

The Pursuit of Accord: Toward a Theory of Justice With a Second-Best Approach to the Insider-Outsider Problem

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The hardest thing for any society to do is to avoid oppressing its least advantaged individuals. If we fail to find a truly inclusive set of basic principles, the social structure is not a true social contract but an insider-outsider contract, the kind criticized by Carole Pateman and Charles Mills.¹ One could say nearly the same thing about a set of natural rights that aren't as natural and undeniable as their proponents would like to believe. Although the rights in the set might be universal in some sense, the set chosen favors a group of insiders.

This article argues that most mainstream theories of justice offer first-best approaches to the insider-outsider problem. Although they have other second-best aspects, they presume that humans can create a basic social structure “that no one could reasonably reject.”²

This article argues to the contrary that no first-best solution to the insider-outsider problem exists. Reasonable objections exist to any set of principles complex enough to establish a basic structure. The mistaken belief that the insider-outsider problem is resolved creates systematic disadvantages for the least powerful people in political, social, and economic terms. Section 1 provides an overview of this problem. Section 2 gives ten reasons to believe the insider-outsider problem is unsolvable. Section 3 argues that four strategies to establish consensus fall short of that ambitious goal.

Section 4 suggests an alternative theory called “justice as the pursuit of accord” (JPA), which offers a second-best approach to the insider-outsider problem under the working assumption that consensus is impossible to achieve even if everyone is rational and reasonable. My earlier book, *Independence, Propertylessness, and Basic Income: A Theory of Freedom as the Power to Say No*,³ outlined JPA's theory of freedom. My future book, *Justice as the Pursuit of Accord*, will discuss JPA as an overall theory of justice. This article only very briefly previews that theory and its accompanying property theory.

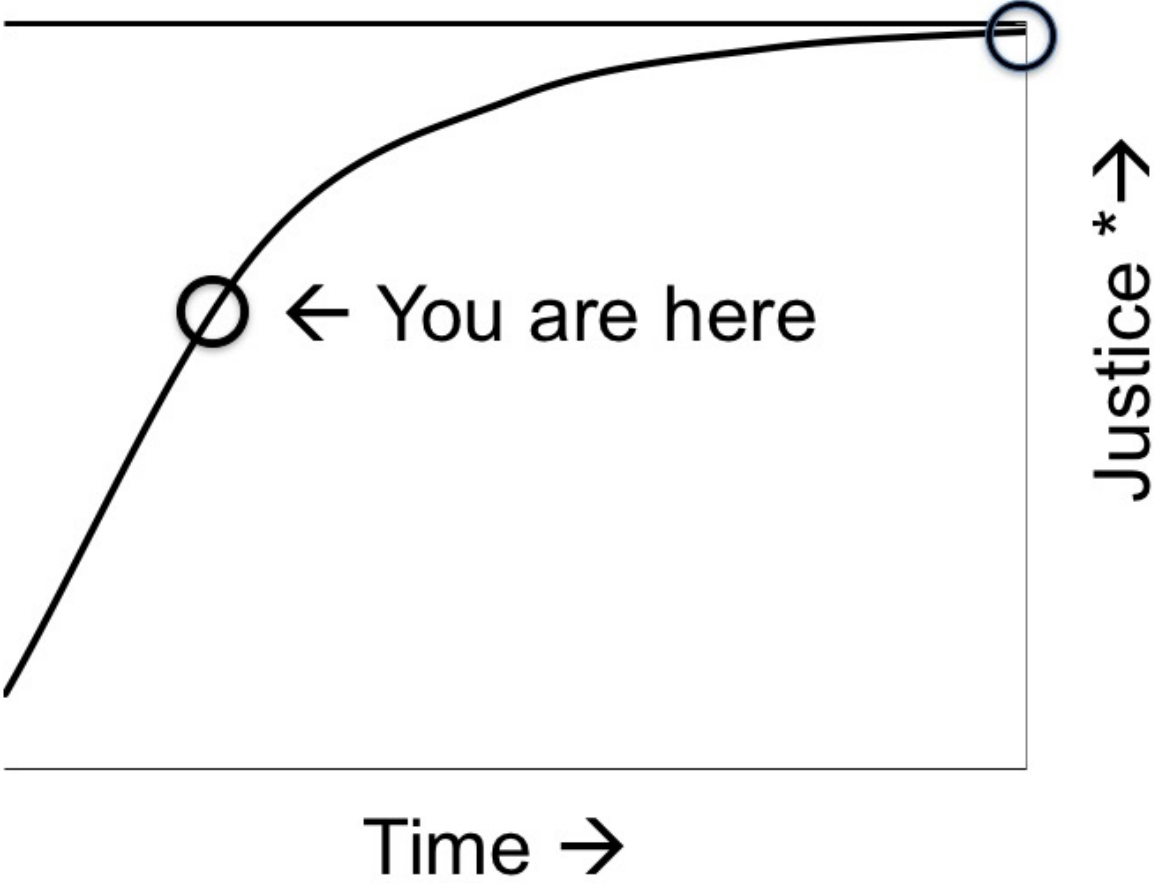
1. An overview of the insider-outsider problem

This article refers to various examples of natural rights and social contract theories that fail to fully eliminate the insider-outsider problem. Robert Nozick's “libertarian” “entitlement theory” (ET) is its primary example of a natural rights theory. John Rawls's “justice as fairness” (JAF) is its primary example of a theory from the social contract tradition. The literature this article can address is a miniscule sample of these enormous traditions, but hopefully it is enough to convey the novelty of the JPA approach.

The following graph illustrates the difference in approach between JPA and what I see as a common element in both social contract and natural rights traditions. It shows “time” on

the horizontal axis and “justice” (for lack of a better word) on the vertical access. Justice can be thought of as fully obtained when the insider-outsider problem is solved—the portion of people with reasonable, rational, or fully informed objections to existing social arrangements reaches zero.

Anyone above the line is what I call a “dissenter”—a person with a reasonable, rational, or fully informed objection to existing social arrangements. They can also be thought of as “outsiders” because they do not necessarily *voice* objections; their defining characteristic is that they *have* a reasonable one whether they voice it or not. They might be unaware that they have a complaint of justice. They might be unable to articulate their complaint, and if so, they might remain silent or voice unreasonable complaints instead.



The point marked “you are here” is far from justice, but on a path toward it. The path is an asymptote, eventually approximating but never quite reaching justice, because no society is perfectly just. The overconfident feature of most theories of justice is the belief they even approximate justice. They focus not on the path from here, but on the imaginary end-point, where the distinction between insiders and outsiders virtually disappears. In contractarian terms, society has solved the problem of “what principles can be justified to all reasonable citizens.”⁴ Rawls calls this point a “well-ordered society” with an “overlapping consensus.”⁵ In Scanlon’s words, society has introduced a “set of principles for the general regulation of behaviour that no one could reasonably reject as a basis for informed, unforced, general agreement.”⁶

The absence of *reasonable* disagreement about the principles of justice doesn’t imply the absence of disagreement. At least two forms of objection remain: (1) the principles of justice are basic; there is plenty of disagreement about substantive policy issues that aren’t part of the basic structure, and (2) there is *unreasonable* disagreement about the basic principles of justice.

I call people with unreasonable objections “recalcitrants” or “intransigents.” In addition to being irrational, insufficiently informed, and/or purely selfish, people might voice unreasonable objections because of a comprehensive doctrine, such as a religion, that they cannot reasonably expect others will accept.

Theories in the social contract tradition tend to treat recalcitrants as if they were signers. Either their imagined more rational, more reasonable selves signed on for them, or the people in charge (call them the “ruling coalition”) fully incorporated recalcitrants’ interests to remove any distinction between insiders and outsiders from the basic social structure. Recalcitrants have full civil rights and freedom to express their objections, but the ruling coalition doesn’t have to take these objections (or the possibility of unexpressed objections) as a serious challenge to the basic social structure, or as a reason to suspect that genuine oppression still exists.

For natural rights theories, the endpoint is reached when the social structure protects natural rights, which are found not by thinking about agreement, but by thinking about human nature. If the truly just natural rights system is in place, those who reject it must be irrational, unreasonable, or insufficiently informed about human nature, but the belief that they would agree if they were reasonable is not what makes the system just. Consistency with human nature justifies the system whether people agree or not. Nozick practically implies that those who refuse to recognize his set of natural rights are criminal.⁷

Therefore—in my terminology—natural right theorists also believe they have eliminated the problem of dissent but not the problem of recalcitrance. As in social contract theory, recalcitrants have the right to voice objections, but the ruling coalition doesn’t have to consider their objections as a serious challenge to the basic principles of society.

My criticism here is not of the treatment of recalcitrants in either tradition. We protect ourselves from them as necessary, but we treat them humanely, offer them to share the benefits of our social arrangements, and hope that they will see that it is in their interest to endorse social arrangements or at least to abide by them. My worry isn’t about the claims of unreasonable privileged people who might cry for more privileges.

My worry is that any theorist and any ruling coalition will fail to recognize its mistreatment of the truly disadvantaged, using the excuse of “unreasonableness” to force more onerous duties on disadvantaged people than they would if they recognize them as conscientious objectors to the social structure.

Supposedly, the ruling coalition is reasonable. All objectors are unreasonable. Recalcitrants exist. Dissenters do not. Of course, I want this to be true. It is the ultimate goal of justice. The first-best solution to the insider-outsider problem is to eliminate it by listening to and addressing all reasonable objections.

Supposedly, there is no dichotomy between insiders and outsiders. The people have put in place a decision-making procedure that everyone accepts as legitimate. Therefore, everyone views social decisions as the people’s decision even if they often disagree. Efforts to achieve legitimacy are essential. The assumption that those efforts are completely successful is dangerous.

Perhaps it is impossible for any set of basic principles to eliminate all reasonable objections to the social structure. Even if it is possible, perhaps no theorist knows how to identify those principles. Even if a theorist can identify those principles, perhaps no ruling coalition can be relied on to put them fully into practice. As long as any or all of these problems remain unsolved, the question of how to treat dissenters while they remain in dissent will always remain an issue for social justice.

Approaches that aim for first-best, might hit third-best: not only failing to eliminate dissent but treating dissenters worse than we need to. The belief that the first-best strategy for

dealing with injustice is so successful that all objections can be dismissed as unreasonable makes both rights- and contract-based traditions potentially oppressive.

JPA is a hybrid theory involving elements of both social contract and natural rights traditions, while rejecting the assumption that any structure eliminates reasonable objections. In terms of the illustration, JPA focuses on the path toward justice from “you are here,” where dissenters exist rather than about the endpoint. At “you are here,” we don’t know how to eliminate *all* reasonable objections, but we can treat dissenters better. As far as I know every hierarchical society that has so far existed has assumed away this problem. If theories of justice assume they’ve solved it, they give no guidance how to deal with the crucial problem we face right here, right now.

How do we know whether an objector is a recalcitrant (with unreasonable objections) or a dissenter (with reasonable objections)? In practice, the ruling coalition would decide. That power is dangerous; they will make mistakes. The central problem of justice throughout recorded history is not one of recalcitrant disadvantaged individuals refusing to recognize that social arrangements truly are in their interest but ruling coalitions that fail to avoid oppressing disadvantaged people because they don’t understand or empathize with them enough.

Theorizing only about the endpoint is a mistake because in reality, all we have is the path. In a second-best world, we are always pursuing social agreement, never managing to approximate it, never completely sure which objectors are recalcitrants or dissenters. In this world, a central question becomes: how should the ruling coalition treat dissenters? Endpoint-focused theories abstract away from that problem. Their only possible answer is to say that dissenters don’t exist: people putting the theory together thought long and hard about all problems that might motivate real dissent; once the theory is in place all remaining objectors are recalcitrants.

JPA is an attempt to refocus attention from the first-best issue of eliminating the insider-outsider problem to the second-best issue of how to minimize injustice, given the inherently insider-outsider nature of political systems. How can society obtain the widest agreement possible with the minimum negative impact on dissenters?

2. Reasons to believe all possible social structures are insider-outsider contracts

Consider ten reasons to believe or at least to assume that any possible social structure is likely to resemble an insider-outsider contract rather than a truly inclusive social contract. Most of these reasons need far more argumentation than possible within the space constraints of this article, which introduces them only minimally, leaving more thorough argumentation for my forthcoming book.

1. Although I don’t know a satisfying burden-of-proof theory, it seems reasonable that the burden should be on theorists who justify duties on the premise that no reasonable objections exist. The impossibility of proving that no overlapping consensus exists is a poor reason to base a theory of authority on the premise that it is fully achieved. In the absence of proof, I suggest the working assumption that either the theory or its application will fail to create a structure that no one can reasonably reject.

2. Bargaining theory gives good reason to reject the hope that any unanimously agreeable social contract exists. Negotiations don’t always have a “core,” a range of possible outcomes that are mutually beneficial. The probability of a core existing decreases as the number of people involved increases, because concessions needed to bring one person into agreement often cause others to drop out of agreement. This problem strongly implies that the

unanimous agreement of millions of people stuck together within national borders and with limited opportunities to split is extremely unlikely. Principled political beliefs are so diverse that theorist can't reasonably assume a core exists.

For example, probably every principled person agrees to prohibit murder, but principled disagreements exist about whether that prohibition is enforced equally or whether its definition should apply in some way to sentient non-human animals, fetuses, terminally ill people suffering from severe pain, and so on.

Negotiations commonly end in no agreement, forcing a return to the default position. The default position of social contract negotiations is unclear. Theorists often characterize the default as civil war or war of everyone against everyone, and suppose that everyone would drop their demands to the bare minimum to avoid that, but because people have competing beliefs about what bare minimum should be, this hope does not ensure a core exists.

Perhaps the more practical default option is an insider contract that labels outsiders as recalcitrants. If so, more advantaged people might develop very different beliefs about the reasonable bare minimum than disadvantaged people.

3. Informational problems might make it impossible to know enough about everyone's needs and concerns to build a basic structure that is just to everyone. A structure based on incomplete information will be systemically biased against the least advantaged, because theorists and policymakers are more familiar with their own relatively advantaged situations than those of outsiders.

For example, Rawls hopes people can agree to a list of primary goods (things that all rational people are presumed to want).⁸ But in practice, not everyone settles on the exact same list. Theorists can come up with their list; the ruling coalition will probably change it as they put it into practice. Even under the best democratic conditions, marginalized, disadvantaged people will have the least input in the process, and insiders lack the information to know what is most important to people in such circumstances.

Rawls uses "leisure" as a primary good in a way I suspect harms the least advantage people he obviously wants to help. As a primary good, leisure becomes something that otherwise disadvantaged people might consume too much of.⁹ He combines it with a principle of fairness by which "those who have submitted to these restrictions [by contributing] have a right to a similar acquiescence on the part of those who have benefited from their submission. We are not to gain from the cooperative labors of others without doing our fair share."¹⁰ He labels people who refuse to work an eight-hour day as "surfers" who "must find a way to support themselves and would not be entitled to public funds."¹¹ Ronald Dworkin similarly labels those who don't want to contribute to his version of the social project as "beachcombers."¹²

Perhaps Rawls and Dworkin lack the information to conclude the system reaches the overall level of fairness necessary to apply this fairness principle. Perhaps potential workers might refuse to contribute for reasons other than the desire to consume excessive leisure. These could include unrecognized talent, unrecognized disability, unfairness in the distribution of jobs, unnecessary inequality in pay or working conditions, non-mutually beneficial goals included as part of the joint project, and so on. Perhaps the workings of the labor market make the power to refuse employment a necessary tool to ensure the least advantaged contributors receive a fair share.

4. Self-serving bias compounds informational problems. Theorists and policymakers, being relatively advantaged, will think the system that advantages them is more reasonable than it would appear if they could really see the view from nowhere. Bias strongly favors an insider-outsider contract, because the practical question for the ruling coalition is not what rights do all people need to exchange with each other to avoid conflict but how little insiders can concede to outsiders without creating too much risk of revolt. This amount is probably much less than the minimum they need to concede to avoid oppression. If informational problems make the

ruling coalition unable to sufficiently understand the disadvantaged, systematic bias is likely to make them think that they are offering outsiders as much as reasonably possible when they actually offer something closer to the least they can get away with. Self-serving bias virtually ensures they will more often mislabel dissenters as recalcitrants than the reverse.

5. Many decisions that are basic to the structure of society have no other character than what people want—how people *want* to live, the laws they *want* to live under. For example, human treatment of the environment has enormous justice implications, but all of them, I will argue, exist because sentient beings have different preferences about the environment, and we can't make a first-best agreement that satisfies everyone. If one sentient being were alone on this planet, their environmental policy would have no justice implications. They would be free to balance tradeoffs environmental and greater consumption now in *any way they wanted*. The same would apply if the planet had 10 billion like-minded and fully informed people. They might do things that were short sighted, but not unjust. They could risk poisoning their environment if they wanted; they could keep it pristinely clean; or they could choose any point in between, depending on their attitude toward risk. But because people disagree about how to make that tradeoff, any decision amounts to one group of people imposing their will on others, and the issue takes on justice implications. If there is a process that all see as legitimate, even people who don't get their way might accept the decision as just. But if some people are consistently on the losing side of a process they see as favoring insiders and/or producing tyranny of the majority, they feel how harmful, unjust, and even deadly it can be to have other people's preferences imposed on them.

6. People are likely to move in and out of agreement overtime, making the contract unstable. This is why JPA uses the word "accord," rather than "agreement" or "contract." Theories take an unwarranted shortcut if they dismiss someone's actually existing disagreement to focus on hypothetical agreement in some original position. Social contract theorists in the direct Hobbesian tradition, such as David Gauthier, ask people to consider an original position they portray as a real alternative, such as widespread civil unrest or their imaginings about how people might live in the absence of the state.¹³ Rawls's original position does not literally refer to any past agreement that people would have reached and could not contest afterward. It is a thought experiment that individuals are asked to use when they are reflecting about social arrangements with the goal of fostering accord over time. But it does so by asking them to imagine that they are bound by a past agreement.¹⁴ This exercise is supposed to help people accept the arbitrary disadvantages that they are subject to, but that even society committed to JAF is unable to eliminate. Whether this method will satisfy people actually in the least advantage position is uncertain.

7. Any theory attempting to eliminate reasonable disagreement has to deal with the problem of reasonable disagreement over *both* the good and the right. This is both a reason to try to build an overlapping consensus and a reason to believe consensus might be impossible. Everyone does have an incentive to look for broadly applicable principles, but this incentive does not assure that they will find principles that are acceptable to everyone given their considered beliefs about morality. Reasonable positions about justice might be better understood as all principled positions. If theorists abstract away from the problems of principled disagreements about what justice is or of reluctance to set aside principled disagreements to find a consensus, they might assume more agreement than exists—or perhaps more agreement than is possible.

8. Beyond the factual informational problems and beyond the problem of disagreement about both the right and the good, ethics has to be conducted under uncertainty about ethics itself. No matter how carefully theorists have studied the issue and thought it over using their mechanisms such as the veil of ignorance, they must know that they are fallible human beings, who might have built a faulty theory of justice. This knowledge should give them reason to

pause before assuming that all objections to their social structure are irrational or unreasonable. Certainly, a more tentative theory is warranted, one that considers minimizing the maximum loss that would be created if the basic structure is not as ethically sound as its framers suppose. For example, Rawls could be right or wrong about his work obligation. If the response to ethical uncertainty is to minimize the maximum loss, it seems better to risk the possibility that the disadvantage might consume too much leisure than to risk the possibility that the advantaged will use the threat of economic destitution to force the disadvantaged to do work they might not have any obligation to do.

9. In practice, the reasonable-agreement standard helps justify oppression by giving policymakers permission to assume away dissenters as recalcitrants. Historical examples demonstrate that upper-class people consistently claim social arrangements benefit everyone no matter how much the lower class suffers. Many people have claimed that slavery and extreme poverty are consistent with mutual advantage.¹⁵

10. Philosophers have been unable to come to a consensus among themselves about what basic principles should be adopted by all reasonable people, although most of them seem sincere and reasonable. They are less vulnerable to some problems, such as the need to placate vested interest, that will affect a ruling coalition. A Rawlsian ruling coalition would have to dismiss Nozickians as recalcitrants, and a Nozickian ruling coalition would dismiss Rawlsians on similar grounds. Nozick complains that “Rawls is merely repeating that it seems reasonable; hardly a convincing reply to anyone to whom it doesn’t seem reasonable.”¹⁶ Fair enough, but Nozick hardly has a convincing reply to anyone to whom his argument for ET doesn’t seem reasonable. He simply dismisses them as unjust rights violators. The lack of consensus among seemingly reasonable, principled philosophers is good evidence (although not definitive evidence) that none of the existing theories of justice can produce an overlapping consensus among all reasonable people. That philosophers have been at it for thousands of years is at least prima facie evidence that they might never find such principles.

3. Reasons to believe strategies to eliminate genuine dissent won’t be fully successful

Political philosophers are aware of many if not all of the problems mentioned in the last section. I’ll discuss my dissatisfaction with four broad strategies to eliminate all genuine dissent in light of them.

1. Splitting: some theorists (including anarchists and both left and right libertarians) suggest splitting as a solution to disagreement, so that differently minded people could group themselves into communities based on full agreement.¹⁷ Although splitting works for some things (e.g. a beach for nudists and one for people who don’t want to see them), it is not a realistic solution for establishing the boundaries of a society covered by a basic set of principles, because emigration does not work for everyone. People develop ties to other people and to places. Asking them to leave is not always offering them freedom; it can be punishing them with banishment. Many conflicts about justice are also conflicts about who has the right to be on this particular spot and what should the laws be over in this particular territory. Splitting should be tried when possible, but in a crucial way, we are all stuck here together for a while; we have to find a way to get along. Staying out of each other’s way is going to be part of the solution, but it can’t be the whole solution.

2. A “thin” structure: liberals including both libertarians and liberal-egalitarians claim to create a thin social structure with minimal demands on people, one that will allow everyone freedom to pursue their own goals to the greatest extent possible. Therefore, supposedly, the

thin structure provides a core (either a system of rights or a hypothetical contract) to which no one can reasonably object. Although I agree that the ruling coalition must strive for the thinnest reasonable structure, I doubt any system can be both thin enough to eliminate dissent and thick enough to create a working structure. Rawlsian and Nozickian systems are “thin” in very different ways. Making it thinner in the Rawlsian sense will make it thicker in the Nozickian sense and vice versa. A truly thin compromise incorporating only principles endorsed by both Rawls and Nozick would involve only a few basic ideas, such as freedom of expression and freedom from direct bodily harm, but it would give the ruling coalition no way to treat resources. The two structures share no principle by which private, public, or common property can be created.

My use of Rawls and Nozick as primary examples of opposing theories might imply I think of libertarians as the outsiders in Rawlsian system, but the suspected outsiders should always be the politically, economically, and socially disadvantaged. Everyone else has the opportunity to do what they do and chooses not to. They do not have the opportunity to do what everyone else does.

In fact, both Nozick’s and Rawls’s structures are thick in ways that harm disadvantaged people. I have argued elsewhere that right-libertarian theories including ET involve one-sided and onerous duties for the least free individuals in their supposedly thin and freedom-promoting structure. For example, one group gets to own the entire earth and pay no compensation to those who therefore own nothing outside their own bodies. Those made propertyless by these rules are effectively forced to work for the owners, following their orders, often for their whole lives.¹⁸

Rawls’s use of leisure as a primary good, mentioned in section 2, might be a “thick” idea. Using it in combination with the principle of fairness and a definition of society as “a mutually advantageous cooperative venture”¹⁹ allows Rawls to severely curtail the application of the difference principle. It does not maximize the advantages of the least advantaged person *born* into society, but the least advantaged contributor to the social project.²⁰ That is, JAF rules out considering alternative social arrangements that improve the advantages of disadvantage people by reducing their contributory burden to zero. Notice that this limitation is based on the belief that systematically disadvantaged people are being unfair to relatively advantaged people by refusing to take jobs contributing to the system that produces those systematic advantages and disadvantages.²¹ The would-be noncontributors forced to take jobs they hate to avoid economic destitution might not agree that these systems are so thin. The search for thinness must be a substantial part of the strategy to pursue accord, but the assumption that that search has been completely successful must never be used to justify potentially thick obligations.

3. Imagining a horrible alternative: many contractarian and libertarian theories take another short-cut to assumed agreement. They imagine a natural starting point that happens to be horrible, and declare that everybody consents to the structure because it saves them from that horrible alternative. Although Rawls avoids employing this strategy,²² others have been using it for centuries.²³ Hobbes apparently first popularized this strategy in social contract theory.²⁴ Locke applied it to property theory in his “proviso.”²⁵ Some social contract theories say something to the effect of, *every rational person prefers just about any state to statelessness, except the rare persons who just loves violence and death and insecurity*. Many Right-libertarian theories say something to the effect of, *all rational people—even the propertyless—prefer a society with private property except maybe the rare person who loves poverty*.

An earlier book, *Prehistoric myths in modern political philosophy* criticizes both contractarian and right-libertarian applications of this approach. It shows that they use this counterfactual claim as a necessary premise and that they have offered little or no evidence for it, relying on a presumption of obviousness.²⁶ The book presents evidence that the least

advantage people state societies are even worse off than historically observed people in stateless societies that treat land as a commons. Extreme disadvantaged exists today, not because it is impossible to make everyone better off, but simply out of neglect and mistreatment. The myth that everyone benefits compared to some imagined alternative helps advantaged people to carry on that mistreatment.²⁷

Of course, the reasons for dissent multiply if one believes—as Rawls does—that the social structure must not simply be better than one particularly horrible alternative, but it must be better in some relevant way than all other reasonable alternatives. On this issue JPA and JAF compatible.

4. The ruling coalition as the arbiter of reasonableness: everyone hopes some ruling coalition enacts principles capable of eliminating injustice, and that everyone will see this is so. JAF asks advantaged and disadvantaged people to imagine that if they had been in an original position, they would have chosen the basic social arrangements even under the assumption that they would be the least advantaged person. Hopefully, this kind of reasoning will convince even the least advantaged individual to accept that their position in society—seeing it justified by rational arguments rather than the product of someone’s preferences or cultural views.²⁸

But suppose, using this reasoning, an advantage majority consistently finds the arrangements reasonable while a disadvantaged minority consistently find the arrangements unreasonable. After long discussion, the disagreement remains. It’s not clear to me exactly what most theorists believe should happen at this point, but what ultimately must happen in practice seems obvious. At some point the ruling coalition decides they discussed the issue enough; they cannot be any further distracted by the recalcitrance of a few because they have indeed found a “set of principles ... no one could reasonably reject.”²⁹ The advantaged will declare the arrangements reasonable and the objectors unreasonable, finding textual justification in almost all contract-based theories.

That is, only the ruling coalition’s belief about reasonableness really counts. The test of reasonableness is not whether the least powerful people find social arrangements unreasonable but whether powerful people find the objections of less powerful people reasonable. World politics has a long history of advantaged people convincing themselves that the objections of disadvantaged people are unreasonable.³⁰ Relying on their self-reflection is no mechanism at all. Only an omniscient deity could know for sure whether the social system is a truly inclusive social contract among all reasonable people or an insider-outsider contract imposed over the objections of some reasonable people. But the ultimate mechanism we have for ensuring reasonableness simply asks the ruling coalition to be the judge in their own case. Don’t tell the disadvantaged when their last reasonable objection has been eliminated. They’ll tell you. Until then, respect their position. Ask as little from them as you possibly can.

4. The basics of JPA

Like contractarianism, JPA endorses the goal of getting as many people as possible to sign on to the social agreement, but it does so under the presumption that no social contract and no set of natural rights can eliminate all rational, reasonable objections. Accord is pursued, not reached, and the treatment of dissenters becomes a central issue for justice. If no ruling coalition can eliminate the insider-outsider character of politics, what justifies any authority taking power, determining the social structure, and making rules over the reasonable objections of dissenters?

This section describes JPA as one attempt to answer that question.

JPA replaces reasonable disagreement as principled disagreement. All consistent sets of principles beginning on the egalitarian plateau are to an important extent reasonable. This is a

broader concept than one supposing all reasonable people will recognize a specific set of natural rights or will set aside their overriding beliefs about natural rights to find something strategically acceptable to others.

Society is not necessarily “a mutually advantageous cooperative venture” as Rawls conceives of it,³¹ but simply a group of people stuck together in the same territory with limited opportunities to separate.

JPA has no moral default position in case of no agreement. All social structures—including anarchy and partition—involve some group of people imposing some way of doing things on people who might have principled objections to it. The practical default position in case of no agreement is not the state of nature, nor is it usually civil war, but an insider-outsider arrangement in which one group imposes its will on another.

Unlike JAF and other theories, JPA rejects the assumption that members of society are motivated to contribute to the cooperative project because they judge it to be fair. Instead, some people who are stuck in the territory might have principled reason to reject participation. Although cooperation benefits them in some ways relative to some alternative, it might not benefit them overall compared to an alternative that a principled person could believe is ethically superior. Such people do not *voluntarily* accept the benefits of social cooperation. Whatever benefits they receive are accepted *involuntarily* and might reasonably be perceived as inadequate compensation for being unable to do things their way.

By “accord,” I mean neither a hypothetical agreement nor a past contract that one is now bound by despite objections, but a literal in-the-moment agreement. This method has advantages and disadvantages over Rawls anonymous hypothetical original position, but that discussion will have to wait for my forthcoming book.

I assume that a majority accord is possible but consensus is not. Therefore, dissenters will exist no matter how hard the ruling coalition pursues accord, and the treatment of dissenters remains a problem for social justice. They can’t be assumed to endorse either the legitimacy of the process or the reasonableness of the outcome. Both the ruling coalition and dissenters are bad judges in their own cases. We cannot always be sure who is right. In such a situation, the ruling coalition is akin to a club: a group of like-minded people doing things their way.

The ruling coalition is a special kind of club that inherently dominates a territory because people are stuck together with limited opportunities to separate. Assuming all possible social structures are always and everywhere insider-outsider contracts, what is the most just an insider-outsider arrangement can be? The answer to this question has to come from some basic notion of equal and equitable treatment. As I’ve argued in my earlier book and will elaborate further in my forthcoming book, the answer involves basic civil rights, legal equality, democracy, respect for freedom in both the status and scalar sense of the term, and the duty to stay out of each other’s way. Therefore, JPA holds the ruling coalition to three requirements to justify the social structure: the widest-possible accord, the minimum negative impact on dissenters, and constant striving for greater accord. All of these are duties that the ruling coalition takes on because it assumed power over the objections of outsiders. Although seeking accord is probably something any ethical person should do, JPA is a theory of social justice rather than individual just behavior. The idea is that to justify holding power over dissenters, the ruling coalition must set up an institutional structure dedicated to bring dissenters into accord.

JPA is stricter than social contract theory in some ways and less strict in others. It is stricter in the sense that it requires literal accord (actual current agreement rather than past non-withdrawable agreement and/or current hypothetical agreement). But it is less strict in the sense that it does not assume universal accord is possible and therefore does not demand the structure achieves unanimity. Yet, JPA becomes stricter again because relaxing the unanimity requirement brings in a new responsibility: the just treatment of dissenters.

The first criteria, maximum support, means the literal consent of the largest number of people, which in practice is usually majority support, because super-majority rules tend not to protect minorities but to protect those who benefit most from existing arrangements.³² The first and second principles can come into conflict: a smaller group might treat dissenters better when a larger group would treat them worse. This difficult problem is not unique to JPA. Any democratic theory of justice faces problems like this unless the theory defines justice as anything the majority decides. The potential conflict between democracy and the respect for any other principle of justice is, in fact, yet another reason to believe that no social structure can successfully justify itself to all reasonable people.

The third criterion overlaps with both of the others. One can hardly reach the widest possible accord without continually striving to bring more people into agreement. The things the ruling coalition can do to minimize their negative impact on dissenters might also help to bring them into accord. But the effort to widen the accord stresses one particular goal of the just treatment of dissenters. Minimum negative impact is the requirement to ask as little as possible from dissenters as an end in itself; the effort to widen accord stresses treating dissenters well to help bring them into accord.

I have no objection to the efforts social contract theorists suggest to try to achieve consensus, only with their belief that any strategy actually achieves consensus even if that consensus is limited to reasonable people. Hobbes believes that the provision of a safe environment is enough to assure consensus among everyone who likes safety.³³ Rawls, Scanlon, Dworkin, and others devote hundreds of pages to consensus-building strategies, most of which are very helpful (e.g. Rawls's primary goods, the difference principle, efforts to make sure disadvantaged groups can voice their objections, and so on). My objection is the assumption that those efforts are completely successful. If the ruling coalition assumes they have achieved unanimous reasonable agreement, they will stop striving for even greater agreement and they will impose more obligations on the disadvantage that they would if they recognized the objections of the disadvantage as reasonable. Although the ruling coalition must attempt to come up with a basic structure that no one could reasonably reject, they must also assume they have failed in that effort, which implies that they need to reduce the obligations they can impose on disadvantaged people to the bare minimum.

The requirement of minimum negative interference with dissenters has at least three important implications. First, following from the duty to stay out of each other's way are the requirements that everyone should have equal access to resources unless unequal division is in the interest of those with the least access, and those with relatively more access to resources must compensate those who have less. These two requirements imply the highest sustainable Universal Basic Income (UBI), which beneficiaries can choose to use either to buy resources or to buy services and finished goods in compensation (see the discussion of JPA property theory below).³⁴ Philippe Van Parijs's suggests the same policy but for different reasons.³⁵ For a discussion of the differences see two earlier works.³⁶

Second, the ruling coalition has the responsibility to concede as much political power as possible to disadvantaged individuals. This responsibility involves not only familiar civil rights, legal equality, voting rights, rights to organize, and so on, but also that the ruling coalition must look for ways to concede power to them as individuals. My earlier book suggests what one might call a right to withhold participation. If this institution is in place, each side controls something the other does not. The ruling coalition decides the terms of participation. Potential dissenters decide whether they will participate. The ruling coalition says that we are trying to build a mutually beneficial project. We don't assume we have earned the right to demand your participation. We will offer you terms that we hope will make you want to participate. But if not we will stay out of your way as much as we can, given the territorial constraints we all live under. Community is good. A humane community is built on the choice

of individuals to participate when they could have done otherwise rather than by making it impossible for them to do otherwise whenever relatively advantaged people decide that choice is unreasonable.

Third, as my 2012 book argued³⁷ the ruling coalition has a responsibility to protect every individual's status as a free person in their relations with other individuals. This responsibility overlaps with the second, but it has broader motivation and implications. The book argues that that status freedom should be understood as effective control self-ownership, essentially freedom as independence or freedom as the power to say no. Individuals have a responsibility to stay out of each other's way sufficiently that they neither directly nor indirectly force the other to do their bidding.

Humans need resources to survive. If any group of people dominates resources so that a person cannot access enough resources to meet their basic needs, that group has taken power not only over those resources, but also over that person. She has no effective power to refuse whatever they demand she does to get access to resources. Although forced compliance is indirect, it is no less coercive, no less a denial of an extremely significant negative liberty. Only force can establish control over an environment that was here long before humans. It does not matter whether the group controlling resources is a king, a democratic government, a group of property owners, or some other grouping. People without access to the resources they need to survive and thrive are unfree to refuse whatever at least one member of the group controlling resources demands.³⁸

Any group that dominates resources in a region, therefore, must compensate individuals at least enough that they can meet their basic needs so that they remain free in their interactions with others. Any pervasive property rights system requires a sufficiently large UBI to remain consistent with individual status freedom.³⁹

All three implications of how the ruling coalition should treat dissenters imply (among many other things) the responsibility to maintain a UBI large enough to live on and/or at the highest sustainable level. Individuals are compensated as much as possible for rules that give others more access to resources and that they might reasonably object to; they retain some form of political power at the individual level;⁴⁰ they have access to enough resources to maintain their status freedom. UBI functions both as compensation and as a form of internal exit. Although we cannot stay out of each other's way sufficiently so that every individual who objects to social arrangements can join a society they fully endorse, we can allow dissenters to live among us without forcing them to actively contribute to our shared project, while we compensate them as much as possible for the questionable aspects of the social structure we force on them. We do so in part because we admit we don't know how to build a social structure without any questionable aspects.

These requirements place a constraint on the possible property rights regimes that might exist under JPA, but they do not constitute a theory of property. The other JPA requirement for establishing a property rights regime is that it should follow from the literal accord of as many people as possible. The effort to create a property rights accord is a major part of my forthcoming book. The following paragraphs preview it both because of property's importance to JPA and to illustrate the effort of constructing social arrangements that follow from accord.

JPA does not assume any potential property rights regime is the *right* property rights regime. Human society has a wide range of options of property rights regimes. Resources could be a commons, for everyone's use but no one's ownership. They could be public property, devoted to specific public projects. They could be divided into private property under an infinite number of different terms—different regulations, lengths of tenure, rules of taxation, and so forth. Any portion could be common, public, and private. None of these is naturally the right regime and none of them is naturally the default point for no agreement.⁴¹ All property in assets external to the human body are made out of resources that were here before humans. The

maintenance of any property rights regime implies imposing duties on people who might have principled objections.

The property rights regime is a matter of competing preferences, and therefore, in a first-best scenario, it would be determined by an accord between everyone. Propertarians since Locke have argued that the impossibility of what I call a first-best property rights accord somehow implies individuals have the right to “appropriate” unequal amounts of resources, making them into property and thereby imposing duties on others without their consent. JPA instead calls for a second-best approximation of a property rights accord, which involves striking a compromise between many competing preferences (bringing a majority into accord) and minimizing the negative impact on people who cannot be brought into the accord.

The imposition of duties has to be reciprocal: I can’t murder you; you can’t murder me. But reciprocity is not sufficient to ensure a duty is just. For example, rules saying all the world is a commons or saying that all the world is divided into equal-value plots are both reciprocal but imposing one of these regimes on people who prefer another has strong justice implications.

Despite the widely recognized importance of reciprocity, most or all of the world’s property rights regimes distinctly lack it. Governments coercively enforce a situation in which a group of property owners controls all the resources within their territory; the group controlling resources pay no direct compensation to those who are, therefore, denied access to resources.⁴²

Unequal control of property can be made reciprocal if owners pay the full value for the duties they impose. But what is the full value? Left-libertarians suggest the overly simple solution of taxing away the market value of the return on resources leaving the rest of the monetary value of the world’s property to owners and employees as the market determines.⁴³

Although this idea is far superior to the current system, by taking the market price as given, it involves a forced sale. It includes no negotiation of price and terms of sale between the person imposing duties (saying this resource is mine) and the people those duties are imposed on (everyone else). Market prices are social constructions that depend on morally arbitrary market conditions and policy-determined background conditions. People with little or no property have the least input in determining those market valuations. Market prices measure how much property owners value putting others under the duty of respecting property rights under the current terms of ownership, but they do not measure how much nonowners value having those duties imposed on them nor do they measure how much anyone would value property under different terms (such as length of tenure and regulatory rules).

A first-best property rights accord would be a negotiation between potential owners and potential non-owners who come to an agreement over which resources remain in common, which are made public, which are privatized, and what terms of lease apply. Owners would always like to pay less for and have fewer restrictions on their use of resources. Nonowners would always like to receive more compensation and would probably like to put more restrictions on owners’ uses of resources, but they willingly accept the negotiated price and terms when they could have done otherwise.

My suggestion for a second-best approximation of that accord is that government treats the nation’s resources—the environment—as the people’s endowment, and acts as its custodian with a fiduciary responsibility to act in the interests of current and future generations. They use democratic means to determine what differing beliefs exist for how many resources should be common, public, or privatized and what price and terms of privatization might be acceptable. They offer resources for lease, using their monopoly power with the goal not simply to maximize profit, but to maximize the long-term value of the people’s endowment—in the full sense of “value” not simply financial value.⁴⁴

Potential buyers decide whether they want resources on those terms, creating a useful feedback mechanism that might give the ruling coalition reason to revise its decision when they don’t sell as many resources as they expected. This method reaches an accord between the

buyers of resources and the sellers—people who vote in favor of the price & terms of regulation—in the sense that both groups willingly accept the deal when they could have done otherwise. Voters could have set stronger terms. Owners could have refused to buy resources, gone into dissent, and declined active participation. If so, they would have been allowed to live off the UBI in compensation for the fact that others imposed a property rights regime that they wanted no part of.

I'll address three questions that might occur to readers. First, can society's wealthiest person be a dissenter? Yes and no. I would hope that they would recognize they have more access to resources than anyone else in society, and they have willingly accepted the terms required of them to maintain that access when they could have done otherwise, which demonstrates much greater accord than any existing society can claim from workers. But they might still believe they should get more for less, and I can't prove their belief is unreasonable. So, yes, they are dissenters, but legal equality requires equal compensation for all dissenters. The compensation we offer is UBI, equal eligibility for government services, and civil and political rights. All dissenters believe compensation is not enough (or they wouldn't be dissenters), and all have the same right to voice their complaints.

Second, how is this treatment of resources different from treating them as joint property? Resource owners do not pay for the resources per se but for the duties that their control of resources impose on nonowners. If the outcome of the resource accord was to make all investment capital public property, the ruling coalition would still owe individuals compensation for duties that regime imposes. Taxes are not an imposition on individual ownership but the justification of it. The reward for paying taxes is the right to hold property—the legally enforced right to hold others to the duty of refraining from using the resources that property is made out of.

Third, other than the use of monopoly power discussed above, how does this proposal differ from the left-libertarian strategy of taxing resource rents? Although rent taxes are a useful device, the argument here has no ethical tie to rents. All property external to the human body is made partly out of resources. Any tax or regulation of property is part of the condition of holding those resources as property.

With revenue at least in part financing a UBI, each person pays for the resources they control (the obligations their property rights impose on others) and receives a payment for the resources that others control (the obligation other people's property rights impose on them). Net contributors control more than the average amount of resources. Net beneficiaries control less than the average amount of resources. The money received by net contributors gives them access to services in compensation for having access to fewer resources than net contributors.

In a second-best property rights accord, people living off a UBI might be satisfied resource sellers, people with special disadvantages, or dissenters. Satisfied sellers are people who are happy to accept UBI in compensation for having access to fewer resources than everyone else. People with special disadvantages want to participate more but are prevented by disability or unrecognized ability. This category overlaps with dissenters, whose relationship to the property rights accord is discussed above.

The existence of dissenters, the entrance of new generations, and the reasonableness of humans changing their minds all imply that the accord must be revisable, but this provision has to be balanced against property holders' need for secure tenure and reasonable expectations.

Readers will have many unanswered questions. This brief discussion leaves out many details and requires much more supportive argumentation, both of which I promise in my forthcoming book. I hope that this overview provides of very minimal introduction to one method of creating a property rights regime that follows from the accord of as many people as possible and minimizes the negative impact on those who cannot be brought into accord.

The hope of JPA is simple. By bringing the majority into accord, by minimizing the negative impact on those left out of accord, and by constantly trying to bring more people into accord, we move forward on the path toward a more just society. We do not instantly create an arrangement to which no one could reasonably object. Moving forward on the path in the awareness of our deficiencies is probably the best a theory of justice can offer.

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Notes

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