show that the bottom line, so to speak, of the principles is the premise which we brought "into the light of day," above. For, later in this same paragraph with which we are presently concerned, Rawls tells us:

Once we decide to look for a conception of justice that nullifies the accidents of natural endowment and the contingencies of social circumstance as counters in quest for political and economic advantage, we are led to these principles. They express the result of leaving aside those aspects of the social world that seem arbitrary from a moral point of view. (Rawls, p. 15)

Now that we have certified what the bottom line of the general conception of the two principles is, and have cited the general summary, let us move on to the next important general comments that Rawls makes about these two principles. These come when Rawls speaks of what he calls "the priority problem":

As an important special case I shall, in fact, propose an ordering of this kind (i.e., a lexicographical or serial ordering—H.M.S.) by ranking the principle of equal liberty prior to the principle regulating economic and social inequalities. This means, in effect, that the basic structure of society is to arrange the inequalities of wealth and authority in ways consistent with equal liberties required by the preceding principle. Certainly the concept of a lexical (lexicographical—H.M.S.), or serial, order does not offend our sense of moderation and good judgment. Moreover, it presupposes that the principles in the order be of a rather special kind. For example, unless the earlier principles have but a limited application and establish definite requirements which can be fulfilled, later principles will never come into play. Thus the
principle of equal liberty can assume a prior position since it may, let us suppose, be satisfied (Rawls, p. 43. For a critique of this see Barry, Chap. 7)

Hence, given the two principles of justice, the principle of equal liberty is to be satisfied prior to that of the second principle. We shall forebear here in answering the obvious question of, "Why should this be so?" until the section entitled "The Choice." For now we cite the above passage to document the priority of equal liberty and the assumption that it can be fulfilled.

Let us move on to Rawls' first formal formulation of the two principles of justice. Here he tells us:

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

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all. (Rawls, p. 60)

As Rawls points out, the terms "everyone's advantage" and "open to all" require further explication since they are ambiguous. Such explication leads us to a second formulation of the two principles of justice.

Here, we will only say, quite summararily, that Rawls considers four interpretations of the second principle (i.e., Natural Liberty, Natural Aristocracy, Liberal Equality, and Democratic Equality) and construes the second principle of justice as Democratic Equality. What this means is that he
holds that "equally open" is to be understood as "equality of fair opportunity," and "to everyone's advantage" is to be understood in terms of what he calls "the difference principle." We shall here deal with the difference principle first, and shall take the following as Rawls' definition of it:

Assuming the framework of institutions required by equal liberty and fair equality of opportunity, the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged. (Rawls, p. 75)

A few points must be noted here with reference to the difference principle. First, as stated above, its employment assumes the satisfaction of the equal liberty and equality of fair opportunity clauses. Second, although it is a bit more specific than those things previously discussed, it certainly seems to be a close relative to Rawls' intuitive notions cited previously of society as a cooperative enterprise and of the necessity "from a moral point of view" of disregarding or nullifying the "accidents of natural endowment and the contingencies of social circumstance."

In his discussion of the difference principle Rawls makes two further points about it. Third, then, we can say, strictly speaking and while abiding by Rawls' warning, that the difference principle is a maximizing principle in that it calls for the expectations of the least advantaged to be maximized, subject to the mentioned constraints. Rawls calls the situation where this obtains, the perfectly just scheme.
Yet, in the case where if the expectations of the better off were decreased the expectations of the least advantaged would drop also, and also where even higher expectations for the more advantaged would increase the expectations of the least advantaged, we are said to have a scheme that is just throughout, although it is not the best just arrangement. (Rawls, pp. 78-79) Based upon this distinction, Rawls notes also that the second principle when construed as Democratic Equality is compatible with the principle of efficiency:

But it should be noted that the difference principle is compatible with the principle of efficiency. For when the former is fully satisfied, it is indeed impossible to make any one representative man better off without making another worse off, namely, the least advantaged representative man whose expectations we are to maximize. (Rawls, p. 79. On efficiency see Rawls, pp. 66-70)

The clause, "the former is fully satisfied," of course, is to be taken as "where the perfectly just scheme obtains" since the above passage is not necessarily true of the best just scheme.

Furthermore, Rawls then tells us that we are to maximize the welfare of the worst-off, second worst-off, third worst-off, etc., until we come to the best-off representative man. Yet he chooses to give us his second formulation of the second principle as the following:

Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under fair equality of opportunity. (Rawls, p. 83)
Now, with reference to fair equality of opportunity, Rawls defines it in the following way: "In all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed. The expectations of those with the same abilities and aspirations should not be affected by their social class.

(Rawls, p. 73) There seem to be two, by now familiar, notions which underlie the fair equality of opportunity clause. The first notion is that of pure procedural justice:

It is evident that the role of the principle of fair opportunity is to ensure that the system of cooperation is one of pure procedural justice. Unless it is satisfied distributive justice could not be left to take care of itself, even within a restricted range...Thus in this kind of procedural justice the correctness of the distribution is founded on the scheme of cooperation from which it arises and on answering the claims of individuals in it.

(Rawls, pp. 87-88)

In other words, since Rawls desires that the assignments of rights, etc., in the basic structure of the well-ordered society be fair, whatever they turn out to be, as a result only of taking the principles of justice into consideration, which those in the original position decide to adopt, Rawls adopts the fair equality of opportunity clause as opposed to the alternative of "careers as open to talents," hoping to avoid the problem of the eventual development of a meritocracy.
Yet, the above is only half of the story, since Rawls also tells us that this principle of open positions forbids the exclusion of certain groups from certain positions, even though this might result in obtaining better talents for those positions. This is forbidden, as Rawls tells us, because:

It (the principle—H.M.S.) expresses the conviction that if some places were not open on a basis fair to all, those kept out would be right in feeling unjustly treated...because they were debarred from experiencing the realization of self which comes from skillful and devoted exercise of social duties. They would be deprived of one of the main forms of human good. (Rawls, p. 84)

This passage brings us to the second notion which underlies the fair equality of opportunity clause, which is his thin theory of good. In our discussion of the rationality of the parties in the original position, we pointed out that Rawls' conception of 'good' was a morally neutral conception. Further we noted that those in the original position had the general knowledge that there were some goods they would want more of than less regardless of what their particular life plans turned out to be. These Rawls calls "primary goods." Now of the primary goods, one of the ones which Rawls takes to be basic is that good of self-respect, which he defines in the following way:

First of all...it includes a person's sense of his own value, his secure conviction that his conception of his good, his life plan is worth carrying out. And second, self-respect implies a confidence in one's ability, so far as it is in one's power, to fulfill one's intentions. (Rawls, p. 440)
Hence, it is now clear that when Rawls tells us that a violation of the open positions clause deprives one of the main forms of human goods, he is relying heavily on his thin theory of good and on the notion of self-respect within it.

In essence, then, we have given a summary of what Rawls' two principles seem to entail. However, his final formulation of the principles is not given until he has talked considerably on some institutions consistent with the two principles we have investigated. Since Rawls argues that the formulations which we have seen would be adopted in the original position, we shall go on to discuss the reasons why Rawls believes they would be adopted. Later in Chapter Three we will deal with some of the issues which bring about and are embedded in Rawls' final formulation of the principles.

C. The Choice

In this section, we shall address ourselves to the following two questions: (1) Why would the two principles be adopted by those in the original position?; and (2) Why would they be adopted with the order (priority of liberty) Rawls has given them? Again, we note that, we shall here be concerned with what we have called "the positive arguments" of Rawls; that is, the reasons for the two principles as opposed to the reasons weighing against the competing theories also on the menu in the original position, such as average utilitarianism.
Our question at this point is, therefore: (1) "Why would the two principles be adopted in the original position?"
The answer to this question can be found mainly, but not totally, in the two sections of Rawls' work, entitled: "The Reasoning for the Two Principles," and "Main Grounds for the Two Principles." Quite generally, for the moment, the answer to the above question is that the two principles ensure what those in the original position would minimally want ensured, given their situation and their characteristics, would not bind them in such a way that they would have to forfeit such things as their own rational life plans, and further, would contribute to ends which would be not only supportive of, but also uplifting to, their rational life plans, whatever they turn out to be, and to the well-ordered society within which they will carry out their life-plans. This seems to be the general answer of Rawls (with the addition, of course, that the two principles accomplish this better than any other conception of justice). Yet, establishing that the above is so, is another, and a much less vague, story.

Let us first address the answer that the two principles ensure what those in the original position would minimally want ensured, and hence would be chosen on this basis. As groundwork for his argument with respect to this, Rawls discusses how the original position is analogous (repeat, ANALOGOUS) to the maximin rule of choice. Rawls does not intend, it seems, that we take the maximin rule as a reason
for the adoption of the principles, but only as an analogy which can clarify how a decisive argument could be made. (Rawls, p. 152. For a view contrary to the one expressed here, and more knowledgable with reference to this history of the use of maximin by Rawls, see Barry, p. 87.) Accordingly, it is important for us to note that maximin is not discussed as a main ground for the adoption of the two principles, but is only discussed within the confines of the reasoning leading to the adoption of the two principles.

First, then, what is the maximin rule of choice? "The maximin rule tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the outcome of which is superior to the worst outcome of the others?" (Rawls, pp. 152-153) Now let us take a step backwards and see upon what characteristics Rawls draws the analogy between the choice situation in the original position and the choice situation where it is appropriate to use maximin. One situation, as Rawls tells us, where we would use maximin would be if we knew that our enemies were to assign us a place in one of a number of alternative societies (e.g., a Rawlsian, a utilitarian, or an intuitionist society). According to maximin and to Rawls, we would choose the Rawlsian society. However, such a conclusive argument, given that it could be made, could not be used by Rawls since: "The persons in the original position do not, of course, assume that their initial place in society is decided by malevolent opponents."
(Rawls, p. 153) Yet, in considering "the reasoning for the two principles," a look at the maximin rule of choice can be illuminating, and this is implied quite strongly in the following passage:

But that the two principles of justice would be chosen if the parties were forced to protect themselves against such a contingency (assignment by enemies--H.M.S.) explains the sense in which this solution is a maximin solution. And this analogy suggests that if the original position has been described so that it is rational for the parties to adopt the conservative attitude expressed by this rule, a conclusive argument can indeed be constructed for these principles. Clearly the maximin rule is not, in general, a suitable guide for choices under uncertainty. But it is attractive in situations marked by certain special features. My aim, then, is to show that a good case can be made for the two principles based on the fact that the original position manifests these features to the fullest possible degree, carrying them to the limit, so to speak. (Rawls, p. 153)

Now, Rawls tells us that there are three features of a situation that may make it plausible to use the maximin rule. These are:

First, since the rule takes no account of the likelihoods of the possible circumstances, there must be some reason for sharply discounting estimates of these probabilities...The second feature that suggests the maximin rule is the following: the person choosing must care very little, if anything, for what he might gain above the minimum stipend that he can, in fact, be sure of by following the maximin rule...This last feature brings in the third feature, namely, that the rejected alternatives have outcomes that one can hardly accept. (Rawls, p. 154)

Furthermore, as Rawls sees it, maximin is usually to be taken as a maxim, or a rule of thumb, since it does not in general strictly apply unless the three above conditions are
fulfilled. Yet, the analogy between the three above conditions and the choice in the original position does seem striking:

To begin with, the veil of ignorance excludes all but the vaguest knowledge of likelihoods... If we can maintain that these principles provide a workable theory of social justice, and that they are compatible with reasonable demands of efficiency, then this conception guarantees a satisfactory minimum. There may be, on reflection, little reason for trying to do better... The minimum assured by the two principles in lexical order is not one that the parties wish to jeopardize for the sake of greater economic and social advantages... Finally, the third feature holds if we can assume that the other conceptions of justice may lead to institutions that the parties would find intolerable. (Rawls, pp. 155-156)

However, lest we become carried away and begin to think that the maximin rule of choice can actually yield a conclusive argument leading to Rawls' two principles of justice, Rawls again reminds us that he has brought to light the employment of the maximin rule in order to elucidate the nature of the choice problem in the original position. At the end of his discussion of maximin, he tells us:

The original position clearly exhibits these special features to a very high degree in view of the fundamental character of the choice of a conception of justice. These remarks about the maximin rule are intended only to clarify the structure of the choice problem in the original position. They depict its qualitative anatomy. The arguments for the two principles will be presented more fully as we proceed. (Rawls, p. 157)

Therefore, Rawls uses maximin as a fruitful heuristic device by which to illustrate concretely the nature of the choice in the original position and some of the reasons that those in
the original position might want to choose the two principles of justice. With this in mind we now turn to what Rawls takes to be the main grounds for the adoption of the two principles in the original position.

There seem to be three main grounds upon which Rawls argues that the two principles of justice are superior to other competing conceptions, and hence would lead to the choice of the two principles in the original position. These three grounds are: (1) the strains of commitment; (2) stability; and, (3) the support given to men's self-respect. Concerning the first main ground in favor of the two principles, Rawls tells us:

The first confirming ground for the two principles can be explained in terms of what I earlier referred to as the strains of commitment. I said...that the parties have a capacity for justice in the sense that they can be assured that their undertaking is not in vain...Thus they consider the strains of commitment. They cannot enter into agreements that may have consequences they cannot accept. They will avoid those they can adhere to only with great difficulty. Since the original agreement is final and made in perpetuity, there is no second chance. In view of the serious nature of the possible consequences the question of the burden of commitment is especially acute...Thus the parties must weigh with care whether they will be able to stick by their commitment in all circumstances. (Rawls, p. 176)

By looking to the two principles of justice, we can see why Rawls tells us that this is a main ground for the acceptance of the two principles. That is, since the basic rights and liberties of those in the original position are secured by the two principles, and cannot be disregarded or
gambled away for some economic gain, the two principles do better on the strains of commitment grounds than some competing theory of, say, utilitarianism. For, those who agree to the two principles in the original position, "...run no chance of having to acquiesce in a loss of freedom over the course of their life for the sake of a greater good enjoyed by others, an undertaking that in actual circumstances they might not be able to keep." (Rawls, p. 176)

Although the second main ground supporting the two principles invokes the publicity constraint on the principles, as well as the notion of the strains of commitment, Rawls eventually summarizes this ground as the ground of stability. Here Rawls tells us that a strong point in favor of any conception of justice is that it generates its own support, and that persons subject to a basic structure of society which satisfies its principles for an extended period of time, tend to develop a desire to act in accordance with and to uphold the institutions which exemplify the principles. To summarize this, he says, further:

A conception of justice is stable when the public recognition of its realization by the social system tends to bring about the corresponding sense of justice. (Rawls, p. 177)

Looking to the two principles of justice, then, we see that when they are satisfied, "each person's liberties are secured and there is a sense defined by the difference principle in which everyone is benefited by social cooperation." (Rawls, p. 177) Further, "since everyone's good is affirmed, all acquire
inclinations to uphold the scheme." (Rawls, p. 177) Since, one point will be pertinent for our later discussion, let us merely note here that Rawls later speaks of the notion of the good of the individual as being consistent with the good of society as the notion of congruence, which he takes to contribute to the stability of a society.

Finally, the third main ground upon which the two principles are judged to be superior to competing conceptions of justice is that they give greater support to men's self-respect, which Rawls also claims increases the effectiveness of social cooperation. As we saw earlier when discussing the fair equality of opportunity clause of the second principle, self-respect is a basic "primary good"; which is to say that someone in the original position would choose to have more of it than less, regardless of his future life-plan. Here again with respect to the third main ground supporting the two principles, Rawls tells us of self-respect:

It is clearly rational for men to secure their self-respect. A sense of their own worth is necessary if they are to pursue their conception of the good with zest and to delight in its fulfillment. Self-respect is not so much a part of any rational plan of life as the sense that one's plan is worth carrying out. Now our self-respect normally depends upon the respect of others. Unless we feel that our endeavors are honored by them, it is difficult if not impossible for us to maintain the conviction that our ends are worth advancing...Moreover, one may assume that those who respect themselves are more likely to respect each other and conversely... Thus a desirable feature of a conception of justice is that it should publicly express men's respect for one another. In this way they insure a sense of their own value. (Rawls, pp. 178-179)
Furthermore, Rawls tells us, when society abides by the two principles of justice each person's self-esteem is affirmed in a scheme of mutual benefit which supports institutions which again affirms men's self-esteem. Such are the effects of the two principles since they have the notion of reciprocity embedded in them:

For by arranging inequalities for reciprocal advantage and by abstaining from the exploitation of the contingencies of nature and social circumstance within a framework of equal liberty, persons express their respect for one another in the very constitution of their society. In this way they insure their self-esteem as it is rational for them to do. (Rawls, p. 179)

Although it is obvious that the ends of stability, congruence, and self-respect must be discussed, we shall first go on to answer our second question, which is: "Why would the two principles of justice be adopted with the order (priority of liberty) Rawls has given them?" Again, it seems quixotical that we should have to go so far into Rawls' work (over five hundred pages to be more exact) to get the reasons for the priority of liberty, which Rawls discusses in the early part of his work. In "The Grounds for the Priority of Liberty," we see why Rawls holds that the two principles would be adopted with his ordering by those in the original position.

The first point to note in Rawls' position is that the priority of liberty is contingent upon the supposition that society will attain a certain level of wealth. As Rawls tells us:
The supposition is that if the persons in the original position assume that their basic liberties can be effectively exercised, they will not exchange a lesser liberty for an improvement in their economic well-being, at least not once a certain level of wealth has been attained... The denial of equal liberty can be accepted only if it is necessary to enhance the quality of civilization so that in due course the equal freedoms can be enjoyed by all. The lexical ordering of the two principles is the long-run tendency of the general conception of justice consistently pursued under reasonably favorable conditions. Eventually there comes a time in the history of a well-ordered society beyond which the special form of the two principles takes over and holds from then on. (Rawls, p. 542)

About the above passage, Rawls notes two things. First, he quite rightly points out that the ranking of the two principles must be established by showing that it is rational from the point of view of those in the original position to rank them in the way he does. Second, he points out that "goodness as rationality" (his thin theory of, or neutral conception of, good) and the principles of moral psychology play a part in establishing this position.

Rawls then lays-out the basis for the priority of liberty quite succinctly, as we see in the following passage:

Now the basis for the priority of liberty is roughly as follows: as the conditions of civilization improve, the marginal significance for our good of further economic and social advantages diminishes relative to the interests of liberty, which become stronger as the conditions for the exercise of the equal freedoms are more fully realized. Beyond some point it becomes and then remains irrational from the standpoint of the original position to acknowledge a lesser liberty for the sake of greater material means and amenities of office. (Rawls, p. 542)
Now, why this is so is discussed by Rawls in quite a confusing way. However, in general, it seems that he discusses the reasons under the above basis of priority of liberty in two different ways. First, he points out that as the level of well-being rises, only less urgent wants remain to be met, while at the same time the obstacles to the exercise of equal liberties decline. Arising with this condition comes a growing insistence upon such things as the right to pursue spiritual and cultural interests, the importance of forming social unions consistent with equal liberty, the aspiration by men to have control over the laws and rules that regulate their own associations, etc. Hence, given the importance of the priority of liberty above a certain level of well-being in society, and the triviality of the economic wants remaining at this level, Rawls holds that it would be irrational not to opt for the priority of liberty. (Rawls, p. 543)

Yet, there seems to be a second and related way of establishing the grounds for the priority of liberty. Once society reaches a particular level of well-being and certain favorable conditions exist, Rawls tells us that the fundamental interest in determining our plan of life eventually assumes a prior place. (Rawls, p. 543) We are given only a hint as to the first reason that this is so: "One reason for this I have discussed in connection with liberty of conscious and freedom of thought." (Rawls, p. 543) Why we are
given no footnote or further reference to this reason is puzzling. The second reason why under favorable conditions one's interest turns to determining one's fundamental plan of life has to do again with the primary good of self-respect, and the nature of human beings:

And a second reason is the central place of the primary good of self-respect and the desire of human beings to express their nature in a free social union with others. Thus the desire for liberty is the chief regulative interest that the parties must suppose they all will have in common in due course. The veil of ignorance forces them to abstract from the particulars of their plans of life, thereby leading to this conclusion. The serial ordering of the two principles then follows. (Rawls, p. 543)

Here, then, is the basis of the priority of liberty. Now that we have seen it, it is striking that it relies so much on seeming facts of human nature and on generalizations of moral psychology, as well as on Rawls' theory of good, and certain ends discussed in that theory. As a matter of fact, it seems that much of the basis of Rawls' theory relies upon the above elements. Yet, Rawls warned us previously that "goodness as rationality" as well as the principles of moral psychology would play a part in establishing the above position. With reference to the reliance on natural facts, Rawls tells us:

Contract theory agrees, then, with utilitarianism in holding that the fundamental principles of justice quite properly depend upon the natural facts about men in society. This dependence is made explicit by the description of the original position: the decision of the parties is taken in light
of general knowledge. Moreover, the various elements in the original position presuppose many things about the circumstances of human life. (Rawls, p. 159)

Since we have now covered the main grounds for the choice of the two principles, we shall move to a brief discussion of some of the ends that are presupposed by Rawls' argument for his principles.

D. Ends

In our discussion thus far, we have referred, at different points to Rawls' "thin theory of good," to the notions of stability, self-respect, and to other topics which fall under the third section of Rawls' work entitled, "Ends." We shall now briefly look more closely at three of those ends; i.e., the well-ordered society, the notion of stability, and the notion of congruence. It would be foolish for us to think that we shall do more than dent the surface of Rawls' discussion of ends, which is quite rich in the way it deals with a diversity of issues. Rather, our task here is only to say a bit more about some of the ends which have been presupposed by Rawls' argument that his principles would be those chosen in the original position. Finally, to be intellectually honest about the present endeavor, we must also say that given the extent of Rawls' work, we, being forced to choose which elements shall be taken into account, have chosen to discuss the ends mentioned above, while casting an eye to the possible applications of Rawls' theory to the
problem of preferential treatment in admissions to education. Unfortunately, this results in our ignoring some rather important discussions of such things as the relation between the moral sentiment and natural attitudes, moral education, etc.

Almost from the beginning of this chapter we have been employing the term, "well-ordered society," which is the term which labels the type of society Rawls claims his principles would underlie. Let us now look at what Rawls takes a well-ordered society to be. One of the more general formulations of a well-ordered society is the following:

At the beginning (§ 1) I characterized a well-ordered society as one designed to advance the good of its members and effectively regulated by a public conception of justice. Thus it is a society in which everyone accepts and knows that others accept the same principles of justice, and the basic social institutions satisfy and are known to satisfy these principles...Now a well-ordered society is also regulated by its public conception of justice. This fact implies that its members have a strong and normally effective desire to act as the principles of justice require. Since a well-ordered society endures over time, its conception of justice is presumably stable: that is, when institutions are just (as defined by this conception) those taking part in these arrangements acquire the corresponding sense of justice and desire to do their part in maintaining them. (Rawls, pp. 453-454)

At first glance, this seems to present an adequate conception of a well-ordered society. Yet, in the above passage it is not clear whether or not stability and congruence (to be understood intuitively for the moment) either separately or together are defining or accompanying characteristics of
a well-ordered society. Rawls speaks of a well-ordered society as enduring over time and of its conception of justice as, hence, stable, without noting whether this expresses an empirical generalization or an analytic claim. However, he does wish at different points to speak of the "problems" of congruence and stability for the well-ordered society, which would imply that the relationship between a well-ordered society and congruence or stability is an empirical relationship. Although we shall speak more of this when we address the concepts of 'stability' and 'congruence', we cite them here merely to point out that Rawls' notion of 'well-ordered society' is not as easily grasped as we might first have believed. What we shall attempt to do for the moment is to clarify what Rawls takes the characteristics of a well-ordered society to be, independent of the notions of stability and congruence.

Let us turn to Rawls' discussion of, "The Idea of Social Union," which will give us a better idea of what 'well-ordered society' means without as much emphasis on 'stability' and 'congruence' as we find in other places. Quite generally, first, we can summararily say that the principles of justice were those principles that were to underlie society in order to make certain inequalities work to the benefit of all, and to do this in such a way as to foster a cooperative (in the general sense of the term) society. Now, what this seems to be leaning towards is the idea of a society as a community,
and Rawls makes this explicit, finally, towards the end of his work:

But the question remains whether the contract doctrine is a satisfactory framework for understanding the values of community and for choosing among social arrangements to realize them. It is natural to conjecture that the congruence of the right and the good depends in large part upon whether a well-ordered society achieves the good of community. (Rawls, p. 520)

Here, we have found one characteristic which is essential to the well-ordered society; that is, that it promote the value of community (whatever that may turn out to be).

Furthermore, the value of community seems to rest upon a particular conception of the nature of mankind, according to Rawls:

The social nature of mankind is best seen by contrast with the conception of a private society. Thus human beings have in fact shared final ends and they value their common institutions and activities as good in themselves. We need one another as partners in ways of life that are engaged in for their own sake, and the successes and enjoyments of others are necessary for and complementary to our own good...The potentialities of each individual are greater than those he can hope to realize; and they fall far short of the powers among men generally. Thus everyone must select which of his abilities and possible interests he wishes to encourage; he must plan their training and exercise, and schedule their pursuit in an orderly way. (Rawls, pp. 522-523)

Given the above foundation of the nature of humankind, we arrive, as Rawls tells us, at the community of humankind:
We are led to the notion of the community of humankind the members of which enjoy one another's excellences and individuality elicited by free institutions, and they recognize the good of each as an element in the complete activity the whole scheme of which is consented to and gives pleasure to all. (Rawls, p. 523)

What Rawls is aiming at here, as we see by his further discussion is the idea of a social union. Within this discussion we are told that a social union has two essential features: (1) that there is some shared final end; and (2) that there are some common activities which are valued for themselves. Rawls provides us with such examples of social unions as science, art, families, and friendships. This idea of social union is a main feature underlying the idea of a well-ordered society:

The main idea is simply that a well-ordered society (corresponding to justice as fairness) is itself a form of social union. Indeed, it is a social union of social unions. Both characteristic features are present: the successful carrying out of just institutions is the shared final end of all the members of society, and these institutional forms are prized as good in themselves. (Rawls, p. 527)

Although Rawls goes on to discuss this idea of a social union of social unions, we need not do so here. Rather, for our purposes we need only note three important points: first, the so-called value of community underlies the idea of the well-ordered society; second, both the conception of the community of humankind and the idea of a social union of social unions are based upon a particular view of the nature of
humankind (as are many of Rawls' major notions, which he is quite willing to accept the responsibility for); and third, we have, in our discussion, been brought full-circle back to the ideas of stability and congruence of a society by trying to get an idea of the well-ordered society. That is, we have been brought again to the issue of the congruence of the good and the right, as well as the issue of the tendency of a social union to affirm itself. Hence, let us now look to Rawls' discussions of 'stability' and 'congruence'.

Although we could discuss either stability or congruence first, we shall discuss congruence to begin with, since Rawls takes congruence to be a crucial factor in determining the stability of a society:

It remains to be shown that this disposition to take up and to be guided by the standpoint of justice accords with the individual's good. Whether these two points of view are congruent is likely to be a crucial factor in determining stability. (Rawls, p. 567)

As we have noted previously, it is unclear as to whether Rawls takes congruence and stability to be defining or accompanying characteristics of a well-ordered society. However, regardless of the places at which this confusion occurs, there are other places in which Rawls speaks of them as accompanying characteristics. Clearly, since he wants to speak of the "problems" of stability and congruence, he must speak of the issue, at some point, as an empirical one: "But congruence is not a foregone conclusion even in a well-ordered society. We must verify it." (Rawls, p. 567)
Although we shall come across this problem of the seeming analyticity of Rawls' "problem" of congruence in a well-ordered society again in a moment, let us now turn to a preliminary description of what Rawls takes the problem of congruence to be. In the section entitled, "The Good of the Sense of Justice," he tells us:

The problem is whether the regulative desire to adopt the standpoint of justice belongs to a person's own good when viewed in light of the thin theory with no restrictions on information. We should like to know that this desire is indeed rational.... (Rawls, p. 567)

In other words, it seems that the problem of congruence is that, first of all, from the viewpoint of justice (society, the institutions of the well-ordered society, etc.), it is good for an individual to uphold and abide by his sense of justice which Rawls has provided individuals in the well-ordered society with, via certain laws of moral psychology. Yet, the crucial question is: "Is it a good for the individual to abide by/affirm this sense of justice, given that his goods are determined by his life plan which is based upon "goodness as rationality" (Rawls' thin theory of good)?"

Now, remembering from our general remarks that in Rawls' theory right is prior to good (i.e., one's good is chosen within the bounds of the principles of right which have been accepted in the original position), we see that we again have come upon the problem of the analyticity of the "problem" of congruence. In other words, in a well-ordered society
individuals desire to act from their sense of justice, since this society is a social union of social unions. Hence, it is trivially, given at least one meaning of "well-ordered society," a good for them. Rawls realizes this with respect to the question of congruence:

If a person wants with deliberative rationality to act from the standpoint of justice above all else, it is rational for him so to act. Therefore, in this form the question is trivial: being the sorts of persons they are, the members of a well-ordered society desire more than anything to act justly and fulfilling this desire is part of their good. Once we acquire a sense of justice that is truly final and effective, as the precedence of justice requires, we are confirmed in a life plan that, insofar as we are rational, leads us to preserve and to encourage this sentiment. (Rawls, p. 569)

Hence, with this in mind let us look at what Rawls' takes to be "the real problem" of congruence:

The real problem of congruence is what happens if we imagine someone to give weight to his sense of justice only to the extent that it satisfies other descriptions which connect it with reasons specified by the thin theory of the good. (Rawls, p. 569)

In answer to this problem Rawls then goes on to summarize the grounds for congruence, which he has discussed elsewhere, which are put forth by this theory of justice. These grounds are drawn from his discussions of the publicity constraint on the principles of justice; the relation between acting justly and natural attitudes; the good of participating in the well-ordered society; and our desire to express our (Kantian) nature as free and moral persons. From this, Rawls
does not conclude that congruence will necessarily hold in the well-ordered contractarian society, but only that it is, "surely more probably than on the utilitarian view." (Rawls, p. 573)

Yet, since our concern here is to say a bit more about some of the ends that underlie Rawls' argument for his two principles of justice, our major concern with the issue of congruence is merely of what it is and how it is related to the well-ordered society and stability; which is the second main ground for the two principles of justice. Of this relation, Rawls tells:

> It can happen that there are many who do not find a sense of justice for their good; but if so; the forces making for stability are weaker...The greater the lack of congruence, the greater the likelihood other things equal, of instability with its attendant evils. Yet, none of this nullifies the collective rationality of the principles of justice; it still is to the advantage of each that everyone should honor them. At least this holds true so long as the conception of justice is not so unstable that some other conception would be preferable. (Rawls, p. 576)

Surely, the above passage describes the relationship between congruence and stability in, at best, a confusing way. First we are told that, other things being equal, lack of congruence can contribute to instability. Although we shall discuss stability in a moment, at this point, such a claim makes sense intuitively, at least. Then, we are told that it is collectively rational for all of us to honor the principles of justice, since this would then be to the good of each of us.
This begins to sound suspicious when we note that Rawls is telling us that we all ought to take them as being congruent with our good (honor them), since doing this would contribute to our good. Yet, what was to be proven was that they were, in fact, congruent to our good; i.e., that given our life plan it was rational for us to affirm them. However, the major confusion, for our concern, comes in the last sentence of the passage, where Rawls tells us that we ought to take the conception of justice as congruent to our good unless it is so unstable as to make some other conception preferable. What this says is that even where we took the conception justice to be congruent, which should contribute to its stability, it still may turn out to be an unstable conception of justice. Hence, this implies that there is something more than congruence that contributes to stability. This may only be confusing due to the fact that we have not yet reviewed Rawls' discussion of stability. We shall turn to that discussion now in order to both review it, and hopefully to find other elements which contribute to stability in order to clear-up the above confusion.

Let us return to Rawls' discussion of a well-ordered society to see what role the concept of stability plays in it. Of stability he tells us:

Since a well-ordered society endures over time, its conception of justice is presumably stable; that is, when institutions are just (as defined by this conception), those taking part in these arrangements acquire the corresponding sense of justice and desire to do their part in maintaining them. One conception of justice is more
stable than another if the sense of justice that it tends to generate is stronger and more likely to override disruptive inclinations and if the institutions it allows foster weaker impulses and temptations to act unjustly. The stability of a conception depends upon a balance of motives: the sense of justice that it cultivates and the aims it encourages must normally win out against propensities toward injustice. To estimate the stability of a conception of justice (and the well-ordered society that it defines), one must examine the relative strength of these opposing tendencies. (Rawls, pp. 454-455)

We have already noted the problem of whether stability or congruence or neither are defining or accompanying characteristics of a well-ordered society. With reference to the above passage, however, some further peculiarities arise. First, we can say that it seems as if stability in the well-ordered society is taken to be an empirical matter by the above passage. Yet, strangely enough, congruence is seen as a defining characteristic of stability: "(T)hose taking part in these arrangements acquire the corresponding sense of justice and desire to do their part in maintaining them." What can this mean but that they take the sense of justice as a good for their plan of life? This tells us that in a stable society there can be no problem of congruence. Hence, if a well-ordered society turned out to be a stable society, by definition, then, there could be no "problem of congruence" for the well-ordered society, given what we have now found.

Another point of key importance in the above passage has to do with Rawls' use of 'well-ordered society'. We have already seen that at least one feature of a well-ordered society
is that it foster the value of community or of social union. Yet, in the above passage we see that such a value is abandoned in that it is implied that there are as many well-ordered societies as there are conceptions of justice: "To estimate the stability of a conception of justice (and the well-ordered society that it defines), one must examine the relative strength of these opposing tendencies." We might ask again then, what a well-ordered society is if any conception of justice defines one.

Let us see what Rawls says further of stability. He tells us, first, that although stability is not a decisive feature in favor of a conception of justice, it is, other thing equal, an attractive feature which would contribute to the choice of a conception of justice by those in the original position. Furthermore, he notes that the concepts of stability and equilibrium are to be applied to systems of some kind, and that in order to define an equilibrium state, three things are essential: "(F)irst, to identify the system and to distinguish between internal and external forces; second, to define the states of the system, a state being a certain configuration of its determining characteristics; and third, to specify the laws connecting the states." (Rawls, p. 457) Next Rawls gives us a definition of 'stable' by using the notion of equilibrium and then he applies this definition to social systems:
Now an equilibrium is stable whenever departures from it, caused say by external disturbances, call into play forces with the system that tend to bring it back to this equilibrium state, unless of course the outside shocks are too great...Since in practice all social systems are subject to disturbances of some kind, they are practically stable, let us say, if the departures from their preferred equilibrium positions caused by normal disturbances elicit forces sufficiently strong to restore these equilibria after a decent length of time, or else to stay sufficiently close to them. (Rawls, p. 457)

Given this notion of stability and the accompanying comment on social systems, it is puzzling as to how the above notion could apply to a well-ordered society, if a well-ordered society is taken to be some idealized abstraction. Hence, it seems that a well-ordered society (as an idealization) must take stability as defining characteristic. Yet, since we have only thin evidence for this suspicion thus far, let us see what Rawls has to say further on this matter:

The relevant systems here, of course, are the basic structures of the well-ordered societies corresponding to the different conceptions of justice...The stability of a conception of justice does not imply that the institutions and practices of the well-ordered society do not alter...In this context stability means that however institutions are changed, they still remain just or approximately so, as adjustments are made in view of new social circumstances. The inevitable deviations from justice are effectively corrected or held within tolerable bounds by forces within the system. Among these forces I assume that the sense of justice shared by the members of the community has a fundamental role. (Rawls, pp. 457-458)
First of all, again we are confronted with the notion of well-ordered societies. Hence, again we say that this is peculiar given that a well-ordered society seems to be more to Rawls than a society based upon any conception of justice. Second, we notice that stability, as it is to be applied to conceptions of justice, seems to be defined by what Rawls earlier called "the tendency towards justice" of a conception of justice. Third, congruence seems to be taken as a defining characteristic of stability. With reference to stability, Rawls tells us: ...I assume that the sense of justice shared by the members of the community has a fundamental role." What could this mean but that they see the affirmation of their sense of justice as a good of their life plan, which in turn leads to stability?

Finally, it is still unclear, even given that congruence is a necessary condition for stability, whether or not stability is a defining characteristic of a well-ordered society. Surely, from what has been said thus far, it does seem in places that Rawls wants stability to be seen as an empirical matter of some sort. Yet, if we look at Rawls' discussion at other points, it is not as clear that stability is an empirical matter given his definition of 'a well-ordered society':

Now let us say that a society is well-ordered when it is not only designed to advance the good of its members but when it is also effectively regulated by a public conception of justice. That is, it is a society in which
(1) everyone accepts and knows that the others accept the same principles of justice, and (2) the basic social institutions generally satisfy and are generally known to satisfy these principles. (Rawls, pp. 4-5)

Again, such questions arise here and elsewhere as to whether such definitions imply stability, congruence, both or neither.

We shall pursue this inquiry into some of the ends presupposed by Rawls' argument no further. Rather, we shall attempt to cite some major questions which Rawls must come to grips with concerning 'well-ordered society', 'congruence', and 'stability', and shall also cite what seems to be at least one major pay-off of our discussion. First, then, if there is a problem of congruence in Rawls' well-ordered society, then what is a well-ordered society? Second, if congruence is a defining characteristic of stability, and a well-ordered society can have congruence and still not have stability, what other factors lead to instability in a well-ordered society? Third, if any conception of justice defines a well-ordered society, given the problems with stability, congruence, and their relation to each other and a well-ordered society, again, what is a well-ordered society? Finally, since it seems that congruence is a necessary but not a sufficient condition for stability in a well-ordered society, what is it further that makes Rawls' two principles those that underlie a more stable well-ordered society than competing conceptions of justice underlie?
Now, this final question leads us to at least one major pay-off which the above discussion of 'a well-ordered society'; 'stability', and 'congruence' seems to have. That is, if we look to Rawls' second main ground for the two principles of justice, we will see that it loses its tenability due to the confusion between these three key concepts and because of a faulty assumption on Rawls' part. Here, Rawls notes that the second main ground for the two principles of justice is that they would lead to greater stability than other conceptions of justice would: "Since everyone's good is affirmed, all acquire inclinations to uphold the scheme." (Rawls, p. 177) Yet, what Rawls does here is to assume that congruence necessarily leads to stability. Hence, we are told that the two principles lead to a more stable conception of justice than do competing principles. To reiterate, however, Rawls' previous discussion, albeit confused, implied in places that congruence although a necessary condition for stability, is not a sufficient condition for it. Hence, given this point as well as the confusion in Rawls' discussion previously cited, it seems that we have good reason to question the second main ground for the principles of justice.

Although we might go on to say more about these ends presupposed by Rawls' argument for the two principles of justice, we shall not do so here since it seems that those ends which are of key importance with reference to Rawls' theory are discussed above. Further, given that the problem
of preferential treatment in admissions to education is a problem of how to arrange or to rearrange the institutions of society, we shall of course come to say more about the ends of stability and congruence later in this work.

Summary

In this chapter, we have attempted to critically summarize the major elements of the theory of A Theory of Justice. To this end, we began by noting some general remarks about the direction and the motivation of Rawls' theory, as well as Rawls' view on how moral theory is to be judged and evaluated. Noting that Rawls sees his theory as progressing from principles of right to principles of good, and that he also holds that moral theory is to be evaluated in a similar way to the way in which other theories are to be evaluated, we then moved on to critically summarize the elements of his theory. We attempted to explain what the elements of the original position are and why Rawls believes that they lead to the choice of the principles that best exemplify the concept of 'right'. Also, we explained what Rawls' two principles are, and why he holds that they would be chosen by the parties in the original position. And finally, we reviewed the ends of stability, congruence, and the well-ordered society, noting some of the confusions in Rawls' discussion of them, which underlie Rawls' theory of justice.
It seems, then, that we have reviewed most of the elements of Rawls' theory that may prove to be of key importance when we begin to address the issue of preferential treatment in admissions to education in Chapters Four and Five. Yet, before we attempt to apply the work of Rawls to that issue, we must first review Rawls' discussion of the institutions which he takes to be compatible with his two principles of justice. Let us proceed to the next chapter, then, in order to undertake this task.
Footnotes


CHAPTER III
"A CRITICAL SUMMARY OF THE INSTITUTIONS OF
A THEORY OF JUSTICE"

Introduction
The final section of A Theory of Justice which we have yet to discuss and which is important for our purposes is Rawls' discussion of the institutions which he takes to be compatible with his theory of justice. Hence, in this chapter, we shall attempt to critically review those institutions which are discussed by Rawls in Part II of his work. However, before we speak specifically about some of the institutions which he discusses, we must be clear about what he intends to accomplish in that section of his work. To this end, we must review some preliminary topics so that we may better understand what Rawls is attempting to accomplish by discussing such institutions of the well-ordered society.

In reviewing this section of his work, we must remember that Rawls regards moral theory, its formulation, and its substantiation, as similar to other theory in general, in many respects:
I have not proceeded then as if first principles, or conditions thereon, or definitions either, have special features that permit them a peculiar place in justifying a moral doctrine. They are central elements and devices of theory, but justification rests upon the entire conception and how it fits in with and organizes our considered judgments in reflective equilibrium. As we have noted before, justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view. (Rawls, p. 579)

Rawls, then goes on to remind us of how the parts of his book abide by the above stance on moral theory:

The first part presents the essentials of the theoretical structure, and the principles of justice are argued for on the basis of reasonable stipulations concerning the choice of such conceptions...In the second part I examined the sorts of institutions that justice enjoins and the kinds of duties and obligations it imposes on individuals. The aim throughout was to show that the theory proposed matches the fixed points of our considered convictions better than other familiar doctrines.... (Rawls, pp. 579-580)

From this passage we see that Rawls' discussion of institutions is undertaken in order to see if the institutions that, "illustrate the content of the principles of justice," (Rawls, p. 195) do match our considered convictions.

Now that this is clear, let us discuss the framework which Rawls gives us in order to apply the principles of justice to institutions; i.e., again, in order to see what institutions illustrate their content. The framework that Rawls develops, The Four-Stage Sequence, is based upon the different kinds of judgments that a citizen must make with reference to a conception of justice and the institutions and activities it defines. Stage one involves the choice
of the principle of justice, which will underlie society, from the original position. In stage two, the parties are to choose a constitution in line with the principles of justice; i.e., they find themselves as delegates to a constitutional convention. Here, the principle of equal liberty is of primary concern:

The first principle of equal liberty is the primary standard for the constitutional convention. Its main requirements are that the fundamental liberties of the person and liberty of conscience and freedom of thought be protected and that the political process as a whole be a just procedure. Thus the constitution establishes a secure common status of equal citizenship and realizes political justice. (Rawls, p. 199)

Further, stage three is the legislative stage where the parties assess the justice of laws and policies:

Now at this point we come to the legislative stage...The justice of laws and policies is to be assessed from this perspective. Proposed bills are judged from the position of a representative legislator who, as always, does not know the particulars about himself. Statutes must satisfy not only the principles of justice but whatever limits are laid down in the constitution. (Rawls, p. 198)

It is at this point in illustrating the content of the two principles of justice that the second principle plays a role:

The second principle comes into play at the stage of the legislature. It dictates that social and economic policies be aimed at maximizing the long-term expectations of the least advantaged under conditions of fair equality of opportunity, subject to equal liberties being maintained. (Rawls, p. 199)

In explanation of the priority of the constitutional to the legislative stage, Rawls explains: "Thus the priority of
the first principle of justice to the second is reflected in the priority of the constitutional convention to the legislative stage." (Rawls, p. 199)

Finally, stage four in the illustration of the content of the principles of justice involves, "the application of rules to particular cases by judges and administrators, and the following of rules by citizens generally." (Rawls, p. 199) It is at this stage that the development and application of partial compliance theory come into play. It is also at this point that the problem of civil disobedience arises, and from this viewpoint that Rawls discusses it.

Furthermore, we must note here that the epistemological conditions vary as that the parties make the relevant decisions at each of the four stages. That is, at stage one there is, of course, the existence of the veil of ignorance. Whereas at stages two and three the general facts about the society of the parties are made available, although the parties still do not know their own particular circumstances within them. Of course, in stage four, particular facts about individuals also come into play. Rawls gives us the rationale behind this modification of the epistemological condition in the following passage:
The flow of information is determined at each stage why what is required in order to apply these principles intelligently to the kind of question of justice at hand, while at the same time any knowledge that is likely to give rise to bias and distortion and to set men against one another is ruled out. (Rawls, p. 200)

Before we go on to review Rawls' discussion itself, we must note the limitations of our review of that discussion. Again, we must point out that due to the extent of Rawls' work, we shall summarize some parts of his discussion in only a cursory way. Whereas, with respect to other parts, we shall review them in more depth. Specifically, of the three major topics discussed in Part II of *A Theory of Justice*, we shall speak more extensively here of the problems that arise in Rawls' discussion of "Distributive Shares" (Chapter V), and shall say somewhat less of "Equal Liberty" (Chapter IV), and "Duty and Obligation" (Chapter VI). We shall do this, of course, with an eye towards those issues which may later be applicable to the problem of preferential treatment in admissions to education. The review begins presently with a summary of Rawls' discussion of equal liberty, and some notes on pertinent points therein.

**Equal Liberty**

Essentially, Rawls' purpose in his discussion of liberty seems to be two-fold. First, he seeks to establish a priority rule for the application of the first principle of justice; i.e., a rule for where equal liberty may be restricted.
Second, Rawls also want to illustrate the content of the notions of equal liberty and the priority of liberty with respect to three problems of liberty: (1) equal liberty of conscience; (2) political justice and equal political rights; and, (3) equal liberty and its relation to the rule of law. Furthermore, these general points, discussed above, are implied by what it is that the delegates to Rawls' constitutional convention must come to grips with:

Thus the delegates to a constitutional convention, or the members of the legislature, must decide how the various liberties are to be specified so as to yield the best total system of equal liberty. They have to balance one liberty against another. The best arrangement of the several liberties depends upon the totality of limitations to which they are subject, upon how they hand together in the whole scheme by which they are defined. (Rawls, p. 203)

Yet, before Rawls begins to discuss the aforementioned problems of liberty, he goes so far as to give us his conclusion, in not so many words, with reference to the restriction upon equal liberty and the priority of liberty:

When lexical order holds, a basic liberty covered by the first principle can be limited only for the sake of liberty itself, that is, only to ensure that the same liberty or a different basic liberty is properly protected and to adjust the one system of liberties in the best way. (Rawls, p. 204)

Rawls then draws a distinction between unequal liberty and unequal worth of liberty. That is, although the system of liberties ensures the equal liberties of citizenship, given that some people will have greater wealth or authority they will have a greater worth of liberty. Now, of this Rawls tells us:
Freedom as equal liberty is the same for all; the question of compensating for a lesser than equal liberty does not arise. But the worth of liberty is not the same for everyone...The lesser worth of liberty is, however, compensated for, since the capacity of the less fortunate members of society to achieve their aims would be even less were they not to accept the existing inequalities whenever the difference principle is satisfied. But compensating for the lesser worth of freedom is not to be confused with making good an unequal liberty. (Rawls, pp. 204-205)

Specifically, with reference to Rawls' discussion of freedom of conscience, toleration, and the restraint thereof, the above general principles are merely applied to these issues. For instance, we are told: "moral and religious freedom follows from the principle of equal liberty; and assuming the priority of this principle, the only ground for denying the equal liberties is to avoid an even greater injustice, an even greater loss of liberty." (Rawls, p. 214)

This is the general conclusion, then, which is applied by Rawls even to the issue of the toleration of the intolerant:

The conclusion, then, is that while an intolerant sect does not itself have title to complain of intolerance, its freedom should be restricted only when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger. The tolerant should curb the intolerant only in this case. (Rawls, p. 220)

Next, Rawls discusses the notion of equal liberty with respect to political justice and equal political rights. He speaks of this in terms of "the principle of (equal) participation." That is, a constitution that abides by the principle of equal liberty will have embedded in it, the principle of
participation, or some facsimile thereof:

By way of summing up the account of the principle of participation, we can say that a just constitution sets up a form of fair rivalry for political office and authority...Since the constitution is the foundation of the social structure, the highest-order system of rules that regulates and controls other institutions, everyone has the same access to the political procedure that it sets up. When the principle of participation is satisfied, all have the common status of equal citizen.

Finally, to avoid misunderstanding, it should be kept in mind that the principle of participation applies to institutions. It does not define an ideal of citizenship; nor does it lay down a duty requiring all to take an active part in political affairs. (Rawls, p. 227)

As with the other problems of liberty, there are limitations on the principle of participation, which of course can be justified only on the basis that they lend either greater security or extent to other or the same liberties:

The relevant point is that to justify these restrictions one must maintain that from the perspective of the representative citizen in the constitutional convention the less extensive freedom of participation is sufficiently outweighed by the greater security and extent of the other liberties...The justification appeals to a greater equal liberty. At no point is there a reference to compensating economic and social benefits. (Rawls, p. 229)

Finally, Rawls attempts to show with reference to the principle of the rule of law, that liberty again, may only be restricted upon the basis of liberty:
The conclusion once again is that arguments for restricting liberty proceed from the principle of liberty itself... Thus in the situation discussed the greater good of some has not been balanced against the lesser good of others. Nor has a lesser liberty been accepted for the sake of greater economic and social benefits. Rather the appeal has been to the common good in the form of the basic equal liberties of the representative citizen. (Rawls, pp. 242-243)

This conclusion is clearly the same as the conclusions arrived at with reference to the other problems of liberty. However, the problem here is that the discussion of the rule of law which precedes it contains some peculiarities, if not some basic confusions on Rawls' part. Although a discussion of these calls for a slight digression, we shall note them presently.

In his discussion of the principle of the rule of law and its relation to liberty, Rawls tells us, first, that we may think of this in terms of the suggestive phrase, "justice as regularity": "The regular and impartial, and in this sense fair, administration of law we may call 'justice as regularity'." (Rawls, p. 234) Further, Rawls goes on to look at the notion of a legal system and its connection with the precepts definitive of justice as regularity in order to illustrate the close connection between the rule of law and liberty. To this end, Rawls first gives us a definition of 'legal system':
A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. (Rawls, p. 235)

The important point to notice here is that by giving the above definition Rawls has begun to confuse what he calls ideal theory (full-compliance) with non-ideal theory (partial compliance). For, if Rawls were concerned here, as he claims to be, with ideal theory, he would not call a legal system for "a" well-ordered society a set of "coercive" rules. Since ideal theory presumes full compliance, the rules in its legal system would merely be constitutive of the procedures whereby a member of that society would have a basis for legitimate expectations. The point here, then, is that Rawls' discussion of the principle of the rule of law has already smuggled in elements of non-ideal (partial compliance) theory.

From this point, Rawls goes on to account for the precepts of justice associated with the rule of law, which, as he notes, are precepts which would be followed by any system of rules which perfectly embodied the ideal of a legal system. Now, at least one of the precepts presupposes that we are not concerned with ideal theory; that is, the precept that there is no offense without a law (nullum crimen sine lege). If this follows from the idea of a legal system then the notion of a legal system ought not to be discussed where we are
concerned with ideal theory, in Rawls' sense. If, however, it is not a part of the idea of a legal system and the idea of a legal system is illustrative of justice as regularity where we are concerned with ideal theory, the discussion is properly concerned with the idea of a legal system as rules constitutive of the procedures whereby a member of the well-ordered society would have a basis for legitimate expectations. Clearly, if the discussion of justice as regularity, legal systems, and the like is most properly held within ideal theory, then it is improper to speak of coercion, offenses, etc., since by definition ideal theory presumes full compliance. Alternatively, if justice as regularity, legal systems, etc. have as germane to them the notions of offenses, coercion, and the like then it seems that the discussion is properly held where we are speaking in terms of non-ideal theory.

The point which Rawls finally arrives at in his discussion is that the relation between the rule of law and liberty is that where the principle of the rule of law is not upheld, due to vagueness of statutes or what have you, the boundaries of liberty are uncertain, since "liberty is restricted by a reasonable fear of its exercise." (Rawls, p. 239) Furthermore, to this conclusion, Rawls also adds the following point:
The principle of legality has a firm foundation, then, in the agreement of rational persons to establish for themselves the greatest equal liberty. To be confident in the possession and exercise of these freedoms, the citizens of a well-ordered society will normally want the rule of law maintained. (Rawls, pp. 239-240)

Of course, the first problem in this passage is, again, the problem of "a" well-ordered society as an idealization versus a well-ordered society as an empirical reality. Regardless of which Rawls is speaking here, the citizens will want the rule of law maintained. Yet, it is because of the ambiguity of 'maintained' that the problem of "the" well-ordered society versus a well-ordered society is so important at this point. If we are speaking of ideal theory (full compliance) and hence, "the" well-ordered society, then maintaining the rule of law will only mean such things as making the law clear, public, impartial, etc. Yet, if we are concerned with non-ideal theory (partial compliance), and hence, a well-ordered society, then maintaining the rule of law will also mean such things as coercion, punishment and the like.

From this, we can now conclude that one of Rawls' main conclusions with reference to the rule of law and liberty, and their relation to ideal theory is mistaken and misleading. Let us look at this main conclusion first:

It is clear from the preceding remarks that we need an account of penal sanctions however limited even for ideal theory. Given the normal conditions of human life, some such arrangements are necessary...It suffices to note that ideal theory requires an account of penal sanctions as a stabilizing device.... (Rawls, p. 241)
Clearly, it is only because Rawls confuses the notions of ideal and non-ideal theory, because he relies on the ambiguity of 'a well-ordered society' and because he equivocates on 'maintained' in the phrase, "the citizens of a well-ordered society will normally want the rule of law maintained," that he can arrive at this conclusion. For, in at least one sense of "a/the well-ordered society," we are told that by definition citizens have a sense of justice and affirm it since they find it to be a good for their life plan. In ideal theory there is no problem of compliance, and hence, no problem of coercion: "Everyone is presumed to act justly and to do his part in upholding just institutions."

(Rawls, p. 8) Q.E.D., then, Rawls' conclusion above is misled in that ideal theory does not require that we give even a limited account of penal sanctions.

However, we must not disregard Rawls' conclusions with reference to the rule of law and liberty merely because he confuses ideal and non-ideal theory. Since most of what Rawls says here pertains to non-ideal theory, and since preferential treatment in admissions is a problem of such, we ought to at least note two of the more important points which he makes here. First, there may arise two kinds of disadvantages, we are told, when setting up a coercive agency for the purpose of contributing to the stability of society:
...(0)ne kind is the cost of maintaining the agency covered say by taxation; the other is the danger to the liberty of the representative citizen measured by the likelihood that these sanctions will wrongly interfere with his freedom. The establishment of a coercive agency is rational only if these disadvantages are less than the loss of liberty from instability. (Rawls, pp. 240-241)

Furthermore, Rawls concludes, the tendency of the operations of the coercive mechanism must be precisely defined:

Knowing what things it penalizes and knowing that these are within their power to do or not to do, citizens can draw up their plans accordingly. One who complies with the announced rules need never fear an infringement of his liberty. (Rawls, p. 241)

The second point of Rawls’ discussion of liberty and the rule of law which may prove important for our purposes is that, with regard to partial compliance theory and the moral dilemmas which arise within it, we must keep the priority of liberty in mind, even where this may mean suspending, in certain cases, some of the precepts embodied by the rule of law:

The moral dilemmas that arise in partial compliance theory are also to be viewed with the priority of liberty in mind...Any injustice in the social order is bound to take its toll; it is impossible that its consequences should be entirely canceled out. In applying the principle of legality we must keep in mind the totality of rights and duties that defines the liberties and adjust its claims accordingly. Sometimes we are forced to allow certain breaches of its precepts if we are to mitigate the loss of freedom from social evils that cannot be removed, and to aim for the least injustice that conditions allow. (Rawls, pp. 242-243)

These points shall come into play later in this work. Yet, at least one observation which we may superficially note
here is that the two passages above are on the brink of paradox since one passage tells us that we must make all of the rules and operations clear to the average citizen, and the other passage tells us that in some cases we may need to suspend the rules. Ignoring the possible entanglement of infinite regress, we see that the way to avoid the paradox is to make clear to the citizen the cases in which we will suspend the rules.

Having summarized Rawls' discussion of the priority of liberty and some problems of liberty, we now leave this part of the constitutional convention by noting his reformulation of the first principle of justice with its priority rule, which has arisen from Rawls' discussion of equal liberty:

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Priority Rule

The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty. There are two cases: (a) a less extensive liberty must strengthen the total system of liberty shared by all, and (b) a less than equal liberty must be acceptable to those citizens with a lesser liberty. (Rawls, p. 250)

Rawls tells us here that he has given no systematic argument for the priority rule, even though he has checked it out in a number of important cases. Of course, we have already reviewed Rawls' argument for the priority rule when we discussed why the principles would be chosen in the order in which
Rawls says they would be chosen. Let us now move on to see what Rawls has to say of "Distributive Shares."

. Distributive Shares

At the beginning of Chapter Five, Rawls tells us that his aim is to, "see how the two principles work out as a conception of political economy, that is, as standards by which to assess economic arrangements and policies, and their background institutions." (Rawls, pp. 258-259) Yet, since Rawls is concerned with justice in political economy, he must somehow attach a suppressed value premise to the standards which are used to assess economic arrangements. He does this by giving us the following seemingly programmatic definitions:

A doctrine of political economy must include an interpretation of the public good which is based upon a conception of justice. It is to guide the reflections of the citizen when he considers questions of economic and social policy. He is to take up the perspective of the constitutional convention or the legislative stage and ascertain how the principles of justice apply. A political opinion concerns what advances the good of the body politic as a whole and invokes some criterion for the just division of social advantages. (Rawls, p. 259)

In the above passage, it seems that by definition a political economic doctrine and a political opinion are concerned with justice. Yet, Rawls seems to want to show a relationship that is more than one between a definiendum and a definiens, and to this end adds another premise to his argument in order to draw essentially the same conclusion as above:
Thus an economic system is not only an institutional device for satisfying existing wants and needs but a way of creating and fashioning wants in the future...Since economic arrangements have these effects, and indeed must do so, the choice of these institutions involves some view of human good and of the design of institutions to realize it. The choice must, therefore, be made on moral and political as well as economic grounds. Considerations of efficiency are but one basis of decision and often relatively minor at that. (Rawls, pp. 259-260)

Hence, according to Rawls, questions of political economy are at least partially questions of moral philosophy. This seems merely to be a manifestation of his definition or maybe even of his general position that right is prior to (his neutral sense of) good.

Now, regardless of whether the relationship between 'political economy' and 'justice' is a priori or a posteriori, it seems clear that the relationship, once taken as a given, can be used to lead us, again, to the problem of the stability of institutions:

A just system must generate its own support. This means that it must be arranged so as to bring about in its members the corresponding sense of justice, an effective desire to act in accordance with its rules for reasons of justice. Thus the requirement of stability and the desires of conflict with the principles of justice put further constraints on institutions. (Rawls, p. 261)

Further, given these constraints, and that not only have the principles of justice already been agreed upon, but also that we can assume certain general desires for primary goods, we can see that Rawls, in this chapter, wants to sketch institutions that are "implied by" the second principle of
justice, promote stability and congruence (which would make them the institutions of the well-ordered society, although we have discussed the problems with this), and which meet with considered fixed points of judgment which we hold. Although Rawls covers many diverse points in the opening section (§ 41) of the chapter, it seems that above we have correctly summarized his task, as is indicated by what Rawls says in the second section of the chapter:

But as we have seen, ethical principles depend upon general facts and therefore a theory of justice for the basic structure presupposes an account of these arrangements. It is necessary to make some assumptions and to spell out their consequences if we are to test moral conceptions. These assumptions are bound to be inaccurate and oversimplified, but this may not matter too much if they enable us to uncover the content of the principles of justice and we are satisfied that under a wide range of circumstances the difference principle will lead to acceptable conclusions. In short, questions of political economy are discussed simply to find out the practicable bearing of justice as fairness. I discuss these matters from the point of view of the citizen who is trying to organize his judgments concerning the justice of economic institutions. (Rawls, p. 265)

Before we go on to discuss what Rawls has to say about the institutions for distributive justice, we shall summarize a few of the preliminary remarks he makes about economic systems, since it seems that some of them will be useful to us when being to discuss preferential treatment in admissions to education. First, it seems that Rawls makes these remarks on economic systems merely to eventually arrive at the following disclaimer:
The theory of justice does not include these matters. But what it can do is to set out in a schematic way the outlines of a just economic system that admits of several variations. The political judgment in any given case will then turn on which variation is most likely to work out best in practice. A conception of justice is a necessary part of any such political assessment, but it is not sufficient. (Rawls, p. 274)

Hence, Rawls' comments on economic systems, per se, are important for any theory of justice to face, but are not to be accommodated for merely by a theory of justice.

Yet, as implied above, the comments seem important for our purposes, and to this end, then, we mention quite briefly the following: the two aspects of the public sector; the problem of the free-rider; and, assurance and isolation.

First, according to Rawls, we can distinguish between two aspects of the public sector: ownership of the means of production and the proportion of total social resources devoted to public goods. The first aspect helps us to distinguish to just what extent an economy is a private-property economy. Whereas, the second aspect takes us into some intricate problems which arise with the topic of public goods. It is the problems that arise with the topic of public goods that is our concern here. Second, according to Rawls, public goods have two characteristic features: indivisibility and publicness. With reference to these goods, Rawls tells us: "The polar case of a public good is full indivisibility over the whole society. A standard example is the defense of the nation against (unjustified) foreign attack. All citizens must
be provided with this good in the same amount..." (Rawls, pp. 266-267)

Furthermore, given that public goods have these features, the free-rider problem arises:

Where the public is large and includes many individuals, there is a temptation for each person to try to avoid doing his share. This is because whatever one man does his action will not significantly affect the amount produced. He regards the collective action of others as already given one way or the other. If the public good is produced his enjoyment of it is not decreased by his not making a contribution. (Rawls, p. 267)

Given these points, we are faced with the problems of isolation and assurance in setting up or administering a government, a society, etc.:

The first sort of problem arises whenever the outcome of many individuals' decisions made in isolation is worse for everyone than some other course of action, even though, taking the conduct of the others as given, each person's decision is perfectly rational...The isolation problem is to identify these situations and to ascertain the binding collective undertaking that would be best from the standpoint of all. The assurance problem is different. Here the aim is to assure the cooperating parties that the common agreement is being carried out. Each person's willingness to contribute is contingent upon the contribution of others. Therefore, to maintain public confidence in the scheme that is superior from everyone's point of view, or better anyway than the situation that would obtain in its absence, some device for administering fines and penalties must be established. (Rawls, pp. 269-270)

We have discussed elsewhere why the notions of penal systems and the like are to be accounted for by nonideal theory, when we discussed the rule of law and liberty. As
we have noted above, we mention the problems here since they may come into play later in our discussion. We shall not, however, go on to mention Rawls' further discussion of market systems. It is sufficient for us to say generally that Rawls wants to establish that although his system of institutions employs market arrangements, this does not preclude the full fleshing out of these institutions as socialist institutions. Furthermore, Rawls also concludes from his argument in the latter part of this section that the advantages of the use of market arrangements in the ideal scheme of institutions are many:

The ideal scheme sketched in the next several sections makes considerable use of market arrangements. It is only in this way, I believe, that the problem of distribution can be handled as a case of pure procedural justice. Further, we also gain the advantages of efficiency and protect the important liberty of free choice of occupation. (Rawls, p. 274)

With these points in mind, let us now turn to Rawls' discussion of the background institutions for distributive justice.

In describing these background institutions, Rawls first tells us that the motive behind their design again is procedural justice: "The social system is to be designed so that the resulting distribution is just however things turn out. To achieve this end it is necessary to set the social and economic process within the surroundings of suitable political and legal institutions." (Rawls, p. 275) We then expect
to view Rawls' description of the background institutions for distributive justice. Unfortunately, either the ambiguity of Rawls' language, or an equivocation in his use of the term 'institutions' deprives us of learning what the background institutions are. We shall presently work to establish this point.

Early in this work, Rawls defines 'institution' in the following way:

Now by an institution I shall understand a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for certain penalties and defenses, and so on, when violations occur... An institution exists at a certain time and place when the actions specified by it are regularly carried out in accordance with a public understanding that the system of rules defining the institution is to be followed. (Rawls, p. 55)

Yet, none of what Rawls describes in the section on background institutions fits the above definition. First he tells us that his task is to, "give a brief description of these supporting institutions as they might exist in a properly organized democratic state that allows private ownership of capital and natural resources." (Rawls, p. 275) Then he tells us that he assumes three things: (1) the basic structure is regulated by a just constitution that secures liberty, etc.; (2) there is fair equality of opportunity; and, (3) the government guarantees a social minimum.
The crucial point comes in the first sentence of the next paragraph in which Rawls writes: "In establishing these background institutions the government may be thought of as divided into four branches." (Rawls, p. 275) To this we must ask to what "these institutions" refers. Surely his three assumptions cannot be the institutions, if we take his definition of 'institution' seriously. Further, the four branches of government are not the institutions since we are told that they are vehicles in establishing these background institutions. As we stated, therefore, due to either the ambiguity of "these institutions" or to some equivocation of his use of 'institutions' we are deprived of learning what Rawls' background institutions for distributive justice are. Yet, since the four branches of government are to serve as a vehicle in establishing such institutions, whatever they are, we shall go on to briefly summarize Rawls' discussion of them.

In discussing the branches of government, Rawls tells us that each branch consists of agencies, activities, etc., which are charged with preserving certain social and economic conditions and that these branches are to be understood in terms of the various functions of government. First, he tells us that there is the allocation branch which is to do such things as keep the price system workably competitive, prevent the formation of unreasonable market power, and correct taxes and prices to reflect social benefits and cost. Second, the stabilization branch is to strive to see that full employment,
free choice of occupation and the deployment of finances are supported by strong effective demand. The underlying purpose here is: "These two branches together are to maintain the efficiency of the market economy generally." (Rawls, p. 276)

Third, the transfer branch takes needs into account and assigns them an appropriate weight with respect to other claims, since the market arrangement does not guarantee the well-being of all. Hence, one of the main functions of this branch is the social minimum. The fourth branch of government, the distribution branch, has the task to preserve an approximate justice in distributive shares by means of taxation and the necessary adjustment in the rights of property. "The purpose of these levies... (is to) gradually and continually correct the distribution of wealth and to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity." (Rawls, p. 277) The limit at which the fair value of political liberty and fair equality of opportunity are jeopardized is not, however, a matter for the theory of justice, but for political judgment, good sense, etc. Furthermore, a second task of the distributive branch is to raise revenues, since social resources must be released to the government so that it may provide public goods and make the transfer payments necessary to satisfy the difference principle.* These are Rawls' four branches of government.

* In this paragraph I have used Rawls' words freely and have not footnoted all places where I have done so since that would be quite tedious. Hence, please see his discussion of the four branches, pp. 275-278.
Whether they are also "background institutions" for distributive justice or not is a conceptual problem that Rawls must clear up.

Furthermore, however, Rawls next invites us to suppose that there is a fifth branch of government called "the exchange branch." Here, given the presumptions that the distribution of income and wealth is just, that the total of public expenditures and the necessary sources of revenue are well-defined, citizens may decide to make further public expenditures, if a sufficiently large number of them find the marginal benefits of public goods greater than that of goods available through the market. More specifically, the task of this branch is the following:

It is authorized by the constitution to consider only such bills as provide for government activities independent from what justice requires, and these to be enacted only when they satisfy Wicksell's unanimity criterion...Wicksell's idea is that if the public good is an efficient use of social resources, there must be some scheme for distributing the extra taxes among different kinds of taxpayers that will gain unanimous approval. If no such proposal exists, the suggested expenditure is wasteful and should not be undertaken. (Rawls, pp. 282-283)

After this Rawls again emphasizes the proviso that the unanimity criterion assumes the justice of the existing distribution of income and wealth, and of the current definition of property rights. Also, we are told that since the basis of this scheme is the benefit principle and not the principles of justice, the exchange branch includes a separate representative body. In fact, the exchange branch turns out not even
to be part of the four-stage sequence: "Ideal legislators do not vote on their interests. Strictly speaking, then the idea of the exchange branch is not part of the four-stage sequence." (Rawls, p. 284)

Now that we have summarized Rawls' branches of government which establish the background institutions for distributive justice, we shall make two related comments before moving on to discuss the problem of justice between generations. We noted earlier that the motive behind the design of the background institutions was procedural justice; that is, given a particular design of institutions, whatever the resulting distribution turned out to look like, it would be just. Yet, especially in the case of the distributive branch of government, it seems as if Rawls presumes a particular distribution and devises enforcement mechanisms, so to speak, for it. This may only be so because the fair value of political liberty and fair equality of opportunity must be preserved. Yet it is a bit misleading to describe the resulting distribution as just, "whatever it is." (Rawls, p. 282. For further criticism on this point see: Robert Nozick, *Anarchy, State, and Utopia.* ) In fact, Rawls' discussion implies, if it does not specifically state, that the desired distribution which he presumes is one with a large statistical variance: "Doing this would encourage the wide dispersal of property which is a necessary condition, it seems, if fair value of equal liberties is to be maintained." (Rawls, p. 277)
The second related point which we shall mention here is that within Rawls' discussion of the branches of government he makes some remarks about nonideal theory. Since our problem is one of nonideal theory, and since these remarks may be of some help to us later, we shall note them here:

In practice we must usually choose between several unjust, or second best, arrangements; and then we look to nonideal theory to find the least unjust scheme. Sometimes this scheme will include measures and policies that a perfectly just scheme would reject. Two wrongs can make a right in the sense that the best available arrangement may contain a balance of imperfections, an adjustment of compensating injustices. (Rawls, p. 279)

With this thought in mind, we now turn to the problem of justice between generations.

To begin this discussion, Rawls attempts to get at this problem via a short discussion on specifying the social minimum. Here he tells us that one might expect that the difference principle would require a very high minimum, such that the wealth of those better off would be scaled down until nearly everyone had the same income. Yet, for the following reasons, we are also told, it would be mistaken to expect this:

The appropriate expectation in applying the difference principle is that of the long-term prospects of the least favored extending over future generations. Each generation must not only preserve the gains of culture and civilization, and maintain intact those just institutions that have been established, but it must also put aside in each period of time a suitable amount of capital accumulation. This saving may take various forms from net investment in machinery and other means of production, to investment in learning and
education. Assuming for the moment that a just savings principle is available which tells us how great investment should be, the level of the social minimum is determined. (Rawls, p. 285)

We must mention a few points here that seem puzzling. First, it is obvious that no reason is given as to why this is "the appropriate expectation" in applying the difference principle. If it could be established as such, then it would seem to follow that the problem of justice between generations would be crucial to the issue of a social minimum. Yet, Rawls does not establish this. Second, notice that underlying this passage is the suppressed premise that if everyone had the same income, the gains of culture, capital accumulations, savings, etc. could not be maintained. That is, it is quixotical why we must apply the difference principle over a number of generations. Finally, it is puzzling how the just savings principle, which would tell us how great our investment should be, would also lead to the determination of the social minimum. Let us examine this final point, presently.

Of the relationship between the savings principle, the least advantaged group, and the social minimum, Rawls tells us to suppose, first, that the social minimum is adjusted by transfers which are paid for, say, by income taxes. Further, he tells us, raising the minimum entails increasing the proportion by which income is taxed. Next he notes that as the proportion by which income is taxed becomes larger, there comes a point where one of two things happen:
Either the appropriate savings cannot be made or the greater taxes interfere so much with economic efficiency that the prospects of the least advantaged in the present generation are no longer improved but begin to decline. In either event the correct minimum has been reached. (Rawls, p. 286)

According to this passage, then, the correct social minimum for the least advantaged group is that point beyond which such funding would be necessary as to bring about the consequence that their expectations would decline, or beyond which the appropriate savings cannot be made. There are two important points to be made here. First, without the suppressed premise that there must be unequal income to accomplish the correct savings to uphold just institutions, etc., we see that the above passage still admits of a leveling out of wealth, via the difference principle. For if the appropriate savings are made by the equal distribution of wealth and the expectations of the least advantaged decline beyond that point, then Rawls' passage above supports such a distribution. Second, and more important for our purposes, notice that it is still assumed and not established by Rawls that the issue of generations is germane to the issue of the social minimum and the difference principle. He assumed this first when he told us that "the appropriate expectation" in applying the difference principle is that of long-term prospects of the least favored over future generations.

Yet, perhaps we belabor this point. We mention the above points only to refute the following claim by Rawls:
"These comments about how to specify the social minimum have led us to the problem of justice between generations."
(Rawls, p. 286) What we have attempted to point out above is that the discussion about the social minimum brings us to the problem of justice between generations only because Rawls says it does, and not because he establishes that it does. However, since Rawls has much to say on justice between generations and on the just savings principle, let us now summarize his discussion of these problems.

As Rawls tells us, one aspect of the problem of justice between generations is the problem of finding a just savings principle. Furthermore, it is not Rawls' purpose here to formulate a specific savings principle, or rate of savings, but rather to discuss "certain bounds which impose significant ethical constraints" (Rawls, p. 286) on any rate of savings that would be chosen. Hence, after quickly dismissing a classical utilitarian approach to the rate of savings problem, he moves on to discuss the contractarian approach to this issue, as well as many of the complexities of the issue.

Yet, rather than employ the difference principle in the resolution of this issue of justice between generations, Rawls bases the resolution on the point of view of the parties in the original position. Those parties, under the veil of ignorance with respect to previously mentioned characteristics as well as the characteristic of what generation they belong to, are to undertake the following:
Thus the persons in the original position are to ask themselves how much they would be willing to save at each stage of advance on the assumption that all other generations are to save at the same rates... No generation has stronger claims than any other. In attempting to estimate the fair rate of savings the persons in the original position ask what is reasonable for members of adjacent generations to expect of one another at each level of advance. They try to piece together a just savings schedule by balancing how much at each stage they would be willing to save for their immediate descendants against what they would feel entitled to claim of their immediate predecessors. (Rawls, p. 287 and p. 289)

This, then, is how the issue of the just savings principle is to be resolved. Yet, to understand why this approach is taken, we must further review Rawls' discussion of the main features of the contractarian approach here.

Rawls first points out that while a just savings principle cannot literally be adopted democratically, the conception of the original position brings about a democratic result, since the just savings principle will be, "one that is fairly adjusted to the claims of each generation and therefore satisfying the precept that what touches all concerns all." (Rawls, p. 288) Second, we are told that when a just savings principle is abided by, all generations benefit except, of course, the first:

Moreover, it is immediately obvious that every generation, except possible the first, gains when a reasonable rate of saving is maintained... Each passes on to the next a fair equivalent in real capital as defined by a just savings principle... Only those in the first generation
do not benefit, let us say, for while they begin the whole process, they do not share in the fruits of their provision. (Rawls, p. 288)

Further, Rawls tells us that since each generation presumably cares for its descendants that a just savings principle would be acknowledged. We shall return to this problem of the first generation in a moment.

The third characteristic of the contractarian approach cited here, is that it defines "a just state of society at which the entire course of accumulation aims." (Rawls, p. 288)

Hence, we are told, we are not bound to go on maximizing indefinitely:

Indeed, it is for this reason that the savings principle is agreed to after the principles of justice for institutions, even though this principle constrains the difference principle. These principles tells us what to strive for. The savings principle represents an interpretation, arrived at in the original position, of the previously accepted natural duty to uphold and to further just institutions. In this case the ethical problem is that of agreeing on a path over time which treats all generations justly during the whole course of a society's history. (Rawls, p. 289)

Although the above passage does make clear the role of the just savings principle and the nature of the ethical problem involved vis-a-vis the contractarian approach, Rawls introduces an issue, the duty to uphold and to further just institutions, which calls for a short digression here.

The duty of justice, the duty to uphold and to further just institutions, is a natural duty according to Rawls. The characteristics of a natural duty are the following:
Now in contrast with obligations, it is characteristic of natural duties that they apply to us without regard to voluntary acts. Moreover, they have no necessary connection with institutions or social practices; their content is not, in general, defined by the rules of these arrangements...A further feature of natural duties is that they hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons. (Rawls, pp. 114-115)

Furthermore, the way in which the natural duty of justice connects with justice as fairness is then explained to us by Rawls:

From the standpoint of justice as fairness, a fundamental natural duty is the duty of justice. This duty requires us to support and to comply with just institutions that exist and apply to us...Thus if the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do his part in the existing scheme. Each is bound to these institutions independent of his voluntary acts, performative or otherwise. (Rawls, p. 115)

What is most important to notice here is that, so far, no argument has been given for the duty of justice, although we have been told that it is a fundamental duty to justice as fairness.

The point, then, is that it is puzzling how the just savings principle is an interpretation of "the previously agreed to" duty to uphold and to further just institutions, when the principles for institutions are agreed to prior to the principles for individuals:
Thus the principles for the basic structure of society are to be agreed to first, principles for individuals next, followed by those for the law of nations...To illustrate: while it would be possible to choose many of the natural duties before those for the basic structure without changing the principles in any substantial way, the sequence in either case reflects the fact that obligations presuppose principles for social forms. And some natural duties also presuppose such principles, for example, the duty to support just institutions. For this reason it seems simpler to adopt all principles for individuals after those for the basic structure. (Rawls, p. 110)

It begins to seem as if Rawls has presupposed that the natural duty of justice has been previously accepted where it has, in fact, not been shown to be accepted or argued for at all.

Two further points are in order here. First, such a long digression would not be called for if Rawls had only presumed that the duty of justice had been previously agreed to. Yet, to further aggravate matters, at the end of "Justice between Generations" Rawls concludes that there is a natural duty of justice as if he had established it in this section: "In addition, men have a natural duty to uphold and to further just institutions and for this the improvement of civilization up to a certain level is required." (Rawls, p. 293) Second, the argument for the duty of justice is given in Chapter Six (pp. 334-337), and perhaps there we shall come to learn how it is that the duty of justice is previously agreed to.
Let us now return to our main discussion of the just saving principle. Before we return to the problem of the first generation, we must note two further points which Rawls makes with reference to the rate of savings and the contractarian approach. First, we are told that while each generation is to do its part in saving, they each have their appropriate aims. Hence, the aimed at just state is not solely that which gives meaning and purpose to the whole process. Second, it is not the case that the last stage is necessarily one of great abundance:

Justice does not require that early generations save so that later ones are simply more wealthy. Savings is demanded as a condition of bringing about the full realization of just institutions and the fair value of liberty. (Rawls, p. 290)

We might note here that the rate of savings, then, may be construed, under Rawls' branches of government, as a special problem for the distribution branch, since it is that branch that is concerned with distributive shares and the fair value of liberty.

After making these comments, Rawls returns to what we have called, the problem of the first generation. Here he wants to go farther than merely saying that the just savings principle would be acknowledged since each generation cares for its descendants. What he wants to do is to show that the relation between generations gives rise to no insuperable difficulties. To this end he first tells us that the relation between generations is a natural fact and as such the question
of the justice or injustice of it does not arise:

We can do something for posterity but it can
do nothing for us. The situation is unalter­
able, and so the question of justice does not
arise. (Rawls, p. 291)

Yet, we are also told where questions of justice and injustice
do come into play:

What is just or unjust is how institutions
deal with natural limitations and the way they
are set up to take advantage of historical pos­
sibilities. Obviously if all generations are
to gain (except perhaps the first), they must
choose a just savings principle which if fol­
lowed brings it about that each receives from
its predecessors and does its fair share for
those which come later. The only reciprocal
exchanges between generations are virtual
ones, that is, compensating adjustments that
can be made in the original position in drawing
up the just savings principle. (Rawls, p. 291)

An important inference which we may draw based upon this
passage is that it is at least theoretically possible that
the problem of the first generation may be resolved by com­
pen­sating adjustments made in drawing up the just rate of
savings, although Rawls seems to be quite pessimistic with
regards to solving this problem for the first generation.

In summarizing his comments on justice between gener­
at­ions, Rawls tells us why the difference principle could
not be employed in this matter, and why the veil of ignorance
with a present time entry interpretation was used. Again, it
is due to the unfortunate first generation:

There is no way for later generations to improve
the situation of the least fortunate first gen­
eration. The (difference) principle is inap­
plicable and it would seem to imply, if anything,
that there be no saving at all. Thus the problem of saving must be treated in another fashion. (Rawls, p. 291)

We must notice that this, of course, presupposes that saving is to be undertaken by each generation. Furthermore, the basis of this presupposition, given our previous discussion, seems to be the duty of justice and the preservation of the fair value of liberty. Yet, we have seen that to this point, the duty of justice is also presumed. For now, however, let us move on to summarize further points that Rawls makes in this chapter on distributive shares, since we shall, at some point in the next chapter, return to the above problems.

Rawls next goes on to try to give some foundation to the presumption that the parties in the original position have no pure time preference (for one generation or another). Here he discusses Sidgwick's point that the mere difference of location in time of something is not in itself a rational ground for an individual having more or less regard for it. When we apply this point to society, what was irrational for the individual becomes unjust for the society:

The just savings principle for society must not, then, be affected by pure time preference, since as before the different temporal position of persons and generations does not in itself justify treating them differently...Although any decision has to be made now, there is no ground for their using today's discount of the future rather than the future's discount of today...In the case of the individual, pure time preference is irrational...In the case of society, pure time preference is unjust...

(Rawls, pp. 294-295)
After concluding this, Rawls takes up the problem that government intervention in behalf of future generations, on the basis of the just savings principle, may be contrary to democratic principles, where it is thought that the present generation should determine social choice: "...(I)t may be thought that a democratic view of the state does not countenance the government's intervening for the sake of future generations even when the public judgment is manifestly mistaken." (Rawls, p. 295) Further, Rawls tells us that whether contention is correct depends upon how it is interpreted. Yet, the main point in the discussion here seems to be that since a constitution is a case of imperfect procedural justice, the people may still decide wrongly, and doing such, may cause irreversible damages for perpetuate grave injustices. In these cases, Rawls concludes, there is no reason why a democrat may not oppose the public will:

Although one believes in the soundness of a democratic constitution and accepts the duty to support it, the duty to comply with particular laws may be overridden in situations where the collective judgment is sufficiently unjust. There is nothing sacrosanct about the public decision concerning the level of savings; and its bias with respect to time preference deserves no special respect. In fact the absence of the injured parties, the future generations, makes it all the more open to question. (Rawls, p. 296)

The bottom line here, for Rawls, is that ultimately all decisions are subject to the principles of justice:
For the moment the essential point is that the collective will concerning the provision for the future is subject, as all other social decisions are, to the principles of justice. The peculiar features of this case do not make it an exception. (Rawls, p. 297)

Finally, Rawls gives us a brief glimpse with respect to the bearing which his view has on nonideal theory. That is, he tells us that where we start with defective criteria, such as the principle of utility, we may have to take steps in order to correct the situation, although these steps may even be contrary to such requirements as no pure time preference: "Certainly introducing time preference may be an improvement in such cases; but I believe that its being invoked in this way is an indication that we have started from an incorrect conception." (Rawls, p. 298)

Having discussed the notion of time preference a bit further, Rawls now goes on to discuss some further cases of the priority of justice. In this section, Rawls is most concerned with showing both that the just savings principle acts as a constraint upon what each generation may be required to save, and that the infringement of these constraints can only be justified on the basis that not to have infringed upon them would have lead to even greater injury to those upon whom the injustice fell:

The just savings principle acts as a constraint on the rate of accumulation. Each age is to do its fair share in achieving the conditions necessary for just institutions and the fair value of liberty; but beyond this more cannot be required...
Whenever the constraints of justice in the matter of savings are infringed, it must be shown that circumstances are such that not to trespass upon them would lead to an even greater injury to those on whom the injustice falls. This case is analogous to those already discussed under the heading of the priority of liberty.... (Rawls, pp. 298-299)

Furthermore, and as we might have surmised, the priority rule which Rawls then goes on to formulate with reference to equality of opportunity states that curtailments of equality of opportunity may only be justified on the basis that the opportunities of the least favored sector would be still worse if it were not for these restrictions. (Rawls, p. 302)

Rawls, then, gives us the following final statement of the two principles of justice for institutions:

**First Principle**

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

**Second Principle**

Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and

(b) attached to offices and positions open to all under conditions of fair equality of opportunity.

**First Priority Rule (The Priority of Liberty)**

The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty. There are two cases:
(a) a less extensive liberty must strengthen the total system of liberty shared by all;

(b) a less than equal liberty must be acceptable to those with the lesser liberty.

Second Priority Rule (The Priority of Justice over Efficiency and Welfare)

The second principle of justice is lexically prior to the principle of efficiency and to that of maximizing the sum of advantages; and fair opportunity is prior to the difference principle. There are two cases:

(a) an inequality of opportunity must enhance the opportunities of those with lesser opportunity;

(b) an excessive rate of saving must on balance mitigate the burden of those bearing this hardship. (Rawls, pp. 302-303)

Following this we are again given the general conception:

All primary social goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantages of the least favored. (Rawls, p. 303)

Since we shall be concerned with how Rawls' theory applies to the problem of preferential treatment in admissions, it seems important to note, here, what Rawls has to say about the application of the specific formulation and the general conception of his theory of justice. Although we are given no specific guidelines for their application to nonideal theory, we are given some general pointers about the ways in which we should proceed:
It suffices to observe that when we come to nonideal theory, we do not fall back straightway upon the general conception of justice. The lexical ordering of the two principles, and the valuations that this ordering implies, suggest priority rules which seem to be reasonable enough in many cases...Thus the ranking of the principles of justice in ideal theory reflects back and guides the application of these principles to nonideal situations. It identifies which limitations need to be dealt with first. (Rawls, p. 303)

Furthermore, as Rawls tells us, in some cases we may be forced to rely upon the more general conception of the theory:

The drawback of the general conception of justice is that it lacks the definite structure of the two principles in serial order. In more extreme and tangled instances of nonideal theory there may be no alternative to it. At some point the priority of rules for nonideal cases will fail; and indeed, we may be able to find no satisfactory answer at all. But we must try to postpone the day of reckoning as long as possible, and try to arrange society so that it never comes. (Rawls, p. 303)

We should remember, then, that when we turn to nonideal theory, the application of the specific formulation seems to be preferred to the application of the general conception, although we may have to rely upon the general conception in some cases.

For the rest of Chapter V, "Distributive Shares," Rawls comments upon four topics further. Although we shall note summarily a few points which are important for our purposes with respect to three of these topics, we shall have the most to say about Rawls' final topic, the principle of perfection. In "The Precepts of Justice," Rawls again reminds us that his theory of justice is based upon the notion of pure procedural
justice, although for such a notion to succeed it is necessary to set up and administer impartially a just system of surrounding institutions. Furthermore, Rawls, in this section, wants to see if his conception of justice accords with common sense precepts of justice. That is, given conflicting precepts of justice, how would the two principles of justice fare as a higher criterion by which such precepts would be given various appropriate weights?

In addressing this issue Rawls notes that although the same common sense precepts of justice may arise from different theories of justice, the important comparison rests upon the emphasis given to such precepts by each conception of justice:

Thus the contrast between conceptions of justice does not show up at the level of common sense norms but rather in the relative and changing emphasis that these norms receive over time. In no case can the customary or conventional notion of a fair or just balancing be taken as fundamental, since it will depend upon the principles regulating the background system and the adjustments which they require to current conditions. (Rawls, p. 307)

This seems to imply that we cannot judge the justice of any distribution by viewing the use of any precepts in isolation, as Rawls tells us:

But no inference about the justice of the final distribution can be drawn from viewing the use of any precept in isolation. The overall weighting of the many precepts is done by the whole system...To assess the justice of distributive shares, we must note the total working of the
background arrangements, the proportion of income and wealth deriving from each branch. (Rawls, pp. 308-309)

At this point, Rawls takes up a possible objection to his theory with which we need not be concerned. Rather, the main point which he finally arrives at in favor of how his conception of justice gives emphasis to common sense precepts of justice is the following:

Thus if markets are reasonably competitive and open, the notion of pure procedural justice is a feasible one to follow. It seems more practicable than other traditional ideals, being explicitly framed to coordinate the multitude of possible criteria into one coherent workable conception. (Rawls, p. 310)

Remembering Rawls' account of the branches of government, we see that this is so in that each branch has as its concern a different precept of justice; e.g., "to each according to his need" is embedded in the transfer branch.

In the section "Legitimate Expectations and Moral Desert," Rawls' main intention is to show that distributive justice cannot be based upon moral desert. Initially he makes the distinction between legitimate expectations and moral desert:

A just scheme, then, answers to what men are entitled to; it satisfies their legitimate expectations as founded upon social institutions. But what they are entitled to is not proportional to nor dependent upon their intrinsic worth. (Rawls, p. 311)

Yet, the core of the argument is that the concept of moral worth cannot be introduced until after the principles of justice, and of natural duty and obligation have been introduced:
Once these principles are on hand, moral worth can be defined as having a sense of justice... Thus the concept of moral worth is secondary to those of right and justice, and it plays no role in the substantive definition of distributive shares... For a society to organize itself with the aim of rewarding moral desert as a first principle would be like having the institution of property in order to punish thieves. (Rawls, pp. 312-313)

Now, the bottom line to the above position is that those who think of distributive justice and retributive justice as converses are misled: "To think of distributive and retributive justice as converses of one another is completely misleading and suggests a different justification for distributive shares than the one they in fact have." (Rawls, p. 315) That is to say, one is misled if one assumes that because one is normally punished for having done something wrong that one is entitled to distributive shares on the basis of having been virtuous.

In the final section of Chapter V with which we are concerned, Rawls discusses the principle of perfection and perfectionism as a conception of justice. Since such a doctrine may come into play in arguments for or against preferential treatment in admissions to education, we shall take a moment to review what Rawls has to say about it. Rawls begins here by identifying two versions of the perfectionist doctrine. The first version we may call the strong version:

...(I)t (the principle of perfection) is the sole principle of a teleological theory directing society to arrange institutions and to define the
duties and obligations of individuals so as to maximize the achievement of human excellence in art, science, and culture. The principle obviously is more demanding the higher the relevant ideal is pitched. (Rawls, p. 325)

As Rawls tells us, the strength Nietzsche gives to such a principle, at times, is quite unusual: "We give value to our lives by working for the good of the highest specimens." (Rawls, p. 325) In the second version, the moderate version, of the doctrine, Rawls tells us, the principle of perfection is taken as one principle among several in an intuitionist theory:

The principle is to be balanced against others by intuition. The extent to which such a view is perfectionist depends, then, upon the weight given to the claims of excellence and culture. (Rawls, p. 325)

In this moderate form, where claims of basic needs clash with the principle of perfection, the claims of basic needs may be honored. Yet, the principle of perfection, under normal circumstances still carries great weight:

These (more perfect) forms of life have greater intrinsic worth than the lesser pleasures, however widely the latter are enjoyed...The only exception is when these claims clash with the demands of basic needs. Thus given improving circumstances, the principle of perfection acquires an increasing weight relative to a greater satisfaction of desire. (Rawls, p. 326)

Having cited these two ways in which the principle of perfection may be employed, Rawls, before arguing against each version, attempts to exhibit the relationship between utilitarianism, perfectionism, and the contract view. Using
Brian Barry's distinction between want-regarding and ideal-regarding principles (although Barry, in *A Liberal Theory of Justice*, says that Rawls misuses this distinction), Rawls shows that the contract view occupies an intermediate position between the two other views, since it is similar to perfectionism in that it takes into account other things besides the net balance of satisfaction and how it is shared, but manages to define an ideal of the person without invoking a prior standard of human excellence.

Having discussed the above relationship, Rawls then goes on to argue against both versions of the principle of perfection, by showing that the parties in the original position would not agree to the principle in either form. The main problem with the principle is that there is no agreed upon criterion of perfection in the original position, which means that were the parties to accept the perfectionist position they would have no way of knowing whether such a principle might not later require them to accept lesser rather than greater liberty. As Rawls tells us:

> Thus it seems that the only understanding that the persons in the original position can reach is that everyone should have the greatest equal liberty consistent with a similar liberty for others. They cannot risk their freedom by authorizing a standard of value to define what is to be maximized by a teleological principle of justice...It is evident, then, that much the same argument that led to the principle of equal liberty requires the rejection of the principle of perfection. (Rawls, pp. 327-328)
Furthermore, Rawls goes on to make clear that his argument is not that the criteria of excellence lack a rational basis from the standpoint of everyday life. In fact, human excellences are to be pursued in his well-ordered society within the limits of the principle of free association. He adds, further, that his view does not imply equality of the excellence of activities and accomplishments, just as it does not imply the equal capacity of individuals for higher forms of life.

Now, against the more moderate intuitionist form of perfectionism Rawls' main contentions are essentially three. First, again he claims that there is no basis for acknowledging a principle of perfection in the original position as a social standard of justice. Second, it seems that "criteria of excellence are imprecise as political principles, and their application to public questions is bound to be unsettled and idiosyncratic, however reasonably they may be invoked and accepted within narrow traditions and communities of thought." (Rawls, pp. 330-331) This second point is exhibited by Rawls when he notes the ad hoc way in which the principle of perfection is cited in arguments about certain types of sexual relationships when principles of liberty, obligation or duty, cannot be found that argue against such relationships. Rawls' third contention against the moderate version is again the jeopardy of equal liberty which arises.
In light of all of this, Rawls concludes:

Since these uncertainties plague perfectionist criteria and jeopardize individual liberty, it seems best to rely entirely on the principles of justice which have a more definite structure. Thus even in its intuitionistic form, perfectionism would be rejected as not defining a feasible basis of social justice. (Rawls, p. 331)

Ending Chapter V, Rawls notes that public funds may be provided for the sciences and arts through his exchange branch of government, as the criterion of excellence does not serve as a political principle in this way. The main point of this suggestion by Rawls, however, is that those who do not receive any compensating benefits from institutions which pursue these excellences, cannot be taxed to support them:

But while the claims of culture can be met in this way (the exchange branch--HMS), the principles of justice do not permit subsidizing universities and institutes, or opera and the theater, on the grounds that these institutions are intrinsically valuable, and that those who engage in them are to be supported even at some significant expense to others who do not receive compensating benefits. Taxation for these purposes can only be justified as promoting directly or indirectly the social conditions that secure equal liberties and as advancing in an appropriate way the long-term interests of the least advantaged. This seems to authorize those subsidies the justice of which is least in dispute, and so in these cases anyway there is no evident need for the principle of perfection. (Rawls, p. 332)

With this, we complete our review of Rawls' discussion of distributive shares and proceed to the next section of this chapter to review the final section of *A Theory of Justice* with which we are concerned.
Duty and Obligation

In Chapter VI, "Duty and Obligation," Rawls discusses the principles of natural duty and obligation which apply to individuals, and argues that these principles would be chosen by the parties in the original position. Furthermore, Rawls goes on to apply these principles to particular instances of conscientious refusal and civil disobedience. Since his discussion of these latter issues is one of the few places in A Theory of Justice where Rawls does indeed attempt to take nonideal theory (i.e., the application of ideal theory to a situation of partial compliance) by the horns, and since preferential treatment in admissions to education is a question of nonideal theory, we shall review much of what Rawls says here, even though the specific topics he is dealing with are not of much concern to us.

According to Rawls, the principles of natural duty and obligation are those principles which, "define our institutional ties and how we become bound to one another." (Rawls, p. 333) As we saw earlier, when we reviewed Rawls' discussion of the just savings principle, the most important natural duty from the standpoint of the theory of justice is the duty to support and to further just institutions (Sokolow, Chapter 3, p.132) At that point we noted in a digression from that conversation that although Rawls presumes the acceptance of the natural duty of justice in the original position, he, in fact, gives no argument for it. Yet, in this section on
natural duty and obligation, there seem to be two major parts to his argument as to why the natural duty of justice would be accepted by the parties in the original position.

At the outset, we would do well to review Rawls' definition of natural duty:

Now in contrast with obligations, it is characteristic of natural duties that they apply to us without regard to our voluntary acts. Moreover, they have no necessary connection with institutions or social practices; their content is not, in general, defined by the rules of these arrangements...A further feature of natural duties is that they hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons. (Rawls, pp. 114-115)

It is in this sense, then, that there is a duty to support and to uphold just institutions. Let us now view the two parts of Rawls' argument as to why the natural duty of justice would be chosen in the original position.

The first part of the argument cuts away with one blow most competing principles of natural duty and obligation. Rawls tells us that since the principles for institutions are chosen prior to those for individuals the feasible alternatives are narrowed down immediately. What we are looking for, then, are principles for individuals which best conform to the two principles of justice. With this move, the choice of principles for individuals which supposedly follows is that of the principle to uphold those institutions which satisfy the two principles of justice. Of course, this cannot be the whole argument for the duty of justice since it would be at
best trivial. That is, we would have a position that would say that we get the principles for institutions from the original position, and the duty of justice from the principles for institutions, which says that we ought to uphold the two principles for institutions and whatever meets their specifications. This argument would only work if the two principles for institutions specified that they ought to be upheld by individuals, which would then make the duty of justice redundant and meaningless. Hence, Rawls needs to add a second part to his argument which is not based upon the two principles for institutions.

Now, for the second part of his argument, he resorts to the position that the duty of justice would be adopted by the parties in the original position, and that they would adopt it in order to curtail the two sorts of tendencies that lead to instability in society; the first sort arising from self-interest and the second sort arising from lack of assurance that others are doing (will do) their part. Mainly upon this basis, then, Rawls concludes:

...(T)he parties in the original position do best when they acknowledge the natural duty of justice. Given the value of a public and effective sense of justice, it is important that the principle defining the duties of individuals be simple and clear, and that it insure the stability of just arrangements. I assume, then, that the natural duty of justice would be agreed to rather than a principle of utility, and that from the standpoint of the theory of justice, it is the fundamental requirement for individuals. (Rawls, p. 337)
Perhaps one interesting point to note with reference to the principle of the natural duty of justice is that it will serve just as well for any conception of justice which is adopted by the parties in the original position, whether it be utilitarianism, intuitionism, etc. For, since it is founded on the notion of stability, rather than on Rawls' particular conception of justice, no matter what conception of justice the parties in the original position choose for institutions, they will surely choose the natural duty of justice for individuals to curtail the two sorts of tendencies leading to instability. In this sense, the choice of any conception of justice for institutions narrows down the choice of principles (or at least one principle) for individuals.

After arguing for the natural duty of justice in this way, Rawls goes on to argue for the duty of mutual respect and then the duty of mutual aid. We shall not review the specifics here, but shall only say that the reasoning is similar to the reasoning in favor of the duty of justice, in that the parties in the original position, although mutually disinterested, see that such duties further or will help to further their interests. Hence, Rawls tells us that taking any natural duty by itself, the reasons favoring its adoption are fairly obvious. The major difficulty, then, is seen to arise with the issue of priority:
The real difficulty lies in their (the duties') more detailed specification and with questions of priority: how are these duties to be balanced when they come into conflict, either with each other or with obligations, and with the good that can be achieved by supererogatory actions? There are no obvious rules for settling these questions. (Rawls, p. 339)

Furthermore, Rawls also tells us that in his work, he shall not attempt to address such difficulties in general, but rather shall address a few specific difficulties which arise with the issues of civil disobedience and conscientious refusal.

After a short digression, Rawls then goes on to discuss the principles of obligation. First, he tells us that all obligations arise from the principle of fairness which has two parts; the first of which specifies how we acquire obligations, and the second of which specifies that the institutions under which we acquire such obligations must be just:

...(A) person is under an obligation to do his part as specified by the rules of an institution whenever he has voluntarily accepted the benefits of the scheme or has taken advantage of the opportunities it offers to advance his interests, provided that the institution is just or fair, that is, satisfies the two principles of justice. (Rawls, pp. 342-343)

Rawls expresses the intuitive notion behind the first part of the principle by noting: "We are not to gain from the cooperative efforts of others without doing our fair share." (Rawls, p. 343) Whereas, the intuitive notion behind the second part is that certain background conditions must be satisfied for
obligations to arise. Here Rawls cites the example that extorted promises are generally seen as void ab initio. Yet, it is quite interesting to note the analogous way and extent to which he pushes this example:

But similarly, unjust social arrangements are themselves a kind of extortion, even violence, and consent to them does not bind. (Rawls, p. 343)

This is an interesting analogy which we should keep in mind for our application of Rawls to preferential treatment in admissions to education.

Next, Rawls goes on to draw the distinction between natural duties and obligations, and then to substantiate that the principle of fairness would be chosen by the parties in the original position. Yet, since these topics are not pertinent to the issue of our concern, we shall only note one point in Rawls' discussion here which does seem to be important for our purposes. That is, having made the distinction between ethical principles and constitutive rules, Rawls notes that moral obligations arise only in virtue of ethical principles that would be chosen in the original position. Furthermore, and more important for our purposes, he also tells us that although the two issues are many times conflated, what the law (constitutive rules) requires and what we are morally bound to do are two different issues:
By contrast, institutional requirements, and those deriving from social practices generally, can be ascertained from the existing rules and how they are to be interpreted. For example, as citizens our legal duties and obligations are settled by what the law is, insofar as it can be ascertained. Whether these requirements are connected with moral duties and obligations is a separate question. This is even so if the standards used by judges and others to interpret and to apply the law resemble the principles of right and justice, or are identical with them. Although in this case it is clear that, should the law satisfy its own standards, we are morally bound, other things equal, to comply with it, the questions what law demands and what justice requires are still distinct. (Rawls, pp. 348-349)

Having now completed his account of moral duty and obligation, Rawls turns his attention to some issues of nonideal theory. Since preferential treatment is an issue of nonideal theory, we shall be concerned here not so much with the particular issues that Rawls discusses, as with the way in which he uses ideal theory to try to resolve some issues in the nonideal realm. It is important to note here that Rawls' only concern with nonideal theory falls within the partial compliance part of nonideal theory. That is, he is concerned with what the individual's role is when faced with injustice. Yet, the issue of preferential treatment in admissions to education seems to belong to a different part of nonideal theory in that at least one of the major concerns of that issue is what can be done to rearrange institutions when they are unjust and what types of consequences may we rightfully expect an individual to endure when such rearrangement takes place. We shall say more of this in the next
chapter. For now, let us see how Rawls applies his ideal theory to the realm of partial compliance, and what issues are of concern:

When we ask whether and under what circumstances unjust arrangements are to be tolerated, we are faced with a different sort of question. We must ascertain how the ideal conception of justice applies, if indeed it applies at all, to cases where rather than having to make adjustments to natural limitations, we are confronted with injustice. The discussion of these problems belongs to the partial compliance part of nonideal theory. Now I shall not attempt to discuss these matters in full generality. In fact, I shall take up but one fragment of partial compliance theory: namely, the problem of civil disobedience and conscientious refusal. (Rawls, p. 351)

Yet, before Rawls discusses these two issues he discusses several points concerning political duty and obligation. First, then, Rawls notes that there are two ways in which injustice can arise:

...(C)urrent arrangements may depart in varying degrees from publicly accepted standards that are more of less just; or these arrangements may conform to a society's conception of justice, or to the view of the dominant class, but this conception itself may be unreasonable, and in many cases clearly unjust. (Rawls, p. 352)

With reference to this distinction, and as we shall see later, it seems that Rawls' discussion of civil disobedience is most concerned with the first kind of injustice, whereas his discussion of conscientious refusal has to do more with the second kind of injustice.
Rawls next considers the question of why, in a situation of near justice, we have a duty to comply with unjust, and not simply with just, laws. His main contention here is that even though representatives to a constitutional convention would select a constitution from which just and effective legislation would most likely follow, perfect procedural justice cannot be achieved in political affairs. Upon this basis and upon the basis of our natural duty to uphold just institutions, Rawls concludes:

Being required to support a just constitution, we must go along with one of its essential principles, that of majority rule. In a state of near justice, then, we normally have a duty to comply with unjust laws in virtue of our duty to support a just constitution. (Rawls, p. 354)

Yet, Rawls goes on to qualify this conclusion by pointing out that the burden of injustice should be more or less evenly distributed over different groups in society. With this qualification, then, comes the problematic issue of the duty of permanent minorities to comply: "Therefore, the duty to comply is problematic for permanent minorities that have suffered from injustice for many years." (Rawls, p. 355)

Rather than saying much more about this problematic issue, Rawls goes on to conclude that, in general, we have a duty of civility, given certain inevitable imperfections of a constitutional system:

Instead, we submit our conduct to democratic authority only to the extent necessary to share equitably in the inevitable imperfections of a constitutional system. Accepting these hardships
is simply recognizing and being willing to work within the limits imposed by the circumstances of human life... The duty of civility imposes a due acceptance of the defects of institutions and a certain restraint in taking advantage of them. Without some recognition of this duty mutual trust and confidence are liable to break down. (Rawls, p. 355)

Finally, before Rawls goes on to discuss civil disobedience and conscientious refusal, he attempts to clarify the role of majority rule in the ideal procedure that forms a part of the theory of justice. Yet, since such concerns are not important for our purposes, let us move on to see how Rawls applies his theory to nonideal issues.

Since the problem of civil disobedience is one of a conflict of duties, the duty to comply and the duty to oppose injustice, where the problem arises in a nearly just society (as Rawls assumes), it is one for nonideal theory. Furthermore, according to Rawls, a theory of civil disobedience has three parts: (1) it defines this kind of dissent; (2) it sets out grounds under which such action is justified; and (3) it explains the role of this kind of dissent within a constitutional system, and accounts for the appropriateness of it within a free society.

Upon this basis, Rawls then defines civil disobedience in the following way, and cites certain relevant considerations:

I shall begin by defining civil disobedience as a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government. By acting in this way one
addresses the sense of justice of the majority of the community and declares that in one's considered opinion the principles of social cooperation among free and equal men are not being respected. (Rawls, p. 364)

To this definition, Rawls adds four major considerations as far as civil disobedience is concerned. First, it is not required that the civilly disobedient act breach the same law being protested. This provides for both direct and indirect civil disobedience. Second, the act is indeed thought to be contrary to the law in the sense that those who engage in it are prepared to oppose a statute even if it is upheld by the court. Third, civil disobedience is a political act, according to Rawls, in that it is not only addressed to the majority that holds political power, but also in that it is guided and justified by political principles, which are, of course, the principles of justice for social institutions: "instead one invokes the commonly shared conception of justice that underlies the political order." (Rawls, p. 365) Finally, civil disobedience is a public act since it is a form of public address, an expression of one's conscientious political convictions. For this reason it is seen by Rawls as non-violent, since it is an expression of one's case rather than a threat. It is non-violent, furthermore, for the following reason: "It expresses disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof." (Rawls, p. 366)
In contrast to the above, Rawls offers the following definition of conscientious refusal:

Conscientious refusal is noncompliance with a more or less direct legal injunction or administrative order. It is refusal since an order is addressed to us and, given the nature of the situation, whether we accede to it is known to the authorities. (Rawls, p. 368)

To this, Rawls adds three main considerations. First, conscientious refusal is not a form of address appealing to the sense of justice of the majority, nor do those who engage in it expect to change the law. Second, conscientious refusal is not necessarily based upon political principles, although it may be. And third, although civil disobedience is a form of political appeal and, hence, is usually not justified until other steps have been taken within the legal framework, such a requirement often fails in obvious cases of legitimate conscientious refusal. To all of this, Rawls adds that even though there is no sharp distinction between conscientious refusal and civil disobedience in actual cases, such a contrast as the one given above may elucidate the interpretation for and role of civil disobedience in a democratic society.

Having completed the contrast between civil disobedience and conscientious refusal, Rawls now discusses five conditions under which it is reasonable to engage in civil disobedience. Concerning the first condition, since Rawls sees civil disobedience as a political act addressed to a community's sense of justice, he tells us that it ought to be limited to clear
and substantial instances of injustice. Further, since it will normally be that serious injustices will be most easily ascertained when they are in violation of the first principle or the equal opportunity part of the second principle, civil disobedience seems to be most appropriate in these cases. The first condition, then, is that a violation of the principle of equal liberty exists. Second, since civil disobedience is a last resort, according to Rawls, we should require that normal appeals to the political majority have been made in good faith and have failed, and that further attempts may be thought to prove fruitless.

Yet, even where the above two conditions are met, there is a third condition that civilly disobedient groups or persons must take into account. That is, they may only engage in civil disobedience at such a time when their act does not, given existant conditions or current actions by others, lead to a breakdown in the respect for law and the constitution. Also, some consideration must be given by those who are about to engage in such an act, to the ability at any given time of the public forum to handle such forms of dissent and to whether their appeal or intention to appeal to the sense of justice of the majority might be lost sight of at any given time. Fourth, Rawls also notes that some allowance must be made for the possibility of injury to third parties; that is, to the innocent. And finally, there is still a question, at any given time, as to whether it is prudent to exercise the
right of civil disobedience. Hence, the exercise of this right ought to be rationally framed to advance the ends one wishes to advance.

In the section entitled, "The Role of Civil Disobedience," Rawls continues to discuss the justification of civil disobedience within a constitutional system, and to account for its connection with a democratic polity. Essentially, there are four main steps in Rawls' reasoning why the parties in the original position would adopt the conditions defining civil disobedience as a way of setting up, within the limits of fidelity to the law, a final device to maintain the stability of a just constitution. First, Rawls tells us that when society is seen as a scheme of cooperation among equals that those injured by serious injustice need not submit to it, and that, indeed, civil disobedience may serve as a stabilizing device to a constitutional system. Second, he tells us that the parties in the original position have two related problems to consider. Having chosen principles for individuals they must work out guidelines for assessing the strength of the natural duties and obligations, and reasonable principles for dealing with unjust situations. Third, Rawls tells us that, given the assumptions characterizing a nearly just society, the parties would agree to the conditions that specify when civil disobedience is justified. Fourth and finally, Rawls tells us that doing this would indicate the
weight of the natural duty of justice in one important case, and would also tend to enhance the realization of justice throughout the society by strengthening men's self-esteem and their respect for one another. That is, since submission to injustice arouses the contempt of those who perpetuate it, and confirms their intention, and since every precaution will be taken to resist through legal channels, and since the conditions specified would further be fulfilled, the parties in the original position would accept civil disobedience as a final device in maintaining the stability of a just constitution.

Following this justification, Rawls comments further upon it. First, Rawls again stresses that civil disobedience is a political act, based upon a conception of justice. It is a way of addressing a sense of justice of the community and is an appeal to the moral basis of civic life. Furthermore, Rawls makes the following five points in order to make his account more plausible. First, he reminds us that he has assumed that society is reasonably just, and that civil disobedience seems to be a reasonable and effective form of dissent only where society is regulated to some degree by a sense of justice. Second, a community's sense of justice is said to work in that unjust advantages or social positions are given up as indefensible. The sense of justice need not involve the profession of principles and the like. Third,
Rawls points out that his assumption of public acceptance of the same principles of justice is stronger than it need be for his account to be plausible:

In general, the overlapping of professed conceptions of justice suffices for civil disobedience to be a reasonable and prudent form of political dissent. Of course, this overlapping need not be perfect; it is enough that a condition of reciprocity is satisfied. (Rawls, p. 388)

At this point Rawls moves on to a fourth point which is, given that to a certain point it is better that the law and its interpretation be settled than that it be settled rightly, there is a question as to who is to decide when circumstances are such so as to justify civil disobedience. Rawls' answer to this is that each person must decide for himself, but that this does not mean that each may decide as he pleases, since the decision must be based upon the political principles that underlie the constitution:

Equals accepting and applying reasonable principles need have no established superior. To the question, who is to decide? the answer is: all are to decide, everyone taking counsel with himself, and with reasonableness, comity, and good fortune, it often works out well enough.

In a democratic society, then, it is recognized that each citizen is responsible for his interpretation of the principles of justice and for his conduct in light of them. (Rawls, p. 390)

This is the basis of Rawls' fifth point, which is that although the court presents its doctrine by reason and argument, if its conception of the constitution is to endure, it must
persuade a major part of the citizens of its soundness.

Hence, the final court of appeal is the electorate as a whole:

The civilly disobedient appeal in a special way to this body. There is no danger of anarchy so long as there is a sufficient working agreement in citizens' conceptions of justice and the conditions for resorting to civil disobedience are respected. That men can achieve such an understanding and honor these limits when the basic political liberties are maintained is an assumption implicit in a democratic polity. (Rawls, p. 390)

In his discussion of conscientious refusal, Rawls wishes to show how his theory of political duty applies to foreign policy. To do this he extends the theory of justice to law between nations and arrives at three principles: (1) a principle of equality between nations; (2) a principle of self-determination without intervention by foreign powers; and (3) the principle that treaties be kept provided they are in accord with the other principles which regulate relations between nations.

Furthermore, such principles would define, according to Rawls, when a nation had a just cause in war (jus ad bellum), and would regulate the means a nation might use to wage war (jus in bello). Rawls further points out here that the aim of war is a just peace and that the conduct of war must be constrained with this in mind. Representatives from nations would recognize, in the original position, that their national interests would be best served by acknowledging these limits on the means of war, and hence, the traditional prohibitions
incorporating the natural duties that protect human life would be chosen.

Hence, if in time of war conscientious refusal were based upon the above principles, it would be a political act which would be based upon the same theory of justice which underlies the constitution and guides its interpretation. Furthermore, where a soldier is ordered to engage in illicit acts of war, he may refuse to obey on the basis that the principles applying to the conduct of war are plainly violated: "He can maintain that, all things considered, his natural duty not to be made the agent of grave injustice and evil to another outweighs his duty to obey." (Rawls, p. 380)

Somewhat similarly, Rawls argues concerning conscription that since it is a drastic interference with the liberties of equal citizenship, it can only be demanded on the basis of the defense of liberty itself, the preservation of just institutions. Further, since the hardships and hazards to any one individual in a just society arise externally from outside attacks as a matter of historical happenstance, the most just institutions may do is to try to ensure that the risks of suffering from these misfortunes are more or less evenly shared by members of society over the course of their lives. Upon this basis, then, Rawls argues that a person may refuse to comply with conscription when the aims of the war engaged in are unjust, or when it is clear that the moral law
of war is being violated, since he is entitled to ensure that he honors his natural duty. Some combinations of these two conditions may also give rise not only to a right, but to a duty to refuse.

Since we said earlier that we were more concerned with what Rawls had done in applying his theory than with the specific issues at hand, let us now take a look at a few general features of his application here. First of all, it seems that in both of the justifications Rawls employs the parties deciding in the original position. That is, one major question here seems to be what type of weights would the parties in the original position give to conflicting duties and why. Second, the answer to the latter part of this question seems to usually refer to either the upholding or stability of just institutions, self-respect, the liberty of each individual, or to duties based upon anyone of these three elements. Third, where there is a conflict between political duties, some form of the principles of justice or derivations thereof are appealed to. Fourth, the "parties" seem to give weight to just institutions while adjusting individual freedoms to them, since weighting things in this way supposedly attains the greatest equal liberty for all. Finally, where burdens of natural happenstance must be assumed, the risk of assuming them must be distributed as evenly as possible among all individuals.
Looking at these general features of Rawls' application to these two specific problems, one is perhaps startled at the way in which the features of ideal theory are embedded in this application. Even though our problem is more a problem of how to structure institutions on the basis of nonideal theory, rather than one of conflicting duties for individuals, we have been given some direction in which to move by viewing Rawls' discussion of civil disobedience and conscientious refusal. This seems to bear out, somewhat, Rawls' hopes and conjectures with reference to the relationship between ideal and nonideal theory:

The account in this part is still highly abstract, but I hope to have provided some guidance as to how the principles of justice apply in practice... For the most part I have tried to develop an ideal conception, only occasionally commenting on the various cases of nonideal theory. To be sure the priority rules suggest directives in many instances, and they may be useful if not pressed too far...If ideal theory is worthy of study, it must be because, as I have conjectured, it is the fundamental part of the theory of justice and essential for the nonideal part as well. (Rawls, p. 391)

Conclusion

In the past two chapters we have reviewed what seem to be the major elements of A Theory of Justice. As we stated at the beginning of Chapter Two, our review unfortunately did not cover certain parts of Rawls' work. For instance, we have not looked at his theory of moral development, nor have we taken any close look at his arguments against utilitarianism.
Although these are major parts of his work, we have been forced, given a limited amount of time and space, to make a judgment on the basis of our discussion in Chapter One, concerning what major elements of Rawls’ theory might prove useful in unraveling the problem of preferential treatment in admissions to education. If the elements we have not discussed are eventually shown to be useful in addressing the problem of our concern, then we must accept the responsibility for our error in judgment. Yet, at this point, it seems that given the elements that we have discussed, there are more than a sufficient number of ways of addressing the problem at hand, in the next chapter. As we move on to the next chapter, we might note incidentally that after having related the main elements of Rawls’ theory to each other in what seems to be a coherent form, contrary to Barry's claim, we do not notice any steam coming out of our ears.
Footnotes


CHAPTER IV
MORE DIRECT APPLICATIONS

Preface

In this chapter and the next, we shall attempt to apply the elements of A Theory of Justice to the issue of our concern. Yet, because 'to apply' is both vague and ambiguous, we must take some time at the outset of this chapter in order to say more specifically what it is that we shall attempt to accomplish in the next two chapters, as well as how and why we shall do so.

Our first step in explicating the rationale behind this application of Rawls' theory is to briefly review his distinction between ideal and nonideal theory. In previous chapters, we have noted that Rawls is most concerned with what he calls ideal theory: "The other limitation on our discussion is that for the most part I examine the principles of justice that would regulate a well-ordered society... Thus I consider what I call strict compliance as opposed to partial compliance theory." (Rawls, p. 8) Rawls, then is most concerned with what principles would underlie a just society, and as such has little to say about what the just
thing is to do when faced with injustice (nonideal theory), aside from little snippets here and there. This points out that there is a gap between ideal and nonideal theory, and that once having solved the problems of ideal theory we are not to rush off and simply impose the answers of ideal theory upon the problems of nonideal theory. However, the connection between ideal and nonideal theory is even more obscure than this since Rawls does say that there is a connection between the study of ideal theory and confronting the problems of nonideal theory:

For the most part I have tried to develop an ideal conception, only occasionally commenting on the various cases of nonideal theory...If ideal theory is worthy of study, it must be because, as I have conjectured, it is a fundamental part of the theory of justice and essential for the nonideal part as well. (Rawls, p. 391)

Hence, it seems that we are faced with a problem of how to proceed with an application of Rawls' theory given this mystical connection between ideal and nonideal theory. Yet, another problem that we face is that Rawls' application of his ideal theory to nonideal problems such as civil disobedience is concerned only with cases where an individual finds that he has conflicting duties and must resolve them somehow. Here Rawls attempts to show us what course of action it is justified for the individual to take. Yet, the problem of preferential treatment in admissions to education, although it is a problem of nonideal theory, is not an issue
of what course is justifiable for an individual to take when faced with conflicting duties or with injustice; i.e., it is not an issue of partial compliance theory, although it is an issue of nonideal theory. We are not concerned with what actions X, Y, or Z's ought to take when faced with injustice, but are concerned with how best to organize institutions to bring about the highest possibility of a just result, given that we begin with institutions that do not seem to be structured in such a way. The fact that we have this gap to bridge too in order to apply Rawls' theory to our concern is merely one manifestation of the problem that Rawls takes his categories of ideal and nonideal to be synonymous with strict compliance and partial compliance when they are, in fact, not.

The following passage seems to elucidate this problem:

Thus I consider primarily what I call strict compliance theory as opposed to partial compliance theory. The latter studies the principles that govern how we are to deal with injustice...These are the things we are faced with in everyday life. The reason for beginning with ideal theory is that it provides, I believe, the only basis for the systematic grasp of these more pressing problems. (Rawls, pp. 8-9)

It seems, then, that we are not only left to bridge the gap between ideal and nonideal theory, but must do so in a way that Rawls has paid little attention to. Before, we speak of the general way in which we shall undertake such an endeavor and of our rationale behind doing so, let us first say a few general words about what the overall task of the
next two chapters will be, which will also help to clarify what we mean here by 'application'. Looking back to Chapter One, we stated the caveat that this endeavor would not be an exercise in social and political philosophical casuistry. More specifically, this meant that we would not be concerned with who was on the side of whom (or, who's side Rawls was on), but rather would be concerned to use the elements of Rawls' position in order to clarify, or at the least to expose, the issues which arise or underlie the problem of preferential treatment in admissions to education.

Now that we have reached Chapter Four, our course is still the same. The questions we shall investigate will not be as intellectually clumsy as, "Given the original position, who gets preferential treatment?" Instead, we shall be concerned with what the elements of Rawls' theory bring to light about the issues involved in preferential treatment, with what questions must be asked and answered with respect to those issues, and with how the elements of Rawls' theory help us to look at the issues involved in preferential treatment in ways that have been ignored. Hopefully these general, albeit vague, words about our endeavor in this chapter and the next bring to light that what we eventually want to do is to expose the issues, principles, etc., which are presupposed by those persons who argue for or against preferential treatment in admission to education. Whether or not we accomplish this larger task, is a criterion upon which one may wish to judge this work as a whole.
Given this general outlook we at least see how we shall not attempt to bridge the gap between ideal and nonideal theory. Further, by noting what has been said previously, we can see the rationale for how we shall attempt to apply Rawls' theory to the issue of preferential treatment in admissions to education. In Chapter Three, we noted that the four-stage sequence represented the direction of Rawls' theory (from principles of right to principles of good), and was to be taken as a process by which hypothetical parties built up a hierarchical structure of principles, standards, and rules which when consistently applied and adhered to, lead to a definite constitution for social action. (Rawls, p. 566) The four stages involved were noted as the original position, the constitutional convention, the legislative stage, and the application stage where judges and administrators apply rules to particular cases and where citizens follow such rules.

In order to see the rationale behind the way our application of Rawls' theory shall proceed, we must address the following two questions: (1) how does what Rawls do in A Theory of Justice fit into the four-stage sequence?; and (2) what stage(s) and elements thereof address concerns that are most similar to or enlightening for the issue of preferential treatment in admissions? At least part of the answer to the first question seems obvious. That is, where Rawls discusses whether or not and why the parties in the original
position would adopt his principles of justice, he is most concerned with the first stage of the sequence. This is the part of the answer that is obvious. Yet, how does Rawls' spelling out of the institutions that are compatible with the principles fit into the four-stage sequence? It seems that at least the core of the discussion of liberty and the priority of liberty is the concern of stage two, the constitutional convention: "The first principle of equal liberty is the primary standard for the constitutional convention." (Rawls, p. 199) Furthermore, the discussion of distributive shares seems most appropriately to be taken up at the stage three, the legislative stage: "The second principle comes into play at the stage of the legislature." (Rawls, p. 199) Finally, it seems that Rawls' discussion of civil disobedience and conscientious refusal fit most appropriately into stage four, given our description above of that stage.

Now, although preferential treatment is an issue for stage four in the sense that certain decisions about the application of rules to particular cases are to be decided, we have also seen that the main concern has to do with what is taken up in stage three; i.e., the arrangement, or re-arrangement in this case, of institutions. The problem we face here, again, is that Rawls takes 'nonideal' to be synonymous with 'partial compliance'. Be this as it may, it seems that since Rawls' discussion of distributive shares
deals with the arrangement of institutions and since his discussion of duty and obligation deals with individuals and justification for their actions, that we will find the elements of his discussion of distributive shares as most pertinent to our discussion of preferential treatment. However, given that the issue of liberty also comes into play with respect to preferential treatment, we shall also find the elements of Rawls' discussion of this issue to be pertinent to our investigation. Such elements as the original position, the general conception of justice as fairness, and the principles of justice, will be seen as a bit harder to specifically apply to the issue of our concern since they are farther away in the sequence, and as such are not meant (have not been formulated) to apply specifically to a topic such as ours. Furthermore, there are also a wealth of issues discussed by Rawls and a number of techniques used by Rawls which, although they do not strictly fit into the four-stage sequence or his theoretical position, may help us to become clear about the issue of preferential treatment in admissions to education.

With these points in mind, we can now see that if upon the above basis we were to speak of more direct applications of A Theory of Justice versus less direct applications, both with reference, of course, to the problem of preferential treatment in admissions, that we would expect to find the elements of Rawls' discussion of distributive shares as well
as some elements of his discussion of liberty under the title of "More Direct Applications," whereas we would expect to find the highly theoretical elements of A Theory of Justice under the title of "Less Direct Applications." Of course, all of this will be elucidated further as our discussion progresses. Yet, such points are mentioned at the outset in order to attempt to convey to the reader, at least intuitively albeit obscurely for the moment, the rationale behind our procedure in applying A Theory of Justice to the issue of preferential treatment in admissions to education.

Having said so much about the problems of application, what the application will aim at, and the rationale behind the structure of the application, we now note that the two following chapters will attempt to apply A Theory of Justice under the three topic headings: (1) More Direct Applications; (2) Less Direct Applications; and (3) Non-Applications. Our discussion thus far has pretty well given an idea of what is to be found under the first two headings. Under the third heading, and in the next chapter, we shall look at some of the elements of Rawls' work that cannot be applied to the issue of our concern because of certain philosophical problems with them. We shall try to point out the problems with applying such elements so that others may not be tempted to use them to argue for or against preferential treatment. Now that we have explicated our strategy, let us go on to review some more direct applications of the elements of Rawls' theory to preferential treatment in admissions to education.
Introduction

In this chapter, as in the next, we hope to bring many diverse elements of Rawls' work to bear on the problem of preferential treatment in admissions. Yet, because we are dealing with diverse elements of Rawls' work, the progression from one point of application to another may not prove to be as smooth as we could hope for it to be. Suffice it to say that we shall attempt to move through such points of application in such a manner that the issues of our concern about preferential treatment are seen to be intimately related. If in the end, we accomplish a dissection of the multifarious issues which underlie the problem of preferential treatment in admissions, our application of such diverse elements will at least be partially vindicated. Let us proceed with the application.

Two Types of Injustice and Just Schemes

To begin to look at the applications of the elements of Rawls' work, we might note that in Chapter One of this work we pointed out how it is that preferential treatment in admissions is a matter of justice. Having now reviewed Rawls, we are clear that it is also a matter to be dealt with by a theory which is of the nonideal type; i.e., a theory which addresses what ought to be done in light of current injustice. Yet, the issue is not so simple as that for, as we noted, Rawls tells us that injustice may arise in two different ways:
Unjust laws do not all stand on a par, and the same is true of policies and institutions. Now there are two ways in which injustice can arise: current arrangements may depart in varying degrees from publicly accepted standards that are more or less just; or these arrangements may conform to a society's conception of justice, or to the view of the dominant class, but this conception itself may be unreasonable, and in many cases clearly unjust. (Rawls, p. 352)

The first application of Rawls, then, points out that the issue of preferential treatment may be concerned with injustices of either type. Furthermore, when people argue for or against the practice it does not seem that they are always clear about whether this practice is to alleviate a more or less current arrangement that departs from a basically just conception, or whether the practice is to address or to make amends for a conception of justice that is itself unreasonable and unjust. Although this is only an initial application of an element of Rawls' work, it seems that which one of the above claims one adheres to in his argument will have a great bearing upon the strength and extent of the claims that Xs, Ys, and Zs will be justified in making. For instance, if X's claims for preferential treatment are based upon the fact that certain arrangements departed from an essentially just scheme, then upon that just scheme, Y may still have certain entitlements that he cannot be denied. Whereas, such may not be the case if the overall scheme itself is unjust. We shall, of course, eventually address the issue of legitimate expectations. For now, however, we can also
note that upon the above basis, it is easy to see how people may argue past one another with reference to preferential treatment. For instance, while one person might argue for preferential treatment on the basis that only particular arrangements were unjust, another person might argue for it (or even against it, as a militant might) on the basis that society's overall conception of justice was both unreasonable and unjust. As noted above, the strength and extent of claims about preferential treatment depends upon which position one holds.

This talk of schemes and conceptions of justice brings us to our next point. Early in his work, Rawls draws a distinction between the perfectly just scheme and the scheme that is just throughout. In speaking of the difference principle, he tells us:

First of all, in applying it, one should distinguish between two cases. The first case is that in which the expectations of the least advantaged are indeed maximized...No changes in the expectations of those better off can improve the situation of those worst off. The best arrangement obtains, what I shall call a perfectly just scheme. The second case is that in which the expectations of all those better off at least contribute to the welfare of the more unfortunate...Yet the maximum is not yet achieved. Even higher expectations for the more advantaged would raise the expectations of those in the lowest position: Such a scheme is, I shall say, just throughout, but not the best just arrangement. A scheme is unjust when the higher expectations, one or more of them, are excessive. (Rawls, pp. 78-79)

Let us assume that someone arguing for the practice of preferential treatment holds that society's conception of justice is
just and reasonable, but that certain arrangements, or the
current scheme, has problems that preferential treatment
can alleviate. The questions that such a person must ad­
dress are still many. First, is preferential treatment
meant to bring about the best just scheme, given that it
does not now exist? Second, is it meant to bring about a
scheme that is just throughout, given that it does not now
exist? Also, if the scheme was not just throughout in the
past, is preferential treatment a way in which to bring about
a scheme that is just throughout in the future? Again, with
Rawls' distinction of the perfectly just scheme versus the
scheme that is just throughout versus the unjust scheme, we
see that both the strength and the extent of the claims made
about preferential treatment will vary. For instance, it
seems that it would be easier to justify an argument for
preferential treatment based upon the position that it will
convert a scheme that is unjust to a scheme that is just
throughout, than to justify that it would create a perfectly
just scheme from one that is already just throughout. Notice
also the different kinds of empirical claims that will need
to be supported, depending upon which one of the ways above
that one chooses to argue.
Balancing of Precepts

It seems that our discussion thus far has led us to the concern of assessing the justice of the institutions of a society. That is, where one is concerned with arguments for or against preferential treatment, it seems that one must, somewhere along the line, make some claims about the justice of the institutions of society. Looking back to Chapter Three of this work, we see that Rawls has much to say about the assessment of the justice of the institutions of society and of the branches of government. First, in arguing for or against preferential treatment one might be tempted to use as a part of one's argument the distribution of goods at \( t_1 \), \( t_2 \), or \( t_3 \), with respect to one precept of justice or another (e.g., distribution according to one's need, merit, etc.). Yet, according to Rawls, it is a mistake to view the issue in this way:

But no inference about the justice of the final distribution can be drawn from viewing the use of any precept in isolation. The overall weighting of the many precepts is done by the whole system...To assess the justice of distributive shares, we must note the total working of the background arrangements, the proportion of income and wealth deriving from each branch. (Rawls, pp. 308-309)

The applicability of this point to preferential treatment, then, is that we must in some way take into account how the whole system (the institutions of a political economy) weights the different precepts of justice and how such weighting is reflected in the distribution. For one to argue, for example,
that preferential treatment ought not be given since our
political economy is based upon distribution according to
merit is for one to miss the intricacy of Rawls' above point
about assessing the injustice of political economic in-
stitutions.

Another point made by Rawls shows again how simplistic
such arguments are, as the one given above. That is, Rawls
notes that the contrast between conceptions of justice does
not show up at the level of common sense:

Thus the contrast between conceptions of
justice does not show up at the level of
common sense norms but rather in the rela-
tive and changing emphasis that these norms
receive over time. In no case can the cus-
tomary or conventional notion of a fair or
just balancing be taken as fundamental,
since it will depend upon the principles
regulating the background system and the
adjustments which they require to current
conditions. (Rawls, p. 307)

Such points at least make us wary about using any one pre-
cept or fact about distribution itself in isolation from the
way in which the institutions of the political economy balance
or emphasize the many precepts of justice. At least one
practical question to be addressed in the issue of preferen-
tial treatment, then, is whether or not the weight given to
certain precepts of distributive justice which have been re-
flected in the distribution of economic shares is taken to
be just; i.e., squares with our conception of justice and the
weights that ought to be reflected in our political economy.
If the weights assigned to such precepts do not presently
square, or have not in the past squared with our conception of justice, then perhaps we have a good reason to presently weight certain precepts in a heavier manner than others. The main point here is that the issue is clearly not as facile as we often times think.

Now, this concern of the weighting or of the balancing of the precepts of justice by the background institutions of justice and of the reflection of such in the economic distribution brings us back to Rawls' discussion of his branches of government which supposedly exhibit the content of his two principles of justice and also meet with our considered judgments. As we have noted, one of the main functions of the background institutions of distributive justice, according to Rawls, is the balancing of the precepts of justice, or giving each its due weight, so to speak:

The relevant point here is that certain precepts tend to be associated with specific institutions. It is left to the background system as a whole to determine how these precepts are balanced. Since the principles of justice regulate the whole structure, they also regulate the balance of precepts. In general, then, this balance will vary in accordance with the underlying political conception. (Rawls, pp. 276-277)

Furthermore, we have also noted that the issue of preferential treatment is an issue of nonideal theory which has as central to its concern questions about the rearrangement of certain institutions of society that are taken to be unjust.
Now, what Rawls' discussion of the branches of government can show us is that although disputes about preferential treatment are often couched in terms of dichotomies that the issue is not necessarily one of this nature. Looking again to his four branches of government, we recall that the allocation and stabilization branches were concerned mainly with the task of maintaining the efficiency of the market economy. Yet, the third branch of government, the transfer branch, was concerned with taking needs into account and with assigning claims of need an appropriate weight with respect to other claims. As Rawls tells us:

A competitive price system gives no consideration to needs and therefore it cannot be the sole device of distribution. There must be a division of labor between the parts of the social system in answering to the common sense precepts of justice. Different institutions meet different claims. (Rawls, p. 276)

Such a point is clearly exhibited in the way in which Rawls has the distribution branch preserving justice in distributive shares, the transfer branch meeting claims of need, and the stabilization and allocation branches keeping the market economy working efficiently. This, of course, works out neatly for ideal theory, but what has it to say with respect to the problem of preferential treatment?

First, it seems that although we can make some distinctions similar to the ones made above with respect to the institutions in our society (e.g., we might contrast the functions of H.E.W. and the F.T.C.), that the functions of
the institutions in our society are not as well cordoned off as in Rawls' ideal conception. We trust, here, that it is safe to assume such, anyway. Furthermore, where such an assumption seems to be particularly well-founded seems to be with respect to the institutions of education. For example, we might ask whether universities, as one of their main functions, give weight to the precept of distribution according to merit, or according to need, or according to moral worth? Is it some combination of the above precepts?

To return to disputes over preferential treatment being couched in terms that are often dichotomous, we can at least note here that by applying Rawls' discussion of the branches of government and their functions to the issue of preferential treatment, we see that issues of political economy are issues which involve a balancing of precepts of justice. Hence, it seems that for one to argue for preferential treatment solely on the basis of distribution according to need, would be for one to take the issue as superficially as someone who argued against preferential treatment solely on the basis of distribution according to merit.

Public Goods

Furthermore, this notion of the functions of the universities and their attempt to balance or to function along the lines of certain precepts of justice helps us to get to a further complexity in the issue of preferential treatment in
admissions to education. We may do this by merely returning to Rawls' discussion of public goods. In Chapter Three, we noted that in discussing economic systems and the two aspects of the public sector, Rawls briefly noted the features of public goods:

The distinction between public and private goods raises a number of intricate points, but the main idea is that a public good has two features, indivisibility and publicness. That is, there are many individuals, a public so to speak, who want more or less of this good, but if they are to enjoy it at all must (sic) enjoy the same amount. The quantity cannot be divided up as private goods can and purchased by individuals according to their preferences for more or less. There are various kinds of public goods depending upon their degree of indivisibility and the size of the relevant public. (Rawls, p. 266)

Before we go on to apply the issue of public goods to the issue to preferential treatment, let us be sure that we understand this notion of public goods. As we noted before, Rawls takes a paradigm case of a public good to be military defense against an enemy attack. Yet, if this example and the definition above do not make the concept clear, we may turn briefly to the quite similar notions of public and privately produced services discussed by John Kenneth Galbraith in, The Affluent Society. In his discussion of our attitudes towards production, Galbraith notes that we view with pride the most trivial product privately produced if it adds to the national wealth. Whereas, we tend to view the production of "some of the most significant and civilizing services with regret." (p. 124) The point for our purposes here, however,
is that Galbraith notes that we tend to view public services as a burden because many of them are necessary: "Public services, by comparison, are an incubus. They are necessary, and they may be necessary in considerable volume." (pp. 124-125) Galbraith notes such examples of public services as postal service, police protection, and street sanitation.

Therefore, it seems that Galbraith's notion of public services quite nicely elucidates Rawls' notion of public goods. For, many times public services are brought into being by those persons who if they are to enjoy them at all must enjoy them in the same (loosely speaking) amount. One cannot normally have an interstate highway all to one's self. Furthermore, what Rawls takes to be public goods, such as military defense, do normally seem to be necessary.

Given the notion of public goods, then, we can now ask if higher education is a public good. Furthermore, it is by answering this question that we can see the complexity of the problem of universities attempting to balance precepts of justice, especially in the issue of preferential treatment in admissions.

We answer the above crucial question (possibly the most crucial with respect to dealing with the issue of preferential treatment) with the response that it seems that higher education in this country is a borderline case of a public good, as defined by Rawls. It is this fact that makes not only the issue of preferential treatment so complex, but also other such
concerns as convincing individual citizens to vote for school levies so complex. That is, like model cases of public goods, higher education has as its result certain consequences that are not strictly divisible as private goods are, such as advancement in the sciences, the arts, the standard of living, culture, etc. In one sense, higher education and its consequences cannot be divided up and purchased by individuals according to their preferences. On the other hand, there are features of higher education that lead us to say that it is more akin to being a private good. That is, one can purchase according to one's preference a particular amount of education (given that one meets certain requirements such as passing tests, etc.) which may result in certain gains, both monetary and personal for that person. In this sense, higher education is divisible and hence is not a public good. The point to note here is that higher education is neither really a public good nor is it really a private good. It is merely a borderline case of each.

Now, with reference to higher education (or the universities), the balancing of precepts, and the issue of preferential treatment, the problems are elucidated by this fact that higher education is a borderline case of a public good. That is, if higher education were clearly a private good, we might be more inclined to hold to distribution according to merit, and to let the market take its course, although not necessarily so. Also, if higher education were clearly a
public good we might be inclined to be more concerned with
distribution according to need, though not necessarily so.
Furthermore, if the issue is not made complex enough by the
fact that higher education seems to be a borderline case of
a public good, we might also note that the issue of preferen-
tial treatment has as one of its concerns the previous denial
of higher education to a group of individuals and to particular
individuals, as well as the present denial to a group of
individuals and particular individuals. It is remarkable how
the application of Rawls' brief discussion of public goods
helps us explicate the complexity of the problem of preferen-
tial treatment here.* At the least, we see here that the
issues are not so simple as distribution according to merit
versus distribution according to need.

Furthermore, given that education has at least some
features of a public good, and since it seems safe to assume
that in at least some ways it weighs into the arena of dis-
tribution according to need (e.g., via such issues as compul-
sory education), or in maintaining a social minimum, we can
see that there is a relationship that may be drawn between
education and the issue of justice between generations.

* Notice what a similar application might do for such con-
cerns as remedial education, and adult education.
We are careful to say here that the relationship "may be drawn" since we have shown that Rawls is mistaken where he argues that there is necessarily a relationship between the social minimum (the "appropriate" application of the difference principle) and the issue of justice between generations. Here, however, we shall not even begin to investigate the multifarious issues involved within education as an issue of justice between generations. Rather, we introduce the relationship here so that we may lay some foundation for viewing preferential treatment in admissions to education as an issue of justice between generations. By viewing the issue in this way, we shall again see how Rawls' theory helps us to fruitfully explicate what is at issue.

**Justice Between Generations**

In viewing preferential treatment in admissions as a problem of justice between generations, let us turn first to one of Rawls' major concerns in this area; that is, the issue of the just savings principle. With respect to this issue, we may remember that Rawls' purpose was not to formulate a specific principle or rate of savings, but rather, to discuss "certain bounds which impose significant ethical constraints" on any rate of savings that would be chosen. (Rawls, p. 286) Also, as we noted, Rawls addresses this issue by holding
that the parties in the original position must "piece together a just savings schedule by balancing how much at each stage they would feel entitled to claim of their immediate predecessors." (Rawls, p. 289) In our discussion in Chapter Three, we also noted that Rawls takes this to be a democratic resolution of the issue since the principle is "one that is fairly adjusted to the claims of each generation and therefore (satisfies) the precept that what touches all concerns all." (Rawls, p. 288) Furthermore, we noted that he states that the contractarian approach does not require that we maximize goods indefinitely, but rather, it defines "a just state of society at which the entire course of accumulation aims." (Rawls, p. 288) Finally, Rawls has told us, also, that although each generation is to do its part in savings, that it also has concerns of its own which give it meaning and purpose.

Of course, in our short summary above we have ignored the important problem of the first generation. Although we shall come to that in a moment, let us first see how we may apply the above points in order to become clearer about the issue of preferential treatment in admissions. Minimally, by viewing the issue in this way we will be able to ask certain questions that we might not have posed prior to reviewing Rawls' discussion. First, we must note again that Rawls is concerned with ideal theory, whereas we are concerned with nonideal theory. That is, the issue of our concern
has to do with facing certain supposed injustices. Looking
to the issue of preferential treatment, then, we see that it
can be viewed, first of all, as an issue of justice between
generations most strictly in Rawls' sense of the issue.
That is, the question of what descendents can feel entitled
to is at the crux of the issue. Furthermore, the reason that
Rawls' concerns are so germane to the issue of our concern
is that he too, like us, is struggling with the issue from
the perspective of the descendents not being legal heirs.
What is at the crux of the problem, then, at least from the
perspective of justice between generations, is that we do
want to admit in some sense that descendant generations are
entitled to something from previous generations but that we
are not sure just what that something is. In our case the
difficulties arise with settling the claims of $X_b$ and $Z'$s
at $t_2$, (which may also, by the way, depend upon settling the
claims of $X_a$ and $Z'$s at $t_1$).

The second difficulty which comes to light, when the
issue of preferential treatment in admissions is viewed from
our current vantage point, is more specific than the first
noted above. That is, understanding the issue of justice
between generations as we now do, we might want to ponder
the question of what action would be appropriate for us to
take if there had existed a just savings principle at $t_1$ and
if at $t_1$ that principle had been violated. In other words,
what if at $t_1$ a certain amount was to have been saved, or
certain actions were to have been taken which would have
resulted in the realization of just institutions at $t_2$
(i.e., say, a space in college for $X_b$, $Y_b$, or for both),
but which were not taken, or even were ignored, at $t_1$? What
are we to do now at $t_2$? Who is to bear the burden of our
actions? The problem, when viewed from the perspective of
justice between generations, surely seems to be one for which
we have few rules of thumb, much less moral principles, at
hand.

As we have pointed out already, when viewing the issue
of preferential treatment from our current vantage point the
problem of the first generation noted by Rawls can also help
us to explicate some of the points at issue. Thus far, we
have said little about the situation of $Y_b$ at $t_2$.

If we draw an analogy between the situation of $Y_b$ and
the situation of Rawls' first generation on the basis that
each is asked to give up something that each feels entitled
to, we may better be able to understand $Y_b$'s perception of
his own situation. What we must assume to look at $Y_b$ in this
manner, however, is that like Rawls' first generation $Y_b$ is
entitled in some sense to that which he contributes to the
scheme which eventually leads to the establishment and main-
tainence of a just state of society. Although assuming this
begs much of what may be at issue with respect to preferential
treatment (i.e., given what occurred at $t_1$, does $Y_b$ have
legitimate expectations?), doing such may prove to be il­luminating for us, if only for the reason that we may view the situation that Y_b perceives himself to be in at t_2.

Let us pursue the analogy between the problem of the first generation and Y_b's perception of his situation. Looking back to Rawls' review of the problem of the first generation, we first note that Rawls holds that their situation is neither just nor unjust, but is merely a natural fact:

> We can do something for posterity but it can do nothing for us. The situation is unalterable, and so the question of justice does not arise. (Rawls, p. 291)

Yet, the first generation still has the following problem:

> Only those in the first generation do not benefit, let us say, for while they begin the whole process, they do not share in the fruits of their provision. (Rawls, p. 288)

Obviously, the analogy between Y_b and the first generation does not hold strictly given the feature that it is not merely a natural fact that Y_b must contribute his slot in college admissions to posterity while receiving nothing in return. Yet, the analogy is illuminating in the sense that while Y_b's may be asked to "begin the whole process, they do not share in the fruits of their provision." Hence, we see, by way of this analogy some grounds upon which Y_b might demand that the accordance of preferential treatment must be shown to be a matter of justice. Of course, if it were shown to be so, then the issue of whether Y_b was ever legitimately entitled to the admissions slot anyway would again arise.
Let us push the analogy even one step further, however, in order to raise another question about \( Y_b \) and his situation with respect to preferential treatment. Looking back to Rawls' quasi-resolution of the problem of the first generation, we again note the following: "The only reciprocal exchanges between generations are virtual ones, that is, compensating adjustments that can be made in the original position in drawing up the just savings principle." (Rawls, p. 291) In the case of \( Y_b \), then, we might ask if there is some way in which we may work out a virtual exchange between generations, say, in the form of a particular principle of preferential treatment? Taking what we have said thus far on this topic as given, it certainly seems that any principle of preferential treatment that would accomplish some type of reciprocal exchange between generations, with respect to \( Y_b \), would be preferable to one that did not do so. Yet, to say this does assume that certain facts about \( Y_b \)'s situation are taken as given.

Having said so much on the problem of preferential treatment viewed as a problem of justice between generations, we have found that preferential treatment in admissions encompasses such problems as: what is it that one generation can legitimately expect from another?; what is to be done and who is to be held responsible where a principle which would have led to the establishment of just institutions has been violated by previous generations?; and what can be done so that those who take the first steps towards the establishment of just
institutions (those in the situation of the first generation) are not deprived any more than others who take similar steps at other times? Yet, related to such issues are four other issues which we discussed in Chapter Three of this work, which are: (1) time preference; (2) legitimate expectations; (3) government intervention on behalf of future generations; and, (4) assurance, stability, and congruence. If it is not as yet clear how these and the above issues are related to each other, hopefully we shall make the relations clear as we proceed to discuss each of the four topics.

**Time Preference**

Looking back to Rawls' discussion of the just savings principle, we may remember that he notes the irrationality of showing a preference for something purely on the basis that it occurs at one point in time rather than at another point in time:

> Although any decision has to be made now, there is no ground for their using today's discount of the future rather than the future's discount of today... In the case of the individual, pure time preference is irrational: it means that he is not viewing all moments as equally parts of one life. In the case of society, pure time preference is unjust: it means (in the more common instance where the future is discounted) that the living take advantage of their position in time to favor their own interests. (Rawls, p. 294-295)

Having noted already that \( Y_b \) is in some ways in the position of the first generation, it seems obvious that arguments of some sort will have to be given to show why \( Y_b \) ought or ought
not to acquiesce to X_b's preferential treatment. Now, what Rawls' discussion of time preference shows us is that such arguments will have to appeal to more than the fact that X_b and Y_b happen to arrive on the scene at a particular point in time, t_2. For example, an argument such as, "It's just Y_b's fate to come at t_2, and hence he must loose out," can be seen to have little plausibility given the above passage. This points out further that any plausible argument for preferential treatment will have to employ other types of claims, such as those dealing with liberty and/or distributive justice.

Yet, the above point, although at first plausible, makes the issue more simple than it is. For Rawls is concerned with ideal theory. Within the confines of such theory some sort of time preference does seem to be either irrational (with reference to the individual) or unjust (with reference to society). Yet, within nonideal theory, we may be tempted to show preference for a particular point in time in order to correct or to compensate for some existent injustice. As Rawls tells us:

We should observe that to reject pure time preference as a first principle is compatible with recognizing that a certain discounting of the future may improve otherwise defective criteria...Certainly introducing time preference may be an improvement in such cases; but I believe its being invoked in this way is an indication that we have started from an incorrect conception. (Rawls, pp. 297-28)
Now, although it is enlightening to see the problem of preferential treatment in admissions as a problem of time preference, given what both we and Rawls have said, we are left with some crucial questions about the justification of showing time preference in nonideal theory to be answered. That is, we can agree with Rawls and say that where we introduce a time preference as an improvement it is most likely an indication that we have started with defective criteria or an incorrect conception. However, the main question to be answered in dealing with preferential treatment, and in the larger realm of nonideal theory, is: "Given that we are or have been faced with injustice, under what conditions could we justify the showing of a preference for a particular time?" If one could answer this question, then one could address the issue of whether it is justified or unjustified to call upon $Y_b$ to bear the burden at $t_2$; at least, one could do this from the perspective of the issue of time preference.

Notice, here, that at least two issues are related to this issue of time preference. First, we must address the issue of legitimate expectations, since showing or not showing time preference as justified will at least be partially dependent upon what $X_b$ and $Y_b$ can legitimately expect, as well as upon what one generation can legitimately expect from another generation. Second, another issue related to
the issue of time preference and preferential treatment is the issue of government intervention on behalf of future generations. That is, given certain legitimate expectations on the part of generations, the conditions under which a government could intervene in behalf of future generations will surely weight into what \( X_b \) and \( Y_b \) can legitimately expect at \( t_2 \). With respect to arguments over preferential treatment, it seems that the arguments which mention \( X_c \), \( Y_c \), or \( Z_s \) at \( t_3 \) are quite concerned with this last point. Let us address these issues, then.

**Legitimate Expectations and Government Intervention**

With respect to the issue of legitimate expectations, we have already noted that whether one argues for preferential treatment for \( X_b \) on the basis that society's conception of justice is unjust, or on the basis that some current or previous arrangements, as opposed to the whole scheme/conception, are unjust will make a difference in what one takes \( Y_b \) to be legitimately entitled to. That is, if one held that the scheme was just but that current arrangements were not, one would most likely concede that \( Y_b \) could legitimately expect certain things based upon the institutions of the just scheme; albeit not upon the basis of the unjust arrangements. Of course, as evidenced by the fact that the dispute goes on over preferential treatment, the issue of what \( X_b \), \( Y_b \), or \( Z_s \) may legitimately expect is confused at best. Yet, we can
note some relevant points from Rawls' work to help clarify the issue, and possibly point out one or two ways of approaching the subject that will not work.

One way to get at the issue of legitimate expectations is to return to Rawls' discussion of the just savings principle in order to see what each generation may or may not be required to save. Possibly, upon this basis, we will get an idea of what each generation can legitimately expect from another. With regards to this matter, Rawls tells us:

The savings principle represents an interpretation, arrived at in the original position, of the previously accepted natural duty to uphold and to further just institutions...In attempting to estimate the fair rate of savings the persons in the original position ask what is reasonable for members of adjacent generations to expect of one another at each level of advance...Justice does not require that early generations save so that later ones are simply more wealthy. Savings is demanded as a condition of bringing about the full realization of just institutions and the fair value of liberty. (Rawls, pp. 289-290)

We must be cautious in how we use the above passage, since here Rawls is speaking in terms of ideal theory, and we are concerned with a problem of nonideal theory. Yet, according to what Rawls tells us above, it seems that we can say that what Xs, Ys, or Zs may not legitimately expect from previous generations is any particular level of affluence; i.e., that a particular amount of wealth have been put aside. However, if Xs, Ys, or Zs could show that a particular amount of wealth ought to have been saved in order to support/bring about certain just institutions or the fair value of liberty,
then it seems that they would have some legitimate claims against an adjacent generation.

Now, with reference to the issue of preferential treatment in admissions we have noted that we are dealing with a problem of nonideal theory; i.e., we are faced with injustices. Hence, the question that arises seems to be: "If Xs or Zs at t₂ could have legitimately expected Xs, Ys, and Zs at t₁ to have saved a particular amount (i.e., so that, say, more admissions slots would be available) and Xs, Ys, and Zs did not save at t₁, what now can Xs or Zs legitimately expect?" Admittedly, we had previously asked a similar question when discussing the just savings principle. Yet, due to the vagueness of that question we did not get at the importance of the issue of legitimate expectations, and its relationship to the problem of justice between generations. Here, we begin to see a basis upon which arguments for preferential treatment in admissions to education might plausibly be made.

However, although such a basis for such arguments seems to be a fertile one, the issue is more complex than presented above, for we have yet to consider the issue of what Yₗ might or might not legitimately expect. In order to address this issue, let's note what Rawls takes legitimate expectations to be founded upon:
Thus it is true that as persons and groups take part in just arrangements, they acquire claims on one another defined by the publicly recognized rules. Having done various things encouraged by the existing arrangements, they now have certain rights, and just distributive shares honor these claims. A just scheme, then, answers to what men are entitled to; it satisfies their legitimate expectations as founded upon social institutions. (Rawls, p. 311)

We note two points with reference to the above passage. First, we note that legitimate expectations, according to Rawls, are founded upon one's acting in accordance with just arrangements. Yet, this points out the same problem concerning \( Y_b \) that we have come across previously. That is, with respect to the issue of preferential treatment, if \( Y_b \) has acted in accord with a scheme that is considered totally unjust, then perhaps \( Y_b \) has no legitimate expectations in this regard. Yet, if \( Y_b \) has acted in accordance with a scheme that is on the whole just, but which had some particular unjust arrangements then perhaps \( Y_b \) does have particular legitimate expectations in this regard.

A related point to the discussion above is that, as we noted in the last chapter, Rawls contends that persons incur obligations when they voluntarily take part in or accept the benefits of just institutions. Similarly here, as above, Rawls makes the point that consent to unjust institutions does not give rise to obligations:
Acquiescence in, or even consent to, clearly unjust institutions does not give rise to obligations. It is generally agreed that extorted promises are void ab initio. But similarly, unjust social arrangements are themselves a kind of extortion, even violence, and consent to them does not bind. (Rawls, p. 343)

Drawing a parallel to the issue of legitimate expectations, then, we may say that participation in clearly unjust institutions does not give rise to legitimate expectations. Of course, this points out that those who argue for or against preferential treatment in admissions will have to address the issue of the degree and kind (i.e., of current arrangements or of the whole scheme?) of injustice that Yb's expectations are founded upon, and exactly which of Yb's expectations are legitimate and which are not, on the basis of this.

Finally, with respect to legitimate expectations, we shall note a relevant point in Rawls' discussion which will help show at least one way that cannot be used to argue for or against preferential treatment in admissions. In his discussion, as we noted, Rawls wants to make a distinction between legitimate expectations and moral desert; i.e., between being entitled and deserving:

But what they (people) are entitled to is not proportional to nor dependent upon their intrinsic worth...For example, in determining wages a competitive economy gives weight to the precept of contribution. But as we have seen, the extent of one's contribution... depends upon supply and demand. Surely a
person's moral worth does not vary according to how many offer similar skills, or happen to want what he can produce. No one supposes that when someone's abilities are less in demand or have deteriorated (as in the case of singers) his moral deservingness undergoes a similar shift. (Rawls, p. 311)

Given this point, it seems that arguments for or against preferential treatment which are based upon the moral deservingness of $X_b$, $Y_b$, or $Z$ miss the point of social justice at issue, since the point is one of what one is entitled to; i.e., of legitimate expectations. This point, however, must not mistakenly be taken to say that claims of need are not to be taken into account. For, it is obvious, given our discussion thus far, that claims of need may be couched in terms of what one is entitled to; i.e., on the basis of the institutions of society.

As we noted earlier, another related issue to the problem of preferential treatment when viewed from the perspective of justice between generations is the issue of government intervention on behalf of future generations. As we stated earlier, it seems that, given certain legitimate expectations on the part of generations, the conditions under which a government could intervene on behalf of future generations will weigh into what $X_b$ and $Y_b$ can legitimately expect. Looking to Rawls, we note how unfortunate it is that he has only little to say upon this subject. Yet, what he does have to say may prove to be enlightening for our purposes and we look to his discussion with such hopes in mind.
What Rawls is attempting to do in the small section where he discusses government intervention on behalf of future generations is to show that such an act, as well as other acts (e.g., civil disobedience), which go contrary to the public will are not necessarily undemocratic, when the public will is mistaken. Of the circumstances within which Rawls holds that such intervention may justifiably take place, he tells us:

A democrat is one who believes that a democratic constitution best meets this criterion. But his conception of justice includes a provision for the just claims of future generations. Since, however, a just constitution even under favorable conditions is a case of imperfect procedural justice, the people still may decide wrongly. By causing irreversible damages, they may perpetuate grave offenses against other generations which under another form of government might have been prevented. Moreover, the injustice may be perfectly evident and demonstrable as such by the conception of justice that underlies the democratic regime itself.

In these cases, then, there is no reason why a democrat may not oppose the public will by suitable forms of noncompliance, or even as a government official try to circumvent it. Although one believes in the soundness of a democratic constitution and accepts the duty to support it, the duty to comply with particular laws may be overridden in situations where the collective judgment is sufficiently unjust. (Rawls, p. 296)

In one sense, the above passage is almost trivial in that it says that whatever action is taken in behalf of future generations, for that action to be considered just, it must be based upon the underlying conception of justice.
Yet, in an important sense, it has much to say with respect to the issue of preferential treatment in admissions. For, if Rawls is correct here, it means that arguments against preferential treatment which are based solely upon the contention that they involve intervention on the part of the government, which is undemocratic, are not sufficient to say that such a practice is either undemocratic or unjust. Further than this, and also based upon the above passage, it seems that where the public will currently (at $t_2$ say) holds to a policy that can, upon the underlying conception of justice, be shown to lead to clearly unjust consequences for future generations that intervention on behalf of future generations may be justified. Within arguments for preferential treatment one might even want to hold to the view that this is what occurred with reference to Xs or Zs between $t_1$ and $t_2$, and because of this we must intervene on their behalf between $t_2$ and $t_3$. However, notice that where one takes this line of argument, one must still show empirically the relationship between the policy endorsed by the public will and the so-called consequences of it, and normatively that such consequences are unacceptable given our underlying conception of justice. Furthermore, however, one might attempt to take a similar line of argument against the policy of according preferential treatment to Xs, with reference to the possible consequences for Ys.
In order to show how the fourth topic of assurance, stability, and congruence can help us explicate what types of things might be at issue when disputes over preferential treatment arise, we must first return to some points in Rawls' discussion of public goods. In Chapter Three, we pointed out that Rawls takes the two features of publicness and indivisibility to be characteristic of public goods. Further, we noted certain problems that arise because of these two features, such as those of the free-rider and of assurance. Concerning the problem of the free-rider, we noted that the basic problem is the following: "He regards the collective action of others as already given one way or the other. If the public good is produced his enjoyment of it is not decreased by his not making a contribution." (Rawls, p. 267) Since everyone is in a position to reason in this manner, we are minimally faced with the problem of assuring them that all others are doing their part. According to Rawls, this reasonable assurance in normal circumstances may take the form of a binding rule that is effectively enforced. It is upon this basis of assurance, then, that, as Rawls points out, political rule is founded:
That political rule is founded solely on men's propensity to self-interest and injustice is a superficial view...For even among just men, once goods are indivisible over large numbers of individuals, their actions decided upon in isolation from one another will not lead to the general good. Some collective arrangement is necessary and everyone wants assurance that it will be adhered to if he is willing to do his part. (Rawls, p. 268)

Having said so much on public goods and assurance, let us return, for a moment to Rawls' discussion of congruence and stability. Although in Chapter Two, we noted that there are a number of problems in Rawls' discussion here, we may still find some of his more general ideas helpful in explicating what is at issue in the issue of preferential treatment in admissions. One such point that may be helpful is the relationship between congruence and stability previously cited:

It can happen that there are many who do not find a sense of justice for their good; but if so, the forces making for stability are weaker...The greater the lack of congruence, the greater the likelihood other things equal, of instability with its attendant evils. Yet, none of this nullifies the collective rationality of the principles of justice; it still is to the advantage of each that every one should honor them. (Rawls, p. 576)

In our Chapter Two, we viewed the above passage with suspicion noting that Rawls seemed to be telling us that we all ought to take the principles as being congruent with our good, when it was to be proven that they were, in fact, congruent with our good. Yet, applying our review of the problem of assurance here, we can say that what Rawls seems
to be attempting to point out is that although a lack of congruence can lead to instability, the problem of assurance may best be overcome if all honor the principles of justice. Now, although this begins to sound analytic (since if all honor the principles there is no problem of assurance), we can see how assurance may weigh into the issue of stability. Citing a relevant passage may help us make this point more explicit:

One conception of justice is more stable than another if the sense of justice that it tends to generate is stronger and more likely to override disruptive inclinations and if the institutions it allows foster weaker impulses and temptations to act unjustly...To estimate the stability of a conception of justice (and the well-ordered society that it defines), one must examine the relative strength of these opposing tendencies. (Rawls, pp. 454-455)

Given the above passage, we can now say that the problem (lack) of assurance is one such tendency that may contribute to instability. That is, since lack of assurance that each will do his part in contributing to just institutions may lead to each person's failure to do his part in upholding just institutions, lack of assurance may lead to instability; i.e., a situation where the sense of justice does not generally win out over opposing tendencies.

Before we attempt to see how all of this weighs into the issue of preferential treatment, we must note a point about the notion of stability which we have not as yet elucidated. That is, that a conception of justice, or the institutions
based upon it, is more stable than another does not mean that that conception of justice is to be preferred to another, or even that it is more just than another. As Rawls tells us:

We must take into account its (a conception of justice's) wider connections; for even though justice has a certain priority, being the most important virtue of institutions, it is still true that, other things equal, one conception of justice is preferable to another when its broader consequences are more desirable. (Rawls, p. 6)

Here, Rawls, after having noted the related issues of coordination, efficiency, and stability to issues of justice, tells us that these three related issues are important factors in weighing competing conceptions of justice, other things equal. Clearly, this substantiates what we have said above, since it is obvious that although one conception of justice may be more stable than another, it might allow for a few particularly horrid injustices which we could not accept. Hence, although more stable, a conception of justice is not necessarily more just than a competing conception.

Let us now see how this information can help us to understand some of what might be being claimed when arguments for or against preferential treatment in admissions are given. Let us look at \( Y_d \) for the moment, and assume that \( Y_d \) has acted in accordance with certain institutions which are at least taken by many persons to be just. Further, let us say that these institutions stipulate what \( Y_d \) can legitimately expect
in the way of higher education. Also, we have already noted, of course, that higher education seems to be a borderline case of a public good, and that this as well as other factors leads to a confusion on just how the precepts of distribution according to need and merit ought to be balanced. Based upon all of this, we can see that someone might want to argue that to employ the practice of preferential treatment for $X_b$ in order to aid Xs or Zs will lead to both lack of assurance and lack of stability. That is, such a practice, one might claim, will bring doubt to the minds of Ys as to whether others are doing their part in upholding just institutions (assuming that they are just). Furthermore, as the argument might go, Ys might then tend not to affirm the underlying conception of justice which, of course, would lead them to act, at the least, contrary to the underlying conception of justice, if not to act unjustly.

Contrariwise, one might argue that, given past treatment of Xs or Zs, and that $X_b$ has acted in accordance with certain institutions, and as such has certain expectations based upon those institutions, for us not to admit $X_b$ would not only affirm Xs' suspicions, founded upon their past treatment, that others are not doing their part to uphold just institutions, but would also contribute to instability. For, one might contend, once Xs realize that even when they act in accordance with particular institutions they do not obtain what they expect, they will no longer tend to affirm or to
act in accordance with the underlying conception of justice. Furthermore, it might be argued that this will lead others to respond to Xs in kind; i.e., in ways not in accordance with the underlying conception of justice. Finally, one might add that although the role of education in the balancing of the precepts of distribution according to need and according to merit is at best confused, the fact remains (assuming here that it does) that given some weight to distribution according to need, \( X_b \), where \( X_b \) is equal in merit to \( Y_b \), ought to be selected due to the greater need on the part of Xs and Zs.

Now, although much could be said about the two above arguments, we shall only make one or two relevant points. First, and most importantly, because the above arguments are based upon stability, if they are at all justifiable, it is only in virtue of the fact that the clause, "other things equal," can be applied to the situation. That is, stability (or lack of it) does not in itself seem to show one course of action to be more just than or preferable to another course of action. For, as we noted, although one course of action may lead to greater stability than another, it may countenance unjust acts that we may not accept. Another important point with respect to the above arguments are the empirical claims that are made within them. Although we shall not deal with any of them individually, we do note that an important question to ask, and not an easy one to answer, for anyone who wants to argue in either one of the above ways is,
"How are such claims to be verified?" For example, how would we verify that taking one action or another would lead to greater or lesser stability?

**The Exchange Branch, Perfection, and Equality**

Thus far in our application of *A Theory of Justice*, we have dealt with points that seem to be intimately interwoven where the issue of preferential treatment in admissions arises. Unfortunately, the next three points from Rawls' work which we shall apply to the issue of our concern are not so closely related to our foregone discussion. Yet, the three points we shall look into are related to our previous discussion in that ways in which persons may choose to argue for or against preferential treatment, as well as some of the assumptions that underlie such arguments, are elucidated by turning to relevant points in Rawls' work. In order to accomplish this task, we shall turn to and shall apply the following topics discussed by Rawls: (1) the exchange branch of government and Wicksell's unanimity criterion; (2) the principle of perfection; and (3) the procedural interpretation of equality and formal justice. Our discussion of how these points apply, although it will not be as extensive as it could be, will attempt to clarify the implications of particular lines of argument.
In attempting to use Rawls' discussion of the exchange branch of government and Wicksell's unanimity criterion to get clearer on what might be at issue in disputes over preferential treatment in admissions, let us first look at a particular position with respect to the issue, which is of our own device. Let us assume that someone (Mr. A) argues that the idea behind preferential treatment in admissions is surely a noble one. That is, Mr. A tells us that it surely is a good idea to educate Xs for the benefit of Xs or Zs since until recent years Xs or Zs have suffered because of the lack of such education. However, Mr. A might tell us, it is up to those persons who want to implement such a noble idea, to unite and to find some way to finance such an idea. That is, let those people contribute to new colleges, or to the creation of new admissions slots in old colleges. It does not seem that we would be too mistaken in saying that Mr. A, with this line of argument, is not alone in the world.

Let us turn to Rawls' discussion of the exchange branch of government and of Wicksell's unanimity criterion to see where Mr. A has either presupposed too much, or has gone astray in his understanding of the issue. In our review of Rawls' branches of government, we noted that the exchange branch had as its concern various expenditures for public goods which were of sufficient social interest:
If a sufficiently large number of them (citizens) find the marginal benefits of public goods greater than that of goods available through the market, it is appropriate that ways should be found for the government to provide for them...

Let us suppose, then, that there is a fifth branch of government, the exchange branch, which consists of a special representative body taking note of the various social interests and their preferences for public goods. (Rawls, p. 282)

Furthermore, Rawls tells us, such a branch of government will enact only those bills that satisfy Wicksell's unanimity criterion:

A motion proposing a new public activity is required to contain one or more alternative arrangements for sharing the costs. Wicksell's idea is that if the public good is an efficient use of social resources, there must be some scheme for distributing the extra taxes among different kinds of taxpayers that will gain unanimous approval. (Rawls, p. 282)

In citing these points from Rawls' discussion we have come up with a position that seems similar to Mr. A's position. That is, Mr. A agrees that education for Xs is a public good that should in some way be provided for, and that those who support it ought to find some way to finance it. Yet, this seeming similarity comes about only because of what we, for the moment, have blatantly ignored in Rawls' discussion of the exchange branch. And, most importantly, what we have so blatantly ignored in Rawls' discussion is parallel to what questions Mr. A begs in his position and what things he presupposes by it.
Turning to Rawls' discussion we note that the exchange branch is authorized to consider only those bills independent of what justice requires, and that the current distribution of shares in society is assumed to be a just one:

Let us suppose that the above account of background institutions is sufficient for our purposes...In this case the total public expenditures and the necessary sources of revenue is well defined, and the distribution of income and wealth that results is just whatever it is...It does not follow, however, that citizens should not decide to make further public expenditures...It (the exchange branch) is authorized by the constitution to consider only such bill as provide for government activities independent of what justice requires.... (Rawls, p. 282)

Furthermore, as Rawls points out, the employment of the unanimity criterion also assumes, "the justice of the existing distribution of income and wealth, and of the current definition of property rights." (Rawls, p. 283) Finally, Rawls points out that the basis of the exchange branch differs from the basis of the other branches of government:

It should be noted that the exchange branch includes a separate representative body. The reason for this is to emphasize that the basis of this scheme is the benefit principle and not the principles of justice. (Rawls, p. 283)

With these points in mind, we may now return to Mr. A's argument to see what it is that he presupposes. First, and most obviously, Mr. A presupposes that the issue of education for Xs is not an issue of justice; i.e., that it is independent of what justice requires. Yet, this is just the point at issue. This is why such questions about legitimate expectations,
justice between generations, and the like have arisen. But further, Mr. A goes even farther astray if he is assuming that whether or not preferential treatment, building more colleges, etc., so that Xs will become educated, ought to be done are only questions of whether or not we can find ways to finance them. For, as a matter of fact, if Mr. A were to assume this he would clearly be confusing issues of efficiency with issues of justice. As Rawls tells us in discussing his second principle of justice, although there may be many efficient distributions, the point is to single out one of these distributions as just. "Now these reflections show only what we knew all along, that is, that the principle of efficiency cannot serve alone as a conception of justice. Therefore it must be supplemented in some way." (Rawls, p. 71) It seems, then, that by looking to Rawls' discussion of the exchange branch and the unanimity criterion, we have shown that Mr. A's argument, and arguments similar to his, beg the main issue to be considered, by construing either preferential treatment or other solutions to the problem as issues of benefit rather than issues of justice. At the very least, if Mr. A desires to maintain such a position he must first establish that the admission of Xs to college is an issue of benefit.
Next, in order to exhibit how Rawls' discussion of the principle of perfection might help us become clear about some more elements that are involved when the issue of preferential treatment in admissions arises, let us consider the following arguments. First, let us consider Ms. B who is in favor of according preferential treatment to Xs because it will promote diversity in the student body. Furthermore, it is obvious, according to Ms. B, that ethnic diversity is to be admired for its own sake and for the fact that students, due to such diversity, will learn about the ways in which various groups of people live. In short, diversity is good, and preferential treatment promotes diversity. Hence, Ms. B argues, we ought to adopt such an admissions policy. However, Ms. B has not yet met Mr. C who is vehemently against preferential treatment for the following reasons. It seems, as Mr. C sees it, that universities ought to promote scholarships. That is, institutions of higher learning have as their essential task the advancement of the arts and sciences. Hence, to employ any other criterion with reference to who ought to be admitted to our universities is taken by Mr. C to be something close to blasphemous. Again, we say that we are probably not too mistaken in asserting that Ms. B and Mr. C are not alone with respect to the types of claims which they amke with reference to preferential treatment in admissions.
Now, although it seems that Ms. B and Mr. C are on two different sides of the fence with respect to the issue of our concern, by looking to Rawls' discussion of the principle of perfection, we will see that they have at least one major problem in common. As we pointed out in Chapter Three, Rawls discusses two versions of perfectionism, the strong and the moderate versions. In the strong version, the principle of perfection is taken to be the sole principle to be maximized. In the moderate version, the principle is to be balanced by intuition against claims of need. In either case, of course, the principle directs us to arrange society so as to maximize human excellence in art, science, and culture.

For the moment, let us review what problems Rawls cites with respect to such doctrines. From the viewpoint of the original position, he tells us that there is no reason for the parties to agree to such a principle since there is no agreed upon criterion of perfection, which means that were the parties to accept the perfectionist position they would have no way of knowing whether such a principle might not later require them to accept a lesser rather than a greater liberty. As Rawls points out: "It is evident, then, that much the same argument that led to the principle of equal liberty requires the rejection of the principle of perfection." (Rawls, p. 328) Furthermore, as we noted, Rawls points out that "criteria of excellence are imprecise as political principles, and their application to public questions is bound to be unsettled and
idiosyncratic, however reasonably invoked and accepted within narrow traditions and communities of thought." (Rawls, pp. 330-331) In short, Rawls concludes: "Since these uncertainties plague perfectionist criteria and jeopardize individual liberty, it seems best to rely entirely on the principles of justice which have a more definite structure." (Rawls, p. 331) As we pointed out in our last chapter, Rawls does not say that perfection ought not be promoted (say, through the exchange branch), but only that the principle of perfection is not to be used to settle issues of justice; i.e., used as a political principle.

Now, returning to Ms. B's and Mr. C's arguments what is their common problem? It is obvious, by now, that each holds to a variant of perfectionism and that the arguments of each are vulnerable to similar criticisms as the ones directed against perfectionism above. That is, it is as "unsettled and idiosyncratic" to admit $X_b$ and reject $Y_b$ on the basis that we ought to maximize that perfect social quality of diversity, as it is, say, to accept $Y_b$ and reject $X_b$ solely on the basis that we ought to maximize that perfect intellectual goal of advancement in the arts and sciences; provided that we take the issue to be one of social justice, where each may have certain entitlements. Notice, furthermore, that if one wanted to make such arguments in the perfectionist vein, one would probably do better if one employed the moderate version, since this version does take some account of claims
of need. Although this would be more in line with what we have previously said about the problems that arise because higher education seems to be a borderline case of a public good (i.e., that one might be required to take into account claims of need), it would seem that one would then not only have to deal with the problems of perfectionism, but would also have to contend with Xs and Ys after having noted that claims of need were balanced against the criterion of perfection by intuition.

The third topic discussed by Rawls which we shall re-view here in order to get clear on what elements might underlie disputes over preferential treatment in admissions to education is the topic of formal justice and the realted topic of the procedural interpretation of equality. Again, in order to see the relevance of Rawls' discussion to the issue of our concern, let us look at the following argument made by Ms. D. Ms. D, it just so happens, is against the policy of giving preferential treatment to $X_b$. Her reasons for this are that $X_b$ and $Y_b$ each ought to be treated fairly and that this means that we must treat $X_b$ and $Y_b$ in the same manner. Hence, argues Ms. D, whoever has the higher grades and test scores gets into college, while the other person gets re-jected. As Ms. D claims: "That's all there is to it." Again, we note that Ms. D is probably not alone in arguing in this way.
Yet, contrary to Ms. D's claim, that is not "all there is to it," at all, and Rawls' discussion of formal justice, and, more specifically, the procedural interpretation of equality can show us where Ms. D has gone wrong. There are four or five different places in *A Theory of Justice* where Rawls speaks of this issue, and we shall note but a few of the points which he makes in two such places. Early in his work, Rawls defines formal justice in the following way and notes some relevant points with respect to it:

This impartial and consistent administration of laws and institutions, whatever their substantive principles, we may call formal justice. If we think of justice as always expressing a kind of equality, then formal justice requires that in their administration laws and institutions should apply equally (that is, in the same way) to those belonging to the classes defined by them...Formal justice is adherence to principle, or as some have said, obedience to system. It is obvious, Sidgwick adds, that law and institutions may be equally executed and yet be unjust. Treating similar cases similarly is not a sufficient guarantee of substantive justice. This depends upon the principles in accordance with which the basic structure is framed (Rawls, pp. 58-59)

Rawls goes on to tell us, however, that where institutions are just formal justice, or justice as regularity, excludes significant kinds of injustices.

Furthermore, in speaking of the basis of equality, later in his work, Rawls also tells us the following:
It might appear that if we wish to hold to a doctrine of equality, we must interpret it in another way, namely as a purely procedural principle. Thus to say that human beings are equal is to say that none has a claim to preferential treatment in the absence of compelling reasons. The burden of proof favors equality: it defines a procedural presumption that persons are to be treated alike. Departures from equal treatment are in each case to be defended and judged impartially by the same system of principles that hold for all; the essential equality is thought to be equality of consideration. (Rawls, p. 507)

Again, with respect to such a position, Rawls points out its weaknesses:

There are several difficulties with this procedural interpretation. For one thing, it is nothing more than the precept of treating similar cases similarly applied to the highest level... Equality of consideration puts no restrictions upon what grounds may be offered to justify inequalities. There is no guarantee of substantive equal treatment since slave and caste systems...may satisfy this conception.

Let us now return to Ms. D's argument to see where she has gone wrong. It seems that in her argument that $X_b$ and $Y_b$ ought to be judged upon grades and tests scores only, she has assumed three key points. For, she has assumed that formal justice is or leads to substantive justice; that $X_b$ and $Y_b$ are similar cases; and that distribution according to grades, merit, or whatever, is a just substantive principle by which to decide between $X_b$ and $Y_b$. With reference to the first key point that Ms. D has assumed, it seems that the comments of Rawls previously cited are sufficient to show that she is mistaken. Second, the point about the assumption of $X_b$ and $Y_b$
being similar cases is a key point to be disputed. If they are similar cases, this can only be shown by answering the important questions which we have previously posed about legitimate expectations and such related issues. Finally, the third key point assumed by Ms. D is also one that she must argue for, since there is much to be disputed, given our previous discussion of possible violations of the just savings principle, education as a public good, and the like. Furthermore, Mr. E (who we shall only say a few words about here) makes many of the same mistakes that Ms. D does, when he claims that he is, "against preferential treatment for X because it's just as wrong to discriminate against Ys as it is to discriminate against Xs." Here Mr. E not only presupposes what Ms. D presupposes above, but also uses the question-begging epithet "to discriminate" to settle the issue in favor of his preferences.

Summary

We began this chapter by laying out the strategy that we would follow in applying A Theory of Justice to the issue of preferential treatment in admissions to education. Essentially, we noted that the issues which we were concerned with seemed to be issues of nonideal theory which also seemed to be most closely akin to the issues dealt with in the second and third stages of the four-stage sequence of Rawls' ideal theory. Upon this basis, we said that the application of
Rawls' theory would, in Chapters Four and Five, proceed from more direct applications, to less direct applications, to non-applications.

Having explicated the strategy of our application, we then began the application by noting the two different ways in which Rawls tells us that injustice may arise. We also pointed out that where one argues for preferential treatment one must be clear about whether one is arguing for a change from an unjust scheme to a scheme that is just throughout, or from a scheme that is just throughout to a scheme that is the best just scheme. The importance of these distinctions was exhibited by the fact that depending upon which one of the many tacks of argument one adopts given the above points, the strength and extent of one's position will differ.

The issue of the schemes of justice led us to the issue of the way in which the institutions of society balance the precepts of justice. Here we noted that the issue of preferential treatment is not as simple as we are often times led to think. Further, that universities play some role in this balancing brought us to the issue of higher education as a public good. The fact that higher education is a borderline case of a public good seemed to help us explain some of the difficulty of resolving the issue of preferential treatment.

From the issue of public goods we moved on to view preferential treatment as an issue of justice between generations, noting how the topics of the just savings principle and the
problem of the first generation elucidated certain important issues. Such issues eventually led us to apply Rawls' discussion of time preference, government intervention on behalf of future generations, and legitimate expectations to the issue of our concern.

In the final sections of this chapter, we first showed that arguments based upon stability or instability can only be decisive in virtue of the fact that, with regard to justice, our choices are equal in all other respects. Second, we went on to show how arguments based upon the principle of perfection, the principle of benefit, or a procedural interpretation of equality either fail to address the issues of justice at hand, or merely presuppose certain resolutions to those issues.

Although there are many conclusions to be drawn on the basis of our discussion thus far, we shall refrain from doing so until we have applied the other elements of Rawls' work which will help us elucidate the problem of preferential treatment in admissions to education. To this end, then, we now move on to the next chapter to look at some less direct applications and some non-applications of Rawls' work to the problem of our concern.
Footnotes


CHAPTER V

LESS DIRECT APPLICATIONS AND NON-APPLICATIONS

Introduction

As we have stated in various places in previous chapters, we are attempting to exercise "due intellectual caution" in applying the elements of Rawls' work to the problem of preferential treatment in admissions. To this end, then, although there are many elements of that work that are not strictly applicable to a problem of nonideal theory such as our own, a discussion of these elements may help to elucidate some of the issues that underlie our problem. The further away we get from the intended use of any element, or the appropriate context for the use of that element, the less direct the application of that element. Finally, then, given a continuum from more direct to the least direct applications, one will reach a point of non-applications; i.e., a point at which certain philosophical elements are so out of context that they ought not be applied, or a point at which certain elements, because of philosophical problems with them, ought not be applied. In general, then, in this chapter, we shall discuss less direct and non-applications of Rawls' theory to the problem of preferential treatment.
Less Direct Applications

We begin this section with a discussion of the following three related topics: (1) the serial ordering and the two principles of justice; (2) the consequences of this serial ordering for arguments for and against preferential treatment in admissions; and, (3) the equal worth of liberty and how it relates to the issue of our concern.

First then, it should not surprise one to find a discussion of these three issues in this section, "Less Direct Applications." That is, Rawls develops the two principles of justice within the confines of ideal theory. They are meant to serve as the foundations of institutions of the well-ordered society, and not as principles upon which to adjudicate such a dispute within nonideal theory which we have on our hands here. At least this much should be obvious from our review of A Theory of Justice in Chapter Two. However, although we cannot directly apply such principles to solve the problem of preferential treatment, we still may use much of what Rawls has to say in his discussion of the principles in order to help us become clearer about what is at issue with respect to preferential treatment in admissions.

Looking back to our review of Rawls, then, we noted that the parties in the original position would choose as their conception of justice the two principles of justice, one of which prescribed the greatest equal liberty for all while the other specified that the difference principle and
equal opportunity were to be the basis of the institutions of distributive justice. Also, we pointed out that the principles were adopted in a serial order, meaning, practically, that a lesser liberty cannot be compensated for by greater economic well-being. The basis for this priority of liberty was cited as the following:

...(A)s the conditions of civilization improve, the marginal significance for our good of further economic and social advantages diminishes relative to the interests of liberty, which become stronger as the conditions for the exercise of the equal freedoms are more fully realized. Beyond some point it becomes and then remains irrational from the standpoint of the original position to acknowledge a lesser liberty for the sake of greater material means and amenities of office. (Rawls, p. 542)

Given the two principles and their serial order, then, how might we use them to elucidate what may be at issue in preferential treatment in admissions, and still accord the appropriate caution to them as elements of ideal theory?

One way in which we may begin to apply such principles with reference to the issue of preferential treatment is to ask, when arguments are put forth, whether those arguments have more to do with Principle One or Principle Two. That is, within such arguments, do the claims made involve such things as liberties, goods, or opportunities lost or denied? Such a simple distinction at the outset has some important consequences. For example, if one claimed that the liberties of Zs had been and remain curtailed because of what happened at t₁, and that preferential treatment for X₂ at t₂ will
alleviate this loss of liberty, then for someone else to argue that Zs had suffered no losses of goods would clearly be irrelevant. That is, at least if we are clear about upon what basis (via categorization by use of the two principles) an argument is being put forth, we may avoid arguing past one another. Notice, again, that we are not here advocating that the two principles of justice together or combined are properly to be used to support such arguments. As we saw earlier, this is not Rawls' intention nor does he consider such a role as appropriate for them. Rather, by considering under what principles such arguments would fall, we may become clear about what is being asserted by them.*

Yet, this suggestion of division of arguments upon the basis of Principle One or Principle Two may be a bit simplistic. That is, arguments for or against preferential treatment may, say, if based upon liberty, still assert certain claims about distributive shares to support the position based upon liberty. This point is, admittedly, obscure, and Rawls' distinction between liberty and the worth of liberty can help us immensely here. Rawls explains the distinction in the following way:

*Possibly some kind of schema such as the following would help us become clear about the elements at issue in any one case:

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<td>Principle 2</td>
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Thus liberty and the worth of liberty are distinguished as follows: liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines. Freedom as equal liberty is the same for all; the question of compensating for a lesser than equal liberty does not arise. But the worth of liberty is not the same for everyone. Some have greater authority and wealth, and therefore greater means to achieve their aims. (Rawls, p. 204)

The point here seems to be that although all have the same basic liberties, that the worth of those liberties may vary with one's authority and wealth; i.e., with the distributive shares one has on hand. Here, then, we have a concept, 'worth of liberty', that appears to combine both principles of justice. Hence, aside from elements in arguments over preferential treatment falling under one principle or another, they may fall under a combination of the two; i.e., within the category of "the worth of liberty." An example of such a claim would be the statement that either Xs or Zs, although not formally denied any political liberty per se, were for years subject to a lesser worth of liberty and now ought to be compensated for it. Furthermore, one might argue that such compensation would not at all lessen the worth of Yb's liberty given the distributive shares available to Yb. Of course, this is only to suggest ways in which one might argue for or against preferential treatment using the concept 'worth of liberty'. 
Since we have noted the basis for the serial ordering of the two principles above, let us now see if such an ordering also can help us become a bit clearer about disputes over preferential treatment in admissions. Now, although it is obvious that there is much to be disputed in this serial ordering of the two principles (See Barry, Chapter Seven), it still may be useful in considering the strength of arguments over preferential treatment. For instance, we can ask such questions as, "If Rawls' serial ordering is correct what does that have to say for such arguments?" Or, we might put it another way and ask, "Doesn't it seem to be the case that arguments based upon liberty or the violation of it, seem to carry more weight than those based upon distribution?"

Yet, if such ways of using the serial ordering are still found to be unacceptable, we might choose to put the issue the same way that Rawls puts it when he speaks of civil disobedience:

Now if one views such disobedience as a political act addressed to the sense of justice of the community, then it seems reasonable, other things equal, to limit it to substantial and clear injustices...For this reason there is a presumption in favor of restricting civil disobedience to serious infringements of the first principle of justice, the principle of equal liberty, and to blatant violations of the second principle, the principle of fair equality of opportunity... By contrast infractions of the difference principle are more difficult to ascertain. There is usually a wide range of conflicting yet rational opinion as to whether this principle is satisfied. (Rawls, p. 372)
Obviously, this passage is not equivalent to what Rawls is arguing for when he says:

Beyond some point it becomes and then remains irrational from the standpoint of the original position to acknowledge a lesser liberty for the sake of greater material means and amenities of office. (Rawls, p. 542)

Yet, we may still view the previous passage on civil disobedience as a useful empirical interpretation of this philosophical point that Brian Barry has so much trouble with. That is, we might note if it is the case that arguments based upon clear violations of liberty are taken to be stronger than arguments based upon concerns similar to those of the difference principle. Along with the help in getting clear about what is at issue in such arguments by using the principles of justice and 'the worth of liberty' to categorize the elements of such arguments, such an empirical interpretation to Rawls' serial ordering might give us a serial (or at least some kind of) ordering for arguments over preferential treatment in admissions.

Related to the principles of justice is Rawls' general conception of justice as fairness about which we have said little, thus far. In noting how it might help to clear up what is at issue in disputes over preferential treatment, we shall not attempt to argue from this general conception. The reasons for this will not be discussed here but may be found in the discussion of the general conception in the section of this chapter entitled, "Non-Applications." We
shall only use the notion, then, to get a bit clearer about what might be at issue in such disputes.

Let us first review Rawls' general conception of justice as fairness:

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 of any or all of these goods is to the advantage of the least favored. (Rawls, p. 303)

Again, this conception is meant to underlie the institutions of the just (the well-ordered) society. Furthermore, it is taken to be only a secondary criterion, since Rawls holds that the two principles and their priority rules are to be appealed to first concerning questions of social justice. Yet, such a general conception may still help us to see what might be at issue in the problem of preferential treatment. However, before we make any attempt to use it in such a way, it will be helpful for us to note what Rawls takes an unjust scheme of social cooperation to be:

A scheme is unjust when the higher expectations (of the more advantaged groups in society), one or more of them are excessive. If these expectations were decreased, the situation of the least favored would be improved. How unjust an arrangement is depends on how excessive the higher expectations are and to what extent they depend upon the violations of the other principles of justice, for example, fair equality of opportunity.... (Rawls, p. 79)

Upon this basis, then, we can see that what seems to underlie arguments for preferential treatment in admissions for $X_p$ for the benefit of Xs or Zs or in compensation to Xs or Zs is this
general idea that particular social institutions have worked to the benefit of those with higher expectations, perhaps to the point where they might be deemed as excessive, but have likewise led to no improvement and possibly have contributed to the decrease of the expectations of the least advantaged. For us to use the above ideas as put forth by Rawls, however, is not for us to give an argument on this basis. We only wish to point out, by citing and using such passages, what issues underlie preferential treatment in admissions.

Now, considering that such a basis might underlie part of what is being argued about when preferential treatment is disputed, it may help us if we discuss briefly the two following related issues: (1) stability as a tendency towards justice; and, (2) the problem of permanent minorities. First, then, we pointed out in Chapter Two that Rawls' discussion of 'stability' and 'congruence' is at best confusing, if not confused. Yet, one of the notions of 'stability' which we noted can perhaps help us to become a bit clearer about the issue of our concern. In speaking of 'stability' with reference to social institutions it seems that Rawls takes the term to mean something similar to "a tendency towards justice," as is evidenced by the following passage:
The stability of a conception of justice does not imply that the institutions and practices of the well-ordered society do not alter...In this context stability means that however institutions are changed, they still remain just or approximately so, as adjustments are made in view of new social circumstances. The inevitable deviations from justice are effectively corrected or held within tolerable bounds by forces within the system. (Rawls, pp. 457-458)

Given that we have assumed that those arguing for preferential treatment in admissions have underlying their arguments something like Rawls' definition of an unjust scheme, we can view the issue of preferential treatment as a question of which forces within the system we ought to use to effectively correct certain injustices. Although this does give us some perspective by which to view the problem, we have noted previously that arguments for or against preferential treatment based only upon stability are not sufficient by themselves since they beg the issue of the justice of the practice:

"To be sure, the criterion of stability is not decisive. In fact, some ethical theories have flouted it entirely, at least on some interpretations." (Rawls, p. 455)

Furthermore, if Rawls' general conception of justice as fairness, his definition of an unjust scheme, and this notion of a tendency towards justice help us to view what might underlie the arguments of those who argue for preferential treatment, then perhaps Rawls' brief statement on the problem of permanent minorities can help further. In speaking of our duty to comply with unjust laws, Rawls points out that there
are certain inevitable defects in any constitutional re-

gime:

Even with the best of intentions, their opinions of justice are bound to clash. In choosing a constitution, then, and in adopting some form of majority rule, the parties accept the risk of suffering the defects of one another's knowledge and sense of justice in order to gain the advantages of an effective legislative pro-
cedure. There is no other way to manage a democratic regime. (Rawls, pp. 355-356)

Since we realize, then, that perfect procedural justice cannot be achieved in political affairs, Rawls points out that we have the duty of civility (i.e., to accept these defects and to restrain ourselves from taking advantage of them), as well as the duty to uphold just institutions. In view of these two duties, we may have to comply with unjust laws or policies, or at least may have the duty not to oppose them by illegal means.

However, this duty to comply with an unjust law is adopted only upon certain conditions:

Roughly speaking, in the long run the burden of injustice should be more or less evenly distrib-
buted over different groups in society, and the hardship of unjust policies should not weigh too heavily in any particular case. (Rawls, p. 355)

Upon this basis, we see that the duty to comply with an unjust law does not hold under certain conditions:

Therefore, the duty to comply is problematic for permanent minorities that have suffered from in-
justice for many years. And certainly we are not required to acquiesce in the denial of our own and others' basic liberties, since this require-
ment could not have been within the meaning of
the duty of justice in the original position, nor consistent with the understanding of the rights of the majority in the constitutional convention. (Rawls, p. 355)

Now, it does seem that 'permanent minorities' is vague. Just how long, or what type of injustice a particular group of people must suffer to be counted as a permanent minority is not at all clear. Yet, if Xs or Zs could be counted as permanent minorities, the underlying basis for preferential treatment might be a bit clearer to us. For, then we might see that in conjunction with the issues that arise when we consider a scheme's tendency towards justice, we are faced with the question of how we might change the institutions of the scheme so that there are no longer permanent minorities. Yet, in the above passage, a general basis for arguments against preferential treatment for Xs in admissions is also given. That is, those who argue against preferential treatment sometimes do want to assert something like the following: "And certainly, we are not required to acquiesce in the denial of our own and others basic liberties..." Hence, by considering the problem of permanent minorities, we have become a bit clearer about both sides of the issue of preferential treatment in admissions.

The final point which we shall consider in this section of Chapter Five is the point that Rawls makes about the dangers of setting up a coercive agency. By 'coercive agency'; it seems quite clear that Rawls means 'a public system set up to enforce penalties'; or 'a penal system'. And were we to
adopt the policy of preferential treatment and employ it through certain agencies within universities, it is quite clear that if such a practice and such agencies were just, then they would clearly not be coercive agencies in Rawls' sense of the term. Yet, what Rawls has to say about the dangers of such agencies can enlighten us as to what might be at issue in disputes over preferential treatment in admissions, if we draw some parallels. This is, of course, a less direct application of Rawls' work since it does not strictly apply to the type of agency of which we are speaking, and since it is we who are drawing such parallels.

In speaking of the rule of law, Rawls, as we noted in our last chapter, holds that even in the well-ordered society effective penal machinery is necessary in order to remove the second kind of instability; i.e., instability due to lack of assurance that others will do their part. Furthermore, Rawls goes on to point out that in setting up a coercive agency the parties in a constitutional convention (stage two) must consider the two following disadvantages:

These (disadvantages—HMS) are of at least two kinds: one kind is the cost of maintaining the agency covered say by taxation; the other is the danger to the liberty of the representative citizen measured by the likelihood that these sanctions will wrongly interfere with his freedom. (Rawls, pp. 240-241)

Rawls then goes on to tell us under what conditions, given these two disadvantages, it would be rational to set up a
coercive agency, and what the best arrangement would be:

The establishment of a coercive agency is rational only if these disadvantages are less than the loss of liberty from instability. Assuming this to be so, the best arrangement is one that minimizes these hazards. It is clear that, other things equal, the dangers to liberty are less when the law is impartially and regularly administered in accordance with the principle of legality. While coercive mechanism is necessary, it is obviously essential to define precisely the tendency of its operations. Knowing what things it penalizes and knowing that these are within their power to do or not to do, citizens can draw up their plans accordingly. One who complies with the announced rules need never fear an infringement of his liberty. (Rawls, p. 241)

Now, with respect to preferential treatment, let us assume that it was decided that Xs did in fact deserve some kind of compensation for past or present injustices, and that preferential treatment for X_b in admission would be one way to accord such compensation. Assuming these points, could there be any arguments brought against preferential treatment for X_b? Clearly, Rawls' discussion above points to some important concerns that might arise. Assuming that just compensation is due, it could still be at issue as to whether this particular practice of preferential treatment and its cost accorded the compensation better than some other practice and its cost. Further, we would then want to ensure that the tendency of the operation of this practice was made clear so that citizens could draw up their plans and devise their expectations accordingly. Finally, we would also want
to consider the danger of the likelihood of such a practice wrongly interfering with the liberties of citizens. By drawing these parallels from Rawls' discussion of the disadvantages of coercive agencies, we see then that where there are arguments given against preferential treatment in admissions, more may be underlying such arguments than just whether or not compensation is deserved or whether or not preferential treatment can be shown to be a legitimate expectation of $X_b$. Quite simply, we can say that some other practice might turn out to bring a just result about (remember that we are assuming certain things in this discussion) and may do better on the score of the two disadvantages noted above. This application shows us again the variety of issues that may be at stake when disputes over preferential treatment in admissions arise.

Having completed this discussion of less direct applications of Rawls' theory to preferential treatment, let us turn to some non-applications of Rawls' work; that is, to some elements that we cannot apply to the issue of our concern.
Non-Applications

Because many of the elements of Rawls' work seem to have an appeal due to their elegance and seeming simplicity upon first view, someone might understandably be tempted to pick out particular elements from Rawls' work and to apply them in order to argue for or against, or to resolve the issue of, preferential treatment in admissions. Throughout this and previous chapters, we have emphasized the fact that Rawls' construction of his theory of justice and his intentions for its use point us in directions of application, some of which seem more appropriate than others. In this section, we shall discuss some of the elements of Rawls' work that one might be tempted to apply to the issue of our concern, if one were to overlook or ignore the problems with such elements or with the application of such elements. Hence, we shall briefly discuss why the following are "non-applications" and how someone might mistakenly attempt to use them: (1) the original position; (2) the general idea that capacities are arbitrary; (3) the issue of choice and maximin; (4) the notion of equal opportunity; (5) the priority rules; (6) the difference principle; and (7) the greatest equal liberty principle and 'the worth of liberty'. We must note at the outset that we shall make no attempt to review all of the critical literature that has been written upon the above elements. Such a task in itself would be overwhelming. Rather, we shall offer reasons and refer to
such literature only to the extent that we show that using these elements in arguments for or against preferential treatment will, given the critical literature on Rawls, be controversial if not inappropriate.

First, then, one might be tempted, upon reading Rawls, to employ the original position in order to somehow resolve the issue of preferential treatment in admissions. That is, one might ask such a question as: "What would the parties in Rawls' original position decide?" Further, one might naively think that if it could be shown that the parties would decide one way or another on the issue that we would have resolved the problem of preferential treatment. Yet, there are two major problems with proceeding in this manner. First, as we pointed out in our review of Rawls' work, the original position is a device that is used in the formulation of ideal theory, and as such, it is not clear as to what it has to say or what its role is, if it has any, in nonideal theory. It is true that, as we saw for instance in Rawls' discussion of conscientious refusal and civil disobedience, Rawls does at times resort to the original position in discussing nonideal issues. But, it is just as obscure what role the original position is to play in dealing with such issues when Rawls resorts to it.

Second, a stronger reason for not applying the original position to the problem of our concern has to do with a major
philosophical problem with it that is seen throughout the critical literature on Rawls. The problem is this: "Why should any decision made in the original position be taken as being right or just?" The arguments that the original position technique of Rawls is inadequate seem to take two general directions. Either these arguments point out that the elements of the original position are biased towards a liberal political view and hence produce principles of justice to match it, or that the epistemological conditions imposed on the parties in the original position not only lead to a biased choice on their part but that such an imposition is unfair to the parties themselves. An example of the former type of position is put forth by Milton Fisk in his essay, "History and Reason in Rawls' Moral Theory." What Fisk shows here, quite briefly, is that Rawls' ideological underpinnings of liberal democracy on such elements as human nature, freedom and the state lead him to a liberal democratic result. Whereas, for example, if we were to hold to a Marxist view of human nature we would arrive at a position quite different from Rawls':

Yet, for the individual as a class member, there can be no agreement on principles of justice except as expedients to survive an historical period during which the class could gather strength and prepare for the realization of its tendencies. This is true even though one does not know what one's social position in history might be...Consequently, the original position cannot yield agreement on principles of justice when the individuals in it are in our
new class sense. There can be no society-wide contract, and a fortiori no contract with universal application. (Fisk, p. 73)

The latter attack against the use of Rawls' original position can be seen in Thomas Nagel's article, "Rawls on Justice." Here Nagel, at one point, argues that Rawls' imposition of certain epistemological restrictions (e.g., each party's ignorance of his or her conception of his or her own good) are in fact not weak, but are strong assumptions which bias the original position in favor of certain parties:

Rawls' minimal conception of the good does not amount to a weak assumption: it depends on a strong assumption of the sufficiency of that reduced conception for the purposes of justice. The refusal to rank particular conceptions of the good implies a very marked tolerance for individual inclinations...The suppression of knowledge required to achieve unanimity is not equally fair to all parties, because the primary goods are not equally valuable in pursuit of all conceptions of the good.... (Nagel, p. 9)

Because these are only two the many arguments against the use of Rawls' original position, it would seem prudent for one to avoid using it, especially where it is doubtful that Rawls ever meant it to be used in such a way.

Second, one might be tempted to adopt Rawls' position that natural talents and abilities, as well as the cultivation of such, being undeserved and arbitrary from a moral point of view, ought not to influence the distribution of goods in such a way that those who have such capacities profit while those who lack them reap no benefits. One might, for instance,
want to argue along this line by saying that preferential treatment compensates for the undue profit that those born with such natural talents have reaped in the past. Yet, to argue in this way, ignores just how philosophically controversial Rawls' position is on the arbitrariness of natural talents, capacities and their development.

In order to see that problems do exist with this position of Rawls, we may turn briefly to two sources. First, Robert Nozick in *Anarchy, State and Utopia*, invests a bit of work into arguing against this position and showing its relation to the original position. Quite generally, Nozick attempts to show that Rawls has given no support for the claim that differences in holdings due to differences in natural assets ought to be nullified and that his makes it unclear, "how anything about the original position can be based upon the (ambiguous) claim that differences in natural assets are arbitrary from a moral point of view." (Nozick, p. 227) It is not our task here to review all of Nozick's argument, but only to raise doubts as to the propriety of applying Rawls' position to the issue of preferential treatment. Given this task, it seems that the following passage from Nozick can accomplish our job here adequately:

Notice that there is no mention at all of how persons have chosen to develop their own natural assets. Why is this simply left out? Perhaps because such choices also are viewed as being the products of factors outside the person's control, and hence "arbitrary from a moral point
of view." ...This line of argument can succeed in blocking the introduction of a person's autonomous choices and actions (and their results) only by attributing everything noteworthy about the person completely to certain sorts of "external" factors. So denigrating a person's autonomy and prime responsibility is a risky line to take for a theory that otherwise wishes to buttress the dignity and self-respect of autonomous beings.... (Nozick, p. 214)

If we have not yet established that the arbitrariness of natural talents and their development is controversial and ought to be avoided in disputes over preferential treatment in admissions, we may turn to the essay of David Lyons, entitled, "Nature and Soundness of the Contract and Coherence Arguments," in order to further attempt to establish this point. At one point in Lyons' discussion he points out that the above position of natural and social contingencies as arbitrary, would seem to lead Rawls to a strict egalitarian position concerning the distribution of goods. Yet, Lyons asserts further that Rawls avoids such an egalitarian position by invoking the notion of pure procedural justice. What is important here for our purposes is what Lyons goes on to say about Rawls' position that natural and social contingencies are arbitrary from a moral point of view:

It is unfortunate, therefore, that Rawls merely claims, without supporting argument, that distributions flowing from natural or social contingencies alone are arbitrary from a moral point of view. An adequate defense of this claim is required for the very idea of a contract argument, that is, to warrant the notion that pure procedural justice is relevant to our case. (Lyons, p. 157)
Lyons then goes on to point out some problems with the above position:

More important, Rawls' dismissal of the notion of desert seems sometimes confused. He says, for example, that we do not deserve the advantages or disadvantages we receive in the 'natural lottery' or as a consequence of social accident. It does not follow, however, as Rawls seems to suggest (pp. 103-4), that some features of the natural or social 'lotteries' could not serve as the just basis of deliberate distributions: one need not deserve what is itself a ground of desert. (Lyons, p. 158)

With such controversial points to be addressed and answered it seems that we would be wise to abstain from applying the position that natural talents, assets, and their development are arbitrary to the issue of preferential treatment in admissions.

Third, having previously noted some problems with using Rawls' technique of the original position in arguments for or against preferential treatment in admissions it would seem wise to avoid such a technique. Yet, the related principle of maximin might still seem to be a plausible technique to use in arguing for or against preferential treatment. One might argue that, for instance, where $X_b$ and $Y_b$ were equally qualified that $X_b$ ought to be given preferential treatment since, of the two alternatives possible, the perpetuation of $Xs$ as a permanent minority which could possibly be the result of not giving such treatment to $Xs$, would be the alternative with the worst possible outcome. Of course, this is merely a line of thought that one might be tempted
to take, and it is not offered here as a full-blown argument. Our task is only to point out the problems with using the maximin rule of choice to underlie such arguments. The crux of the matter is that there are two major problems with using the maximin rule of choice in any way similar to this: 1) there are certain preconditions that must be fulfilled before the rule is appropriately applied; and 2) the rule seems to express a conservative approach to decision making which seems to be unwarranted (or unsupported) in the situation of the original position as well as in other situations. These two points, it seems, are not mutually exclusive.

First, then, the legitimate use of maximin as a principle of choice presupposes that three conditions are satisfied, as we noted in Chapter Two: (1) there must be some reason for sharply discounting estimates of probabilities; (2) the person choosing must care very little about what might be gained above the minimum; and, (3) the rejected alternatives must have outcomes that we could hardly accept. (Rawls, p. 154) Clearly, on this basis, we cannot apply the maximin principle of choice with reference to the issue of our concern. It is clear that we not only have probability estimates of the consequences of different alternative decisions, but also that we will want to take such estimates into account rather than to "sharply discount" them. Second, in making a decision at $t_2$, it seems that we care very much what will be gained "above the minimum," in the
sense that if there is an alternative that yields greater good for almost all concerned, we would take that alternative quite seriously although one or two persons suffered by it. This is not to say that we would necessarily adopt such an alternative, but is only to show that we have a concern for more than "the minimum." Finally, given the alternatives open to us at $t_2$ (such as building more colleges), it seems that the precondition of there being rejected alternatives with outcomes that we could "hardly accept" also falls by the wayside. In short, the maximin principle is to be applied under conditions of extreme uncertainty. For instance, one might want to employ the maximin rule if one were to enter into a society in which his enemy were to assign him a place. (Rawls, p. 153) Yet, it is puzzling as to why one would apply it to the situation at $t_2$ since that situation seems to be so different from the one in which the maximin rule is strictly applicable.

Indeed, we must exercise great caution in our use of such a principle since many persons have argued that the rule is not even applicable in Rawls' original position. For instance, in R.M. Hare's essay entitled, "Rawls' Theory of Justice," we are shown a multitude of faults with the maximin strategy from the perspective of the persons in the original position (POPs - as opposed to POLs, persons in ordinary life). First, Hare points out that POPs have little reason to use the maximin rule instead of the principle of insufficient reason (IR):
...(A) POP, knowing that he will be one of n individuals...will say that there are, correspondingly, n different outcomes, and will, if he uses IR, conclude that the probability of getting any one of them is 1/n. At any rate, we have at least as much reason to suppose this as Rawls has to suppose anything else. (Hare, p. 103)

Furthermore, Hare points out that it is not at all clear whether or not the POPs have an aversion to risk. After pointing out a multitude of inconsistencies in Rawls' position on this point Hare summarizes the confusion in the following way: "In page 172 he says 'the parties do not know whether or not they have a characteristic aversion to taking chances'; and the reader is not to know either." (Hare, p. 103)

Hare also goes on to point out the arbitrariness of not allowing POPs the knowledge of objective probabilities. Further, he points out that at times although it seems that Rawls is speaking of a maximin strategy, that he is actually only speaking of an 'insurance strategy':

...Rawls uses arguments in favor of maximining which are really only arguments in favor of insuring against utter calamity...We insure our houses against fire because we think that a certain outcome, namely having one's house burnt down and having no money to buy another, is so calamitous that we should rule it out. This is not at all the same strategy as maximining... Maximiners would end up refusing to let the man with, say, $50,000 a year have any more if the man with the minimum income of $40,000 received in consequence a dollar or two less; but the follower of the insurance strategy would by that time have lost interest. (Hare, pp. 104-105)
In light of these problems with Rawls' use of maximin, as well as others which Hare and other writers (e.g., Brian Barry, Thomas Nagel, and David Lyons) have discussed, it seems that we have sufficient reason to avoid using the maximin rule of choice in disputes over preferential treatment in admissions.

Fourth, upon first reading, A Theory of Justice, one might be so taken with the notion of fair equality of opportunity that one might want to employ it in disputes over preferential treatment in admissions. For instance, one might claim that since Xs were denied fair equality of opportunity at $t_1$, they now deserve preferential treatment, for such denial, at $t_2$. Yet, insofar as one goes to Rawls' notion of fair equality of opportunity, one will have a multitude of problems and confusions to clear up before one can legitimately (or merely with clarity) use this notion. We shall point out only a few of the problems with this notion here.

As we pointed out in our last chapter, Rawls initially states the fair equality of opportunity clause in the following way: "Social and economic inequalities are to be arranged so that they are...(b) attached to offices and positions open to all under conditions of fair equality of opportunity."

(Rawls, p. 83) At first sight, this would seem to support an argument for preferential treatment such as put forth above.
Yet, Rawls tells us elsewhere: "In all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed. The expectations of those with the same abilities should not be affected by their social class." (Rawls, p. 73) This formulation of equality of fair opportunity, however, might leave the retort open for Y in some cases to claim that X did or X did not have equal motivation, or abilities, for instance. Yet, those arguing for preferential treatment would not want to leave themselves open to such a retort since they may want to claim that inequality of ability is a consequence of social class. At least, at first sight, Rawls' formulation here leaves Y with too many retorts if one wanted to argue for preferential treatment on the basis of Rawls' notion of equal opportunity.

Yet, if this does not give one an aversion to using Rawls' notion of fair equality of opportunity in such arguments, there are other places in this work where Rawls comes up with alternative definitions of the notion that make one wonder what he does mean by it (see, for example, pp. 87-88 and pp. 106-107). The point at which one may ultimately question this notion is in the section entitled, "Further Cases of Priority." In discussing variations on the theme that political power should be exercised only by particular persons, as held by Hegel and Burke, Rawls seems to hold that such positions could be justified by the following arguments:
We must also claim that the attempt to eliminate these inequalities would so interfere with the social system and the operations of the economy that in the long run anyway the opportunities of the disadvantaged would be even more limited... We must hold that a wider range of more desirable alternatives is open to them (those with lesser opportunity-HMS) than otherwise would be the case. (Rawls, p. 301)

Surely, from this, it seems questionable whether one would want to employ Rawls' notion of fair equality of opportunity in disputes over the issue of our concern; especially, if one wants to avoid being the victim of what seems to be crypto-paternalism. Other problems, of course, could be cited here given our review of this notion in the last chapter. For instance, we might ask such questions as: (1) what exactly is the relationship between fair equality of opportunity and self-respect?; and (2) what exactly is the relationship between fair equality of opportunity and pure procedural justice (see Rawls, pp. 84 and 87-88)? Yet, it seems that we have at least established that there is sufficient confusion in the notion to make its application to the issue of our concern seem quite questionable, if not inappropriate.

Fifth, upon reading *A Theory of Justice*, one might have hopes of turning to the priority rules attached to the two principles of justice in order to somehow resolve the issue of preferential treatment in admissions. For example, one might think of the issue in terms of some past or present lesser liberty for Xs or Ys as strengthening the total system
of liberty shared by all or as being justified by having been acceptable to those with the lesser liberty. (See, Rawls, p. 302) However, before engaging in such a line of thought, one ought to note two important points. First, where Rawls dealt with the nonideal issues of civil disobedience and conscientious refusal, even he found little use for the priority rules in his discussion. In the summary of our review of Rawls' discussion of civil disobedience and conscientious refusal, we noted that in his discussion Rawls generally resorted to the following: (1) the original position; (2) stability, self-respect, or the principle of liberty; (3) some form of one of the principles of justice to adjudicate conflicting duties; (4) a greater weight for just institutions while adjusting individual liberties in light of this weight; and (5) even distribution of the possibility of risk or some natural disadvantage. Yet, no priority rule is ever literally invoked by Rawls to solve the above issues.

Now, this surely does not mean that the priority rules may not be helpful in resolving any nonideal issue. Yet, it seems to weigh as heavy evidence that Rawls' concern for how little use the priority rules are in nonideal issues is well-founded:
The drawback of the general conception of justice is that it lacks the definite structure of the two principles in serial order. In more extreme and tangled instances of nonideal theory there may be no alternative to it. At some point the priority rules for nonideal cases will fail; and indeed, we may be able to find no satisfactory answer at all. (Rawls, p. 303)

Our second point here, then, is that Rawls not only finds no explicit use for his priority rules in his major application of ideal to nonideal theory, but also acknowledges that in "tangled instances of nonideal theory" they may not help us at all. If this does not yet discourage one from arguing for or against preferential treatment on the basis of the priority rules, we extend the following invitation in order to make our point: "Given the portrayal of the problem of preferential treatment in our first chapter, and Rawls' priority rules on page 302, what resolution of the problem necessarily follows and why?" Of course, all of this is still not to mention the fact that the priority rules are part of ideal theory and are meant to be applied to institutions and not to individual cases.*

Sixth, perhaps the most tempting element of Rawls' theory that one might consider applying when arguing for (or against?) preferential treatment in admissions is the difference principle. For instance, one might argue that social and economic inequalities have not led to any benefit of the least advantaged,

* See, also, our discussion of liberty and the worth of liberty at the end of this section.
say, Xs or Zs (much less to the greatest benefit of Xs or Zs), and because of this (assuming the difference principle of course) Xs ought to be given preferential treatment in admissions. Yet, again there are a great many philosophical problems with this element of Rawls' theory that should make us cautious about, if not adverse to, such an application. First, at the risk of being redundant, it is an element of ideal theory and is most appropriately applied to institutions of a society that is just, as opposed a situation of nonideal theory which at best is aimed at alleviating supposed injustice.

Yet, since this criticism is not at all substantial enough to stop such an application, let us turn to only a minute portion of the philosophical criticism that has arisen over the difference principle. One major argument against the principle seems to be what we might call "the complaint of the well endowed." We shall look briefly to T.M. Scanlon's article "Rawls' Theory of Justice," for one succinct statement of the problem and then shall turn to some of what Robert Nozick has to say in his discussion of the difference principle in Anarchy, State, and Utopia.

First, in discussing the argument for the difference principle, Scanlon points out that Rawls holds that, as opposed to utilitarianism, his theory does not require anyone to accept lower life prospects for the sake of others (Scanlon, p. 198) Yet, as Scanlon points out the difference
principle seems to yield just such a consequence for those parties who are well endowed:

It seems likely, however, that those who are endowed with talents which are much in demand will receive less in a society governed by Rawls' Difference Principle than they would if allowed to press for all they could get on a free market. Thus in a Rawlsian society these people will be asked to accept less than they might otherwise have had, and there is a clear sense in which they will be asked to accept these smaller shares 'for the sake of others.' (Scanlon, p. 198)

However, to this the Rawlsian replies that the well-being of the better endowed depends upon the social cooperation of others in the society, and hence reasonable terms must be proposed if the better endowed are to ask for the willing cooperation of everyone.

Although Scanlon answers this reply by showing that it begs the question of just what counts as 'reasonable terms,' we shall not review his answer here. Rather, we shall move on to see how Robert Nozick handles this Rawlsian position in Anarchy, State and Utopia. In the section entitled, "Terms of Cooperation and the Difference Principle" (pp. 189-197), Nozick critiques Rawls' argument for the difference principle, and the principle itself, quite extensively. Unfortunately, we shall review only so much of what Nozick has to say, as will complete the criticism of the difference principle initially cited in Scanlon's essay. Upon this matter that the better endowed gain from cooperation with the less endowed, Nozick agrees:
No doubt, the difference principle presents terms on the basis of which those less endowed would be willing to cooperate...The better endowed gain by cooperating with the worse endowed, and the worse endowed gain by cooperating with the better endowed. (Nozick, p. 192)

However, what Nozick wants to argue is that the difference principle is not neutral between the better and worse endowed and that the better endowed have grounds for complaint by being made to accept less than they otherwise would have had so that the worse endowed might have more.

Nozick argues that the question to consider is: How much does each person gain from general social cooperation, "as compared, not with no cooperation, but with more limited cooperation?" (Nozick, p. 193) That is, we are to compare general social cooperation with such forms of cooperation as better endowed with better endowed and less endowed with less endowed. Nozick then goes on to tell us:

If the better endowed group includes those who manage to accomplish something of great economic advantage to others...it is difficult to avoid concluding that the less well endowed gain more then the better endowed do from the scheme of general cooperation. (Nozick, pp. 193-194)

Although we shall not review the rest of Nozick's argument here, we shall cite two further general conclusions which he draws with reference to the difference principle and his argument against it:
What does follow from the conclusion is a deep suspicion of imposing, in the name of fairness, constraints upon voluntary social cooperation... so that those already benefiting most from this general cooperation benefit even more!... Rawls has not shown that the more favored man A has no grounds for complaint at being required to have less in order that another B might have more than he otherwise would. And he can't show this, since A does have grounds for complaint. Doesn't he? (Nozick, pp. 194-195 and 197)

Of course, we shall not resolve this dispute between Rawls and Nozick here, but shall only point out that such a dispute poses grave reservations as to the applicability of the difference principle to arguments over preferential treatment in admissions to education. Yet, we also ought to abstain from using this principle in such disputes since it is not at all clear how Rawls wants to apply the principle, even in ideal theory. Remembering our review of Rawls' discussion of justice between generations, we may again note that there, Rawls surprisingly told us the following:

One naturally imagines that the greater wealth of those better off is to be scaled down until eventually nearly everyone has the same income. But this is a misconception, although it might hold in special circumstances. The appropriate expectation in applying the difference principle is that of the long-term prospects of the least favored extending over future generations. (Rawls, p. 285)

If this is the appropriate application of the difference principle then it is not clear that the principle will necessarily support any argument for or against preferential treatment. Second, given the above interpretation and the difference between it and what the difference principle literally states,
it seems that before any use is made of that principle, we need much clarification on exactly what the principle does say.

Finally, earlier in the section entitled "Less Direct Applications," we noted that we might find Rawls' two principles, their serial order, and 'the worth of liberty' useful in categorizing arguments which were offered for or against preferential treatment in admissions. Yet, at that point we also noted that we were not advocating that one ought to argue from such principles. We have already pointed out some of the problems with arguing from these principles. Yet, one might still find it plausible to argue for or against preferential treatment in admission on the basis of Rawls' first principle on liberty, or on the basis of "the worth of liberty." For instance, one might argue that while, in the past, Xs were not denied basic liberties, in Rawls' sense, they were denied equal worth of liberty by their unfair rejection from colleges, and as such ought to be compensated for it. Or, according to one of Rawls' priority rules on liberty, it is necessary to restrict the liberties of \( Y_b \), one might argue, in order to greater strengthen the total system of liberties. Below, then, we shall attempt to point out that there is a sufficient amount of doubt as to the philosophical adequacy of such notions, that we should restrain ourselves from using them to argue in such ways.
To show some of the questions which have arisen with respect to Rawls' first principle and 'the worth of liberty,' we shall briefly look to H.L.A. Hart's "Rawls on Liberty and its Priority," and to Norman Daniels' "Equal Liberty and Unequal Worth of Liberty." In Hart's essay, we are shown a multitude of questions that arise for Rawls' first principle of justice and its priority rules. First, Hart points out that although Rawls overcomes certain objections by speaking of most extensive total system of equal basic liberties rather than equal liberties in general, it is amazing that Rawls' doctrine is thereby silent about certain important liberties, "which apparently do not fall within any of the roughly described basic liberties...." (Hart, p. 237) Second, and more importantly, Hart questions what it is to limit liberty for the sake of liberty. He points out that doing this calls for a criterion of value between different liberties, but that, "Rawls speaks as if the system 'of basic liberties' were self-contained, and conflicts within it were adjusted without appeal to any other value besides liberty and its extent." (Hart, p. 240) Further, Hart points out that such criteria offered by Rawls to resolve conflicts of liberty as appealing to "a greater liberty," or securing "the best total system" of basic liberties from the point of view of "the representative equal citizen" seen to be of no help in resolving such conflicts. Such criteria seem to help only in quite simple cases at best.
Finally, one other criticism of Rawls' first principle and its priority rules that Hart offers is that they do not provide adequately for those ordinary cases where we constrain liberty of conduct because such conduct would cause harm or suffering:

The point here is not that Rawlsian justice will be shown to be indeterminate at certain points as to the propriety of certain restrictions on liberty; it is, on the contrary, all to determinate since they seem to exclude such restriction (based on suffering or harm—HMS) as actually unjust because they do not limit liberty only for the sake of liberty. (Hart, p. 247)

Given these criticisms, as well as others which Hart offers but which we have not mentioned here, it would seem that one would want to refrain from employing arguments based of the first principle and its priority rules until such issues had been cleared up.

We also noted, however, that one might want to employ Rawls' notion of 'the equal worth of liberty' in arguments for or against preferential treatment in admissions. To see why such a course of action has fallen under our heading of "Non-Applications," let us turn to, "Equal Liberty and Unequal Worth of Liberty," by Norman Daniels. In this essay Daniels begins by telling us that liberal political theory has traditionally attempted to provide a two-fold justification for the co-existence of political equality and social and economic inequalities. That is, such theorists have always assumed that the two were compatible. Daniels asserts that Rawls is
no different and that it is questionable as to whether Rawls' first and second principles are compatible. To show that the two principles are not compatible, one course which Daniels takes is to show that the "liberty versus the worth of liberty" distinction is an arbitrary one, and that appealing to it cannot reconcile the first and second principles. Here, of course, we shall mostly be concerned with Daniels' criticisms of 'the worth of liberty'.

First, then, Daniels points out that since the parties in the original position do value liberty highly according to Rawls, they might find it hard to accept both the first and second principles in conjunction unless they were assured that unequal wealth and power did not destroy equal liberty. As Daniels then points out, Rawls does not rely on the unsupported hope that we can find a constitutional blueprint for eliminating such effects, but rather circumvents the problem by introducing the distinction between liberty and the worth of liberty. (Daniels, p. 259) Here, we are told that the main point as to whether or not such a distinction is arbitrary is the question of "...whether it is useful to talk about something as a 'liberty,' when we cannot effectively exercise it." (Daniels, p. 259)

To show the arbitrariness of Rawls' distinction, Daniels then points out that Rawls' notion of liberty is the following: "'This or that person (or persons) is free (or not free) from this or that constraint (or set of constraints) to
do (or not to do) so and so' (p. 202)." (Daniels, p. 259)

Furthermore, Daniels points out that Rawls holds that such constraints range from legal duties and obligations to coercive influences from public and social pressures. (Daniels, p. 260) The crucial question which he then asks is why Rawls has excluded economic factors from his category of constraints defining liberty. The main point here is that if Rawls is to admit such non-legal restraints as social pressure, that it is arbitrary not to admit economic factors as constraints on liberty since they similarly, "act as systematic, socially produced obstacles (or aids) for hindering agents desiring to perform certain acts." (Daniels, p. 260) Upon this basis, Daniels asserts:

Similarly, if it makes sense to claim that economic factors define only worth of liberty but not liberty itself, then it makes equally good sense to say that other non-legal coercions also define the worth of liberty. The special exclusion of economic factors seems arbitrary.

One way around the charge of arbitrariness might be to exclude all non-legal coercions from the category of defining constraints... Unfortunately, this maneuver will not solve the problem, either. Requiring that constraints definitive of liberty must be legal restrictions will not entail excluding economic factors since economic factors are always reflected in the laws and constitution. (Daniels, p. 261)

Although Daniels goes on to show that it is not rational for those in the original position to choose equal liberty without also choosing equal worth of liberty (by which he shows that "worth of liberty" cannot reconcile the two
principles), we need not review the rest of his essay here. Rather, upon the basis of our brief review above, it seems that Rawls' distinction between liberty and worth of liberty is at least to be held as suspect. Hence, to argue from such a seemingly arbitrary distinction with reference to the issue of preferential treatment in admissions also seems to be a questionable course of action for one to take. Now, because of the problems with the above distinction, one might decide to merely argue from Rawls' first principle. Yet, then one will have to cope with the criticisms of that principle which, as we noted, were put forth by Professor Hart.

**Summary**

In this chapter, we attempted to go a bit further in our application of *A Theory of Justice* to the problem of preferential treatment in admissions to education. To this end, we discussed what we called, "less direct applications" and "non-applications." Within the first section of this chapter, "Less Direct Applications," we attempted to investigate what issues and concerns might underlie arguments for or against preferential treatment by discussing the following: (1) the serial ordering of the two principles of justice; (2) Rawls' notion of equal worth of liberty; (3) the general conception of justice as fairness; (4) stability as a tendency towards justice; (5) the problem of permanent minorities;
and, (6) the dangers of setting up a coercive agency. In general, it seemed that the first five of these elements helped to elucidate what concerns are at the bottom of arguments for preferential treatment in admissions. Whereas, the final element which we discussed seemed to point to the fact that one could even accept the fact that Xs deserve compensation and still object to preferential treatment for Xs for various reasons other than those having to do with compensation.

In the second section of this chapter, we reviewed seven "non-applications" of Rawls' theory. We noted with reference to most of them that they were not only formulated at the highly theoretical stage of the four-stage sequence, but also that they are also most properly to be employed in terms of choosing and structuring the basic institutions of the well-ordered society; i.e., that they are most properly to be employed in issues of ideal theory. Yet, beyond this, we also attempted to review a few of the many philosophical problems which have arisen with respect to these seven elements of Rawls' theory. All of this was undertaken in the same spirit that was stated at the outset of this work; that we ought to exercise due intellectual caution in applying Rawls' theory of justice to the issue of our concern.
Footnotes


Hare, R.M. "Rawls' Theory of Justice," *Reading Rawls*.


CHAPTER VI

CONCLUSIONS AND RECOMMENDATIONS

Introduction

Now that we are in the fortunate position of having completed the task of applying the elements of A Theory of Justice to the problem of preferential treatment in admissions to education, we shall attempt to coherently draw together what we have learned and to draw some further conclusions on that basis. To this end, then, in this chapter we shall first address the five questions of principle which arose in Chapter One when we portrayed the issue of our concern descriptively. Second, we shall then attempt to draw some further conclusions about preferential treatment in admissions. Finally, on the basis of our investigation, both its results and its process, we shall make some recommendations concerning both the issue of preferential treatment and the utility of A Theory of Justice to philosophers of education.
Five Questions of Principle

In the first chapter of this work, we noted five questions of principle that seemed to be of importance when the issue of preferential treatment in admissions was portrayed descriptively. At that point, we also noted that they were neither questions to be answered with finality by this inquiry, nor hypotheses to be investigated by this work. Rather, we stated that we would use them as a cutting edge when it came time to summarize what it was that we had gleaned from our application of Rawls' theory to the problem of preferential treatment. Now that we have shown how the many elements of A Theory of Justice help to elucidate the issues at stake in preferential treatment, let us return to our five questions of principle, one at a time, to attempt to summarize or to discover further what it is that we have learned from our application. Of course, by doing this, we shall not hope to summarize all that we have said in this work, but shall only attempt to pull some of the most important issues together in a different more elucidating way than the way in which we have previously presented them.

Let us now address the first question to see what, if anything, we have gained from our application of A Theory of Justice to the issue of our concern: "What principles concerning the rights of Xs might feasibly underlie arguments for according preferential treatment in admissions to Xs at
Of course, such a question, as we have seen throughout previous chapters, is intimately related to the issue of the legitimate expectations of both Xs and Ys. As such, then, we saw first in Chapter Four that the principles underlying such arguments might have to do with either the injustice of the whole scheme of social cooperation or with the injustice of particular arrangements of the scheme of social cooperation which is taken to be just. Depending upon which set of principles are appealed to, the legitimate expectations of $y_b$ will, as a consequence, also be shown to be greater or smaller.

Yet this question of legitimate expectations of Xs (or of Ys) at $t_2$ is tied into the issue of justice between generations. That is, before Xs or Ys at $t_2$ can appeal to such principles, we must first clear up such related questions as what it is that one generation has a right to expect from another generation. In part, we saw that this issue has to do with the formulation of a just savings principle and the problem of ascertaining when the principle was violated. Further, we saw that even if we could resolve such issues, we are still left with the nonideal query of who is to bear the burden for the violation of such "intergenerational" principles. Two possible ways of solving this query were merely suggested by the notions of showing time preference, or by engaging in a virtual exchange between generations. Yet, as we pointed out, we are far from being clear about what is
involved in either, or under what conditions either is rightly done. Finally, in our section entitled, "Less Direct Applications," we noted, although vaguely so, that there seemed to be the problem of the permanent minority underlying the issue of preferential treatment and that the issue was one for us to be concerned about, although preferential treatment in admissions might or might not be the best answer to it.

In sum, then, and in addressing the first question, we can say that the principles that might plausibly underlie arguments for preferential treatment for Xs at \( t_2 \) and which are concerned with the rights of Xs, will have to address the following issues: (1) what can one generation legitimately expect from another?; (2) who is to bear the burden of a violation of the just savings principle?; (3) when is it justified to show a preference towards time in attempting to alleviate an injustice?; (4) can there be virtual exchanges between generations to alleviate injustices?; and (5) why is preferential treatment the best available resolution of the problem of the permanent minority?

Looking back to the second question we see the following: "What principles might underlie arguments which hold that the treatment to \( Y_b \) at \( t_2 \) is unjust, given that preferential treatment is accorded to \( X_b \) at \( t_2 \)?" Again, we must turn to the distinction between the unjust scheme and the just scheme
with particular unjust arrangements. Of course, if the latter is the case, \( Y_b \) may validly claim to have a right to particular entitlements which any correction for particular, unjust arrangements could not override. Furthermore, and especially if the latter is the case, \( Y_b \) may want to appeal to particular principles that ring analogous to the problem of the first generation, in that they are asked to "begin the whole process, (but) they do not share in the fruits of their provision." (Rawls, p. 288) Of course, this line of argument by \( Y_b \) will only be justifiable insofar as his expectations are not dependent upon the unjust arrangements for which \( X_b \) demands compensation.

Furthermore, given our investigation, there are two other ways that one might attempt to argue that \( Y_b \) is being treated unjustly. In Chapters Four and Five, we spoke briefly about both arguments based upon the notion of "stability" and the dangers of setting up a coercive agency (in Rawls' sense of the term). As we noted with respect to stability, it seems to be a desirable feature which would make one social scheme preferable to another, other things equal. Hence, \( Y_b \) might conceivably appeal to principles that noted how preferential treatment for \( X_b \) would adversely affect the stability of the social scheme. Yet, such an argument would be powerful only insofar as the issue of justice had been resolved or insofar as \( Y_b \) had certain legitimate expectations based upon
the just part of the social scheme. Also, even given that compensation was due to \( X_b \) at \( t_2 \), we noted that \( Y_b \) might want to argue that preferential treatment as a form of compensation either was used to interfere wrongly with the liberties of citizens, cost more than some other practice of according compensation, or was an operation such that citizens, being unclear about its employment, could not draw up their plans or expectations accordingly.

In response to the second question, then, we can say that the principles which might underlie arguments that the treatment accorded to \( Y_b \) was unjust might appeal to the following: (1) the justice of the overall scheme upon which \( Y_b \)'s expectations are founded; (2) the fact that \( Y_b \) is asked to contribute where \( Y_b \) gains nothing from such a contribution (given, of course, that (1) holds); (3) the possibilities of instability in the social scheme if \( Y_b \) is accorded such treatment, other things equal; and (4) the fact that the practice of preferential treatment would either cost more than some other form of compensation, would be likely to wrongly interfere with the liberties of citizens, or would be so obscure in its operation that citizens would not be able to draw up their plans or expectations accordingly.

The third question asks: "What principles concerning the distributive shares of Xs or Zs might underlie arguments for according preferential treatment to Xs at \( t_2 \)?" Now although our investigation does not arrive at or expose any
particular principles about distributive shares that, with plausibility, might be appealed to in order to justify preferential treatment for $X_b$ at $t_2$, it does yield standards of complexity that such principles will have to meet. For instances, as we saw, it will not be sufficient for such principles to argue merely on the basis of one precept of justice; e.g., distribution according to need. Rather, they will have to appeal to how the system of distribution, or the institutions of society, have run amuck in balancing the different precepts of justice by possibly, say, giving too much weight to some and not enough weight to others. As Rawls tells us: "To assess the justice of distributive shares, we must note to total working of the background arrangements, the proportion of income and wealth deriving from each branch." (Rawls, p. 309)

However, if we go further to ask what Rawls' work tells us about what such principles must be like, we see that two types of principles, at least, are not supported by Rawls' work. First, given our investigation, it seems that any principle of distributive shares appealed to, may not be one that demands that a particular level of affluence have been attained. This is evident from two different places in Rawls' work. First, in his discussion of justice between generations, Rawls points out the following: "Justice does not require that early generations save so that later ones are simply more
wealthy. Savings is demanded as a condition of bringing about the full realization of just institutions and the fair value of liberty." (Rawls, p. 290) In light of this, it seems that principles that appeal merely to lack of distributive shares are not supported by Rawls' work. Yet, given our discussion of Rawls' notion of 'the worth of liberty,' we see that Rawls does not expect or argue for equality in distributive shares, and does support particular distributions only to the extent that they secure the worth of liberty (the problems with which we have of course reviewed). Hence, it seems that the principles that are concerned with the distributive shares of Xs or Zs which are appealed to in arguments for preferential treatment in admissions for X, must have, at least, the following characteristics: (1) they must show the injustice of the distribution on the basis that the weight given to particular precepts of justice by certain institutions of society is skewed and unjust; and (2) they may not, if Rawls is correct, appeal merely to a lack of affluence or distributive shares in and of themselves.

Let us go on to the fourth question: "Are there any principles that, although they seem plausible initially, cannot be used to argue for or against preferential treatment in admissions?" In addressing this question, we may say that in Chapter Four we found at least four principles which, if used to argue for or against preferential treatment in admissions, seem to beg or to presume many of the important points
at issue. We pointed this out with respect to arguments based upon the principle of benefit, the principle of perfection, and the procedural interpretation of equality. With reference to arguments based upon the principle of benefit we pointed out how such arguments beg important questions of justice. In discussing arguments that appeal to perfectionist notions, we employed Rawls' criticisms of such principles, which essentially are that they are "unsettled and idiosyncratic" and as such cannot function as principles of social justice. With reference to the procedural interpretation of equality, we pointed out that arguments based upon it are inadequate since procedural equality is not a sufficient guarantee of substantive justice.

Finally, although we did not explicitly point this out within Chapter Four, it seems that we can say now that arguments based upon some principle that preferential treatment in admissions is wrong because it is undemocratic are not sufficient to show that preferential treatment in admissions is unjust. As we saw from Rawls' discussion of government intervention on behalf of future generations, the collective judgment may be mistaken. Hence, in one sense of 'democratic' we may choose to be undemocratic or, if you will, non-democratic in order to do that which is just. Such principles as we have summarized above, and discussed within, then, do not seem to
be those which ought to be used to underlie arguments for or against preferential treatment in admissions.

The fifth question asks: "Are there any special characteristics of the issue of preferential treatment in admissions to education that make the issue particularly difficult to resolve?" Of course, from applying A Theory of Justice to the issue we have found many characteristics particular to the issue which make it difficult to resolve. Yet, we shall summarize only two major characteristics which seem to make the issue quite problematic. First, the problem of justice between generations both from the perspective of ideal and nonideal theory is one feature of the issue of our concern that makes any resolution quite difficult to come by. What is it that one generation owes another, if anything? Rawls holds that what each generation must give is some contribution to the establishment and maintenance of just institutions. Yet, what do we do if a previous generation has not done such? Who rightly is to bear the burden?

The second characteristic which makes the issue of our concern a difficult one to resolve is the fact that higher education seems to be a borderline case of a public good. Hence, there seems to arise the related problem of how we are to balance claims of individuals who desire the good as a private good and claims which advocate certain programs so
that certain good public consequences might be promoted. This borderline status of higher education as a public good seems also to contribute to the problem of how the university ought to balance the precepts of distribution according to need and distribution according to merit.

**Conclusion**

We began our application by noting that hopefully the elements and issues which we would go on to discuss would be seen to be intimately related. Yet, although such a relationship is probably seen as good in terms of our application and its progression, it seems quite plausible that it is just this intimate relationship between the elements discussed that makes the issue of preferential treatment in admissions to education such a difficult issue to resolve.

Hopefully, we have profitted from this application of Rawls' theory to preferential treatment in admissions at least in as much that we have become somewhat clearer about what issues we must address in order to make some progress in resolving the problem. We we have made this little amount of progress, some further questions arise which are outside the scope of this investigation. That is, such concerns as whether or not arguments, discussions, or legal decisions concerning preferential treatment in admissions to education address any of the problems or issues which have arisen in our
investigation and which seem to be fundamental to the issue seem to be important matters worth investigating.

Finally, if we might engage in a bit of speculation after such a long analytic investigation, it seems that much of what we would find in the arguments over preferential treatment would probably be talk about classification of persons according to race. We have dealt minutely with this question although some take it to be the major concern in the issue of preferential treatment in admissions. It is an important issue whether or not the race of someone may be taken to be the classificatory basis in according preferential treatment. However, as a classificatory basis, the race of persons would not be the reason for according them preferential treatment. Rather, the reasons for according them preferential treatment would be couched in terms of the issues which we have discussed.

This, then, shows us that there is at least one difference between discrimination against Xs of the past, and (assuming that it is justified for the moment) preferential treatment for Xs in the present. For, in the past, the race of Xs was not only the classificatory basis but also the reason for treating Xs in a certain manner. However, if the classificatory device of the race of Xs turns out to be too broad, given that we have just reasons for according preferential treatment to certain people, we might choose to
use some other device such as socio-economic level. The
final point, then, is that the issue of race is not the whole
of the issue of preferential treatment in admissions to educa-
tion. In fact, we would have to deal with many of the same
issues no matter what classificatory device we would choose
to use. In the end, however, we may unhappy be called upon
to accept certain imperfections, as Rawls tells us:

In practice we must usually choose between several
unjust, or second best, arrangements; and then we
look to nonideal theory to find the least unjust
scheme. Sometimes this scheme will include measures
and policies that a perfectly just scheme would
reject. Two wrongs can make a right in the sense
that the best available arrangement may contain a
balance of imperfections, and adjustment of com-
pensating injustices. (Rawls, p. 279)

Recommendations

On the basis of this investigation, we here put forth
three recommendations. These recommendations are put forth
in some cases more as pleas than as recommendations, al-
though we here employ the conventional word in the heading
of the section.

First, then, as is obvious from our conclusion, it is
recommended that an investigation be made as to just how many
of the issues and concerns which we have seen as germane to
the issue of preferential treatment in admissions to education
are addressed by arguments, and more importantly, legal de-
cisions, on preferential treatment in admissions. We will
want to be sure that such important issues are addressed in any legal edict that we are compelled to follow. For, as Rawls tells us "...what law demands and what justice requires are still distinct." (Rawls, p. 349)

This point brings us to a second more general one. That is, because issues of social justice, such as preferential treatment in admissions, affect the interests of many people, persons sometimes tend to advocate a position before they are clear on the issue at stake. Our second plea, then, is one for clarity. That is, before such issues are argued, perhaps we should take some time to clarify them. Or, to again cite the words of Kant, "It is never too late to become reasonable and wise...." (Kant, p. 4)

With the point of clarity in mind, we are brought to our third recommendation which deals with the utility of Rawls' *A Theory of Justice* for philosophers of education. Many times a work such as Rawls' which is so influential and enterprising will bring together those who advocate the position of the work on one side and those who are against that position on another side. Such a coagulation seems to be healthy intellectually. Yet, a work such as Rawls' can be used for more than this. Because the work is so enterprising, it combines concepts in new ways, as well as creating new concepts. Hence, we are given new intellectual tools to work with, so to speak, with which we may hopefully more
fruitfully address problems that have heretofore baffled us. Now, in Chapter I we showed how it is that some matters of education and social justice are linked. Further, within the course of our investigation we noted that such issues as remedial education and compulsory education might be clarified by, for instance, Rawls' discussion of public goods. With all of this in mind, then, we now make a plea that philosophers of education begin to approach *A Theory of Justice* as a compendium of intellectual tools by which we may become clearer about issues of social justice and education, rather than as a manifesto to be advocated or rebutted. To put the plea another way, which is by now quite familiar to us, let us not engage in social philosophical casuistry.

Bibliography


Hare, R.M. "Rawls' Theory of Justice," *Reading Rawls*.


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