ABSTRACT: There is an odd proximity between Hayek, hero of the libertarian right, and Rawls, theorist of social justice, because, at the level of principle, Hayek was in some important respects a Rawlsian. Although Hayek said that the idea of social justice was nonsense, he argued against only a particular principle of social justice, one that Rawls too rejected, namely distribution according to individual merit. Any attempt to make reward and merit coincide, Hayek argued, would undermine the market’s price system, leaving us all poorer and less free. Like Rawls, Hayek held that we should assess social institutions from behind a veil of ignorance, and he thought that doing so pushed us toward egalitarianism. Most of the distance between Hayek and Rawls at the level of policy stems from Hayek’s optimism about the operation of markets, his equivocation about the meaning of central concepts, and his appeal to under-argued slippery slopes. Hayek wavered, however, between claiming that private property and markets benefit everyone, compared to the feasible alternatives, and the principle that they maximize the opportunities of a randomly selected member of society, i.e., aggregate opportunity. Contemporary Hayekians claim that capitalism raises the position of the worst off in the long run, in future generations, whereas Rawlsians insist that inequalities between social positions should benefit the worst off now.
Friedrich Hayek (1976) famously called the idea of social justice a “mirage.” In case there might be any confusion about his view, he also called it a “will-o’-the-wisp” (ibid., 99);1 an “empty formula” (Hayek 1979a, 3); “strictly,” “necessarily,” and “entirely” “empty and meaningless” (Hayek 1976, 68, 69, xi); a phrase that “meant nothing at all” (ibid., xii, 33), that had “no meaning whatsoever” (ibid.) and was thus “vacuous” (ibid., 64, 97); “a quasi-religious belief with no content whatsoever” (ibid., xi–xii), a “primitive . . . anthropomorphism” (ibid., 62, 75) or “atavism” (ibid.); a “superstition” (ibid., 66), like believing in witches or the philosopher’s stone (ibid., 75); a “hollow incantation” (ibid., xii), like “open sesame” (ibid., 67); a “humbug” (ibid., 90); not an error but merely “nonsense, like the term ‘moral stone’” (ibid., 78).

Hayek thought that the idea of social justice was a particularly dangerous superstition—“that incubus which today makes fine sentiments the instruments for the destruction of all values of a free civilization” (Hayek 1976, xii)—leading to “the destruction of the indispensable environment in which the traditional moral values alone can flourish, namely personal freedom” (ibid., 67).2 The phrase “social justice” had become a source of “sloppy thinking and even intellectual dishonesty” (ibid., 80), a “dishonest insinuation . . . intellectually disreputable, the mark of demagogy and cheap journalism which responsible thinkers ought to be ashamed to use because, once its vacuity is recognized, its use is dishonest” (ibid., 97). Hayek was appalled that “social justice” had spawned the evidently ridiculous idea of “global justice.”3 In his later work on the errors of socialism, Hayek called the word “social” a “weasel word,” confusingly used to qualify over 160 nouns, from social accounting to social work. He referred to “social justice” as “much the worst use of ‘social,’” one that “wholly destroys” the meaning of the word it qualifies, a “semantic fraud.” And he noted with alarm that the term had “already perverted the thinking of a younger generation,” citing David Miller’s recent Oxford doctoral thesis, entitled “Social Justice” (Hayek 1988, 114–18).

Given all of this, one is naturally surprised to find Hayek (1976, xiii) saying that the differences between himself and John Rawls are “more verbal than substantial” and that they agree on “the essential point”: that principles of justice apply to the rules of institutions and social practices, but not to distributions of particular things to particular people (ibid., xiii, 100). After all, Rawls often deployed the term Hayek hated in A Theory of Justice,4 using “social justice” as a qualifier of principles and
standards (Rawls 1999, 4, 5, 7, 47, 290); conceptions and theories (ibid., 8, 9, 10, 16, 21, 85, 92, 100, 135, 285); convictions and considered judgments (ibid., 18, 34); purposes and ends (ibid., 179, 188); matters, concerns, and standard cases (ibid., 50, 76, 92); and questions and problems (ibid., 39, 78, 92, 118, 132, 135, 136, 174, 479). Rawls also spoke of “the standpoint of social justice” (ibid., 40, 49, 91) and he said that principles of justice “define the appropriate distribution of the benefits and burdens of social cooperation” (ibid., 4, 6, 8).

The phrase “distributive justice” was also the target of Hayek’s ire." He claimed that people had misread Rawls, ignoring his point that if a distribution results from just institutions it is just no matter what it is. Yet for Rawls, justice in institutions was itself defined at least partly in distributive terms. If one thinks of the familiar contrast between classical liberalism and social-justice liberalism, Rawls would seem to be a social-justice liberal. So how could Hayek have claimed to be in agreement with Rawls?7

The odd proximity of Hayek and Rawls has been noted in the past. From the left, it has been argued (e.g., Connin 1985) that if Hayek can agree with Rawls, there’s something wrong with Rawls. From the right, Ayn Rand referred to Hayek’s views as “poison.”8 In the middle, some hold out hope for a “Rawlsian” synthesis (e.g., Lindsey 2006; Wilkinson 2006 and 2008).9 The prospects for such a synthesis are quite good because Hayek is in some important ways a Rawlsian—at the level of normative principle, but not at the level of policy recommendations. I will outline four main areas of Rawls-Hayek convergence: the importance of “pure procedural justice,” the irrelevance of merit, the use of a veil of ignorance, and the principle that inequalities should benefit everyone.

When one presses for a coherent and morally plausible articulation of Hayek’s principles, the results are more egalitarian than one might have expected. Although Hayek does not attribute intrinsic moral value to the equal distribution of economic resources, under many empirical conditions his principles allow for policies that limit inequality and benefit the worst off. Hayek manages to avoid these implications by equivocating about the meaning of central concepts and by making implausible slippery-slope arguments about the lack of politically stable intermediate possibilities between a minimal, nightwatchman state and the totalitarian order that would be necessary to achieve perfect equality. There is thus truth in the claim that Hayek and Rawls disagree about empirical
(economic and political) questions, rather than about philosophical principles (Arthur 2008).

However, at the level of principle, Rawls’s position is significantly more egalitarian than Hayek’s in two respects. First, for Rawls political equality can constrain inequalities that satisfy the difference principle. Second, Rawls’s difference principle allows for inequality only if it immediately benefits the worst off, whereas Hayek thinks that current inequality is justified if it helps the worst off in the long run.

The Irrelevance of Hayek’s Conceptual Claims

While Hayek placed great importance on his conceptual argument against the idea of social justice, his conceptual claims actually do little to undermine the case for social justice.

Hayek’s defense of the claim that “social justice” is meaningless starts from the premise that the concept of justice applies only to how people treat each other, not to states of affairs as such (Hayek 1976, 31). When applied to a state of affairs, the terms “just” and ”unjust” have meaning “only in so far as we hold someone responsible for bringing it about or allowing it to come about” (ibid.). But while Hayek never tires of repeating that social justice is meaningless, when he is being careful he says that the term is meaningless in a market economy (ibid., 64, 67, 68, 69, 81, 91, 96). In a market economy, the distribution of economic benefits is the product of myriad individual actions, each based on different information, in pursuit of widely differing goals, with the result that no one could have foreseen or intended to bring about the resulting distribution. Thus, Hayek argues, it makes no sense to label as just or unjust the distribution that arises in a market economy.

This conclusion is flawed in two ways. First, even if no one can be held responsible for having brought about a particular distribution of benefits in a market economy, there is still an open question about whether people can be held responsible for allowing this distribution to persist: Even if I didn’t cause poverty or inequality, I might have the ability and the duty to do something about them after the fact. If I did have such a duty, this poverty or inequality would be wrong, and perhaps even unjust, despite the fact that I didn’t originally bring it about. Libertarians might deny that people can rightly be forced to aid each other or share fairly in the benefits of cooperation, but Hayek does not make that argument. In fact, he implicitly rejects it by accepting the
legitimacy of state provision of income support for those who can’t support themselves in the market.

Second, even if we don’t have individual duties to remedy or correct distributive outcomes, we might have a collective duty to design institutions in accordance with distributive principles. Hayek admits that questions of justice arise regarding the design and reform of the rules under which individuals interact. Different decisions about how to delimit rights of property and of contract will have different implications for the distribution of economic advantage. Such decisions could be categorized as just or unjust if there were any duties of distributive justice. Hayek’s premise about the interpersonal nature of claims of justice therefore does not advance his case against social justice very far, at least without further normative premises that he does not provide. The real questions are ethical, not conceptual or linguistic.

The Non Sequitur of “Spontaneous Order”

Hayek’s fundamental argument against social justice is that it is impossible within the “spontaneous order” of a “great society” or “open society,” i.e., a market society, and that we have decisive reasons for preferring market society to the alternatives. To understand what these reasons are and why they must take precedence over social justice, we need to know what social justice is and how it conflicts with the spontaneous order of a great society.

Hayek’s idea of spontaneity refers both to the origin of the rules that give rise to social order and to the character of an order even after the rules have been modified by intentional acts of legislation. Originally, human societies were (in part) the product of evolution rather than of conscious design. We didn’t start out as the individually rational consequentialists posited by economic theory, but as herd animals that slowly developed complicated social norms and eventually explicit rules. These rule-governed orders were subject to selection pressures. A rule that disrupted social life or weakened the group in competition with other groups would tend to be weeded out. A rule that promoted social cohesion and strength would tend to be selected. Thus, over the course of millennia, systems of social rules evolved that were far more complicated and based on far more information than any single agent with limited cognitive capacities could ever have designed.
However, the fact that a social order originated in evolution does not prove that social justice is undesirable. It may caution us about revising existing rules and practices since they may contain wisdom that is not immediately apparent to our bounded rationality, but there is no particular reason to think that evolution achieves justice. In fact, success in intergroup competition might be achieved by adopting unpleasant norms. Slavery is historically common.

Hayek is not primarily concerned with the spontaneous origin of rules, however, but with the spontaneous character of the order produced by general rules that allow individuals scope to pursue their own purposes. Individual interactions guided by such rules can lead to an order that is spontaneous in that no agent intended to produce it, even if, via legislative revision, the rules originated in deliberate design rather than spontaneous evolution (Hayek 1973, 46). What is crucial is, first, that the rules be general rules that apply to whole classes of people, not local commands issued to particular individuals identified by name or highly specific designation (ibid., 50). Second, the rules should not aim at any purpose except that of ensuring that people treat each other justly—by which Hayek means that they respect a range of primarily negative rights, such as the right not to be assaulted or killed and the right not to have one’s property taken. These rights establish a set of protected individual domains (Hayek 1976, 37–38, 103) and allow people to pursue their own distinctive aims according to the information available to them while allowing others to do likewise—which is one of Hayek’s definitions of freedom (Hayek 1973, 55).

When social rules have this abstract character, the specific patterns to which interaction gives rise will depend upon a whole range of facts that the designers of the rules could not possibly have known, facts known only to particular people in particular situations.

The free market is the system of abstract rules at the heart of a Great or Open Society, according to Hayek. Market prices are signals about the relative scarcity of resources in relation to people’s preferences, and thus serve to allocate resources efficiently. In addition to aggregating dispersed information, the market discovers facts of which no one was previously aware through a decentralized, trial-and-error exploration of production possibilities. The rewards people obtain in a market economy cannot correspond in any strict way to individual merit, because prices provide indications about how people ought to behave in the future, not rewards for how they have behaved in the past. “The prices which must be paid
in a market economy for different kinds of labour and other factors of production if individual efforts are to match, although they will be affected by effort, diligence, skill, need, etc., cannot conform to any one of these magnitudes” (Hayek 1976, 80). If the market is to fulfill its twin functions of discovering and aggregating information, it must reward luck as well as skill and conscientious effort.

The best illustration of this point is Hayek’s discussion of the relationship of merit and reward within and between occupations. Within a particular occupation, reward will be closely associated with merit (individual ability and industry), but the relative position of different occupations will tend to reflect circumstances beyond anyone’s knowledge or control. Demand for different occupations rises and falls with the development of technology and the evolution of preferences. If prices are to direct people to their most productive efforts, prices must reflect this kind of luck. The results of the market will therefore often seem unfair, but such unfairness is an essential part of the way the market generates prosperity. The only way to increase the correlation between merit and reward would be to replace free choice guided by market prices (which express people’s diverse personal preferences about what they want to consume and produce) with the commands of an authority aiming to reward what it deems virtuous (Hayek 1975, 82). Any attempt to realize distribution according to merit would violate liberty, Hayek (1960, 93–99) claims, in addition to undermining prosperity.

Thus, Hayek’s claim that social justice is incompatible with the spontaneous order of a market society has a very narrow target: the desire to ensure distribution according to the principle of individual merit or desert. Hayek (1976, 68–69) recognizes the force of this principle in everyday moral thinking:

Are we not all constantly disquieted by watching how unjustly life treats different people and by seeing the deserving suffer and the unworthy prosper? And do we not all have a sense of fitness, and watch it with satisfaction, when we recognize a reward to be appropriate to effort or sacrifice? The first insight which should shake this certainty is that we experience the same feelings also with respect to differences in human fates for which clearly no human agency is responsible and which it would therefore clearly be absurd to call injustice. Yet we do cry out against the injustice when a succession of calamities befalls one family while another steadily prospers, when a meritorious effort is frustrated by some unforeseeable accident, and particularly if of many people whose endeavours seem equally great, some succeed brilliantly while others...
utterly fail. . . . It is no different with regard to the general feeling of injustice about the distribution of material goods in a society of free men. . . . Our complaints about the outcome of the market as unjust do not really assert that somebody has been unjust; and there is no answer to the question of who has been unjust. Society has simply become the new deity to which we complain and clamour for redress if it does not fulfil the expectations it has created. There is no individual and no cooperating group of people against which the sufferer would have a just complaint, and there are no conceivable rules of just individual conduct which would at the same time secure a functioning order and prevent such disappointments.19

In this and other similar passages, the meaning of “social justice” is “distribution according to individual merit.”20 This principle would run counter to the spontaneous ordering of a market economy. The problem with Hayek’s argument is that distribution according to merit is just one conception of social justice. Consider the principles of fair equality of opportunity and that of raising the lowest social position as much as possible. Since neither of these principles requires distribution according to individual merit, neither falls afoul of Hayek’s objection. Hayek (1976, 100) comes close to admitting as much at the end of his critique of social justice, when he briefly addresses Rawls’s *Theory of Justice*:

The recognition that in such combinations as “social,” “economic,” “distributive” or “retributive” justice the term “justice” is wholly empty should not lead us to throw the baby out with the bath water. . . . There unquestionably . . . exists a genuine problem of justice in connection with the deliberate design of political institutions, the problem to which Professor John Rawls has recently devoted an important book.

Although in this passage Hayek talks of “political” rather than “social” institutions, he has to admit that there are different ways of designing the rules of property and contract and that he has not yet provided a reason for thinking that the distributive effects of such decisions cannot be judged just or unjust. He allows that “there is no reason why in a free society government should not assure to all protection against severe deprivation in the form of an assured minimum income” (Hayek 1976, 87). In fact, such a scheme “may be felt to be a clear moral duty of all to assist . . . those who cannot assist themselves,” rather than simply being a prudent form of social insurance (ibid).21 So long as this minimum income is provided outside the market without any other interference
with the price mechanism, Hayek says, there is no threat to freedom or the rule of law. The problems he is concerned with, he says, are those that arise when the levels of remuneration for different services are set by authority rather than by the market (ibid.). Hayek provides no reason, here, for thinking that income support or public support of education is not a requirement of social justice, e.g., equal opportunity. His strictures against schemes designed to achieve social justice apply only to attempts to make the distribution of income correspond to individual merit, which would interfere with the setting of market prices.

In *The Constitution of Liberty*, Hayek did provide arguments against redistribution in general, even where the underlying distributive principle is not merit-based. The first is a clearly unsuccessful argument based on the moral constraints on coercion. The basic postulate of a free society, he states, is “the limitation of all coercion by equal law.” Given unequal capacities, however, equal treatment guarantees unequal outcomes; achieving equal outcomes, given unequal capacities, would require unequal treatment. Policies such as progressive taxation for redistribution of wealth therefore amount to “discriminatory coercion or privilege,” in violation of the fundamental liberal premise of equality under law (Hayek 1960, 87–88).

This argument depends on a familiar equivocation concerning the notion of equal treatment. Treating people with different abilities the same leads to unequal outcomes, but treating them differently does not necessarily amount to treating them with unequal concern and respect. Any standard of “same treatment” needs to specify who needs to be treated the same and in what dimension.

Taken literally, the idea of treating people in the same way might mean that everyone should pay the same absolute dollar amount in taxes, rather than the same percentage. Isn’t it unequal treatment if I am required to pay $100 and you are only required to pay $50? Defenders of flat taxation may want to say that equal treatment requires equal taxation relative to total income, i.e., a fixed proportion of income, not equal absolute tax bills. To make this argument, however, they must invoke some normative principle to give content to the bare idea of equality. One needs a theory of justice to determine which forms of differential treatment count as discrimination.

Moreover, Hayek conceded that if state action were necessary to achieve some legitimate objective, but there were different ways of achieving it, then “those [ways] that incidentally also reduce inequality
may well be preferable;” he gives the example of different ways of designing the law of intestate succession (Hayek 1960, 88). This concession seems fatal, since the laws of property and contract are enforced by state coercion, and there are more or less egalitarian ways of designing systems of property rights. For example, is inheritance of wealth to be permitted at all?

One might claim that it is a mistake from Hayek’s point of view to talk about designing institutions—an example of what he called the constructivist fallacy. Constructivists wrongly assume that order results from the intention of a designing agent, and they neglect the fact that evolved order can be more complex and better adapted than designed orders (Hayek 1973, 8–35). The crucial word here, however, is can. Hayek never claimed that social evolution is always optimal. He admits that it can lead down blind alleys and that grown rules may need to be reformed by legislation (ibid., 88–89). This is one reason he denied being a conservative (Hayek 1960, 397).

The concept of spontaneous order, then, does negligible work in Hayek’s political-theory project. There is undoubtedly a moral distinction to be drawn between bad things that people do to each other and bad things that just happen. Because it is the product of myriad individual choices based on diverse information, the distribution the market generates is in some respects more like a natural event than a human action. Yet it is a moral rather than just a conceptual question whether we have a duty to help rectify poverty or inequalities we did not cause, and whether it should count as a duty of justice. Furthermore, our collective choices about the structure of social institutions are actions that can be assessed as just or unjust because of their distributive consequences. An awareness of the spontaneous origins of institutions suggests, at best, that we tread lightly in overturning them. And an awareness of the spontaneous results of institutions does not preclude any egalitarian project except that of assigning compensation according to non-market judgments of value. Neither income redistribution nor any other general government program is barred by respect for spontaneous order.

**Liberty, Coercion, and Social Justice**

Hayek’s conception of liberty, too, fails to open much distance between his position and that of egalitarian redistributionists.
On the one hand, he objected very strenuously to confusing liberty with power or capacity. A conception of liberty as power, he thought, lends itself to socialist attempts to turn “freedom from want” against individual freedom of choice (Hayek 1960, 12–13, 16–19). Hayek therefore insisted that freedom existed only in relationships between people, much as he insisted that justice was a property of intentional, interpersonal conduct. On the other hand, Hayek defined this relationship, in quasi-republican fashion, as the absence of dependence on the arbitrary will of another (Hayek 1976, 12–13). The idea of non-domination provides a strictly interpersonal conception of liberty, one that classifies Robinson Crusoe as free despite the dearth of effective options. Yet it can easily be harnessed to argue for more equal distributive outcomes, to protect people from being subject to the arbitrary will of others in the marketplace.

This argument is facilitated by Hayek’s quasi-republican conception of law. Hayek recognized that the threat of state coercion was necessary to prevent interpersonal coercion, but he insisted that the worst effects of the state’s coercion could be reduced if it operated only through known general rules whose effect on particular people could not be foreseen at the time the rules were made. Because liberty means not being subject to or unilaterally dependent on someone else’s good will, having a framework of known general rules does not make people subject to the arbitrary will of those who made the rules, but permits them to plan their own lives in view of their own ends (Hayek 1960, 133–48).

However, if resources are privately owned and society makes no provision to ensure access to employment, education, and so on, those without property will tend to be subject to the will of those with property, at least when times are bad. Thus, the only way Hayek avoids legitimizing measures to reduce economic inequality in the interests of non-domination is by optimistically assuming that the level of coercion in a market society would not be high. It is only in very exceptional circumstances that control of a resource or a service allows one person to dominate another, he claims (Hayek 1960, 135). A monopolist of an essential good may be able to coerce people into buying that good, but the individual provider of employment cannot normally exercise true coercion because employees can leave and find work elsewhere. Periods of acute unemployment would be “rare exceptions in a prosperous competitive economy” (ibid., 137). Even the threat of starvation that impels someone to take a distasteful job at a low wage is not coercive, so
long as the actions that led to this predicament were not aimed at making the person do particular things or serve someone else’s will (ibid.).

Hayek is quite right that under ordinary circumstances, I am not coercing anyone if I open a new factory that displaces workers at the old factory and leaves some with no option but to take an unpleasant job. But the fact remains that people in dire straits are vulnerable to being coerced, and will thus often be dependent on the good will of others, contrary to Hayek’s initial definition of freedom. It is of course an empirical question how common this situation is under the various possible forms of market economy. But Hayek’s appeal to liberty and equality under law provide no general argument against the claim that considerations of distributive justice should matter in the design of the institutions of such an economy. To the contrary, Hayek defines coercion in such a manner that deprivation and inequality threaten to create unfreedom—dependence on the arbitrary good will of another person—while law need not do so. Unless his optimistic claims about the operation of a market economy are correct, he has provided a powerful basis for social policies aimed at providing people with a threshold of resources sufficient to allow them to avoid the risk of domination in private life.

That Hayek’s concept of liberty was likely to lead him in a social-democratic direction was clear to his early critic, Ronald Hamowy (1961, 32–35). Hamowy claimed that Hayek defined freedom as absence of coercion, and coercion as the manipulation of someone’s environment with a view to benefitting oneself.27 This definition counts beneficial but self-interested offers as coercive. For example, if I offer to buy you beer and pizza to convince you to help me move, I am manipulating your environment—the options available to you—for my own benefit. But intuitively speaking it is clear that I am not coercing you.

Hayek correctly responded that his definition of coercion deemed only option-reducing manipulations of a person’s environment as coercive. Yet this response does not resolve the problems posed by monopolies in essential resources. If I am the owner of a spring in the desert and you are starving of thirst, I might let you drink from my oasis if you agree to work for me for one full year without pay. It seems that I am not coercing you because I am not threatening you with harm. And since you don’t have any options, I am not threatening to take them away; I am, in fact, increasing your options with a mutually beneficial but exploitative offer and can thereby get you under my thumb.
Hayek claims that such examples are not typical of a competitive market economy. But let’s bracket his optimism. The example of a monopoly of an essential resource suggests that what is crucial is not whether your action worsens or enhances someone’s set of options, but the facts of absolute deprivation and relative inequality. If there is enough deprivation and inequality—if one person is poor enough to want to sell himself and the other is rich enough to buy him—then the person on the top end of the relationship can effectively dictate the conduct of the other, treating the other person as a thing, substituting his will for that of the other person because the other person has no choice if he or she wants to survive.

In his response to Hamowy, Hayek (1961, 28–30) dealt with the case of a monopoly of an essential resource by counting failures to fulfill positive duties of aid as harms:

The instance I discuss in my book is the situation in which somebody has acquired control of the whole water supply of an oasis and used this position to exact unusual performances from those whose life depends on access to that water. Other instances of the same kind would be the only doctor available to perform an urgent life-saving operation and similar cases of rescue in an emergency where special unforeseeable circumstances have placed into a single hand the power of rescue from grave danger. They are all instances where I should wish that those in whose hands the life of another is placed should be under a moral and legal obligation to render the help in their power even if they cannot expect any remuneration—though they should of course be entitled to normal remuneration if it is in the power of the rescued. It is because these services are regarded as rights to be counted upon that a refusal to render them except on unusual terms is justly regarded as a harmful alteration of the environment and therefore as coercion.

According to this position, if I make my performance of my positive duty of aid conditional on exorbitant demands, I will be guilty of coercion. Here Hayek follows Mill. This appeal to positive duty brings the case of the monopoly of an essential resource within the ambit of his definition of coercion, but cannot be squared with Hayek’s description of his method in Chapter 9.5 of The Constitution of Liberty:

The existence of . . . an assured free sphere seems to us so much a normal condition of life that we are tempted to define “coercion” by the use of such terms as “the interference with legitimate expectations” or “infringe- ment of rights” or “arbitrary interference.” But in defining coercion we
cannot take for granted the arrangements intended to prevent it. The “legitimacy” of one’s expectations or the “rights” of the individual are the result of the recognition of such a private sphere. . . . Only in a society that has already attempted to prevent coercion by some demarcation of a protected sphere can a concept like “arbitrary interference” have a definite meaning. (Hayek 1960, 139)

In this passage, Hayek says that we cannot assume any specific set of rights and duties in defining “coercion,” but must rather design our rights and duties so as to minimize coercion in an unmoralized sense.\textsuperscript{30} Yet if we are designing rights and duties to minimize coercion, we can’t use claims about positive duties to define coercion.

**Pure Procedural Justice and the Irrelevance of Merit**

We have seen that Hayek’s critique of social justice is really a critique of distribution according to individual merit, as long as society is a scheme of cooperation governed by general rules that allow broad scope for individual liberty. His sympathy for Rawls is therefore readily intelligible, given Rawls’s commitment to pure procedural justice and his denial that desert is a fundamental principle of justice. Rawls, too, argued that principles of justice apply to institutional rules rather than to distributions directly.\textsuperscript{31} The basic structure of society is a public system of rules—for example, rules about property and contract. Distributions of goods and income across individuals arise because people make choices in light of the options the rules make available. Under a different set of rules they would choose differently, and a different distribution would result.\textsuperscript{32} If the rules are just, the distribution that results from voluntary interaction within the constraints of the rules is just, no matter what it may be.

Distributive justice thus involves an element of pure procedural justice. The rules are not a means to bring about a particular result, as in the case of more or less perfect procedural justice (e.g., splitting a cake by the “you cut, I choose” rule, or the rules of a criminal trial). Distributive justice is more like gambling; if the bet was freely entered into under fair conditions, the result is fair no matter what it is. Thus, one cannot take a stock of goods distributed across particular individuals and judge it to be just or unjust independent of the institutional system from which it resulted by way of choices and agreements made in good faith (Rawls 1999, 76).
It will be objected that although principles of justice apply to institutional rules, not distributions, Rawls defines just institutions partly in terms of distributions; for example, a just institution should provide fair equality of opportunity and should raise the position of the worst off. However, the distributions in question are not distributions across particular individuals, but distributions across social positions. We choose systems of institutional rules based on the distribution of positions they make available. Then individuals interact within the constraints set by the rules, and the resulting distribution across individuals is just by definition.

The rationale for focusing on social positions is that people are born into different starting points in life that make it more or less likely that they will be able to succeed. People are born with different levels of innate talent and, assuming that liberty must permit private childrearing in some form, we will never have full equality of opportunity across social positions. Moreover, even if we did, and even if there were no differences in levels of innate talent, the market would still involve a substantial element of luck. People who are willing to work and play by the rules will suffer unmerited failure; others less meritorious will win success.

The extent of one’s contribution (estimated by one’s marginal productivity) 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. All of this is perfectly obvious and has long been agreed to. (Rawls 1999, 273–74)

Since everyone depends on the cooperation of others, we ought not take advantage of this morally arbitrary luck to claim a greater share of what we produce together—not unless this inequality will make everyone better off. We ought therefore to assess the design of economic institutions from the perspective of someone in the lowest social position. This doesn’t mean that we have to maximize the income of the least-responsible individual—say, someone who is unwilling to work or follow the laws. Rather, we should assess economic institutions from the point of view of someone willing to work and follow the laws, but who happens to have been born without a lot of innate talents (at least not talents currently in demand) or born into a family at the bottom end of the distribution of income and wealth.
Rawls’s principles thus have a hybrid character in relation to pure procedural justice. Distributions across individuals are just so long as they result from interaction within just institutions, but just institutions are defined in part by their tendency to produce the right distributions across social positions. Appreciating this hybrid character is essential to understanding how Rawls’s principles avoid two prominent criticisms. The first is the Nozickean argument that liberty upsets patterns; the second is the Dworkinian claim that the difference principle is not sufficiently sensitive to ambition.33

Nozick’s argument is well known. Assume a just distribution, whatever one thinks that is, and then let individuals engage in fully informed and voluntary exchange. The resulting distribution will no longer fit the specified pattern. To get back to the right pattern the state will have to coercively extract some of what individuals justly acquired and give it to others, which doesn’t seem right (Nozick 1974, 160).

The ambition critique has the same structure. Start with an equal distribution of land between two equally talented gardeners, Ian the industrious and Christine the contemplative.34 Next, let them make fully informed and voluntary decisions about work, leisure, and consumption. Ian works hard in the garden so that he can afford to buy things, while Christine only works a little, because she takes pleasure in walking in the woods and watching the sun set. After a time, Ian and Christine will have unequal wealth. By the difference principle, this inequality is only permitted if it benefits the least-well-off person—Christine. To ensure that justice is preserved, government may have to take some money away from Ian and give it Christine, which again doesn’t seem right.

The mistake in both of these cases is the application of principles of justice to distributions across specific individuals, taking their conduct as fixed, instead of applying the principles to institutional rules, within which individuals then makes choices. If individuals engage in voluntary transactions within the framework of just rules, the resulting distribution is just, regardless of the pattern it produces. But just rules are defined partly in terms of ensuring that there is fair equality of opportunity35 and that the lowest social position is raised. If a progressive income tax is necessary to achieve these goals, then distributions of rights over resources are just to the extent that they are compatible with such taxation. There can be no just distribution of resources that does not allow for institutions necessary to maintain fair equality of opportunity and the difference
principle, if these are indeed valid principles of justice. That is to say, there can be no just distribution of absolute property rights.\textsuperscript{36}

Now take the example of the two gardeners. If the rules defining property, contract, inheritance, etc., are just, then any distribution between Ian and Christine that results from their decisions is just \textit{no matter what it may be}; this is the idea of pure procedural justice. But these rules will not be just unless they protect people’s basic liberties, secure fair equality of opportunity, and permit inequalities only if they raise the lowest social position. If property or other rules do not satisfy these principles, then the distribution that results will not be just, but not because of the extra inequality between individuals that results from the decisions they have made about work and lifestyle. Rather, the problem would lie in the extra inequality between social positions that results from collective decisions about the design of institutions.

The Nozickian and Dworkinian critiques of the difference principle are structurally similar in that they focus on distributions across individuals, taking institutional context for granted. It is therefore not surprising that the position-based pure-procedural-justice response to the Dworkinian objection about ambition has the same structure as the property-rights response to the Nozickian objection about liberty.

\textit{Hayek’s Principles of Social Justice}

One of the standard objections to Hayek’s claim that social justice is a mirage is that he himself subscribes to a principle of social justice, namely, the principle of maximizing utility. For example, Hayek (1976, 63) speaks of a market order as “an impersonal process that brings about a greater satisfaction of human desires than any deliberate organization could achieve.” Hayek has been accused of contradicting himself at this point. If principles of social justice can’t be used to assess the outcomes of the market’s spontaneous order, then it should not be possible to assess the market according to the utilitarian standard (Johnston 1997; Lukes 1997).\textsuperscript{37}

One response is to claim that Hayek is talking about desirability, not justice (Feser 1997, 596–97; Tebble 2009, 592). This victory for Hayek would be purely verbal. We need to identify our first principles of institutional assessment, even if we refuse to call them principles of justice. Moreover, since these principles guide the decisions we make about the design of social institutions, Hayek has no grounds for refusing
them the label “principles of justice.” The decisions we make about our social rules are things we do to and with one another, and they give rise to public agencies that do things to people, such as enforcing rules of property and contract. Such decisions are forms of interpersonal conduct, and so can be just or unjust, according to Hayek’s account.

A second response is to admit that Hayek accepts some principles of institutional design, but to insist that first amongst these is respecting and protecting human freedom—a principle that will be undermined by any attempt to achieve a particular distribution of rewards. But as before, this response is plausible only in regard to attempts to achieve distribution according to individual merit—as well as attempts to achieve perfect economic equality. Even if liberty comes first, and even if it always conflicts with merit-based distribution, other kinds of distributive considerations might have a secondary role in designing institutions.

It is misleading to describe Hayek as a utilitarian, however. Hayek (1976, 115) speaks of giving people the opportunity to satisfy their needs, rather than doing whatever will maximize satisfaction of whatever desires they happen to have. The standard objections to maximizing utility therefore do not pose a serious challenge to Hayek.

The objections to designing institutions that will maximize the total sum of utility (in the aggregate, without regard to its distribution) are more serious. Yet here again, Hayek is not a consistent utilitarian. Consider, for example, this comment about the absurdity of complaining about distributive injustice in a market economy:

It has of course to be admitted that the manner in which the benefits and burdens are apportioned by the market mechanism would in many instances have to be regarded as very unjust if it were the result of a deliberate allocation to particular people. But this is not the case. Those shares are the outcome of a process the effect of which on particular people was neither intended nor foreseen by anyone when the institutions first appeared—-institutions which were then permitted to continue because it was found that they improve for all or most the prospects of having their needs satisfied. To demand justice from such a process is clearly absurd. (Hayek 1976, 64)

This passage sets out two different arguments against complaining about the injustice of a market-generated distribution. The first is that doing so would treat the unintended, unforeseeable product of the interaction of a great many agents as if it were the consequence of the actions of a single
agent. The second is that the market improves the prospects for (most) everyone to satisfy their needs when compared to the previously existing, feudal economic order, and presumably also when compared to a planned economy.

A few pages later, Hayek (1976, 70, emph. added) says that “we consent to retain, and agree to enforce, uniform rules for a procedure which has greatly improved the chances of all to have their wants satisfied, but at the price of all individuals and groups incurring the risk of unmerited failure.”

“Unmerited failure” is the lack of distribution according to merit, which is what people think of as social justice. Hayek’s point is that it is “absurd” to prefer this type of social justice at the expense of everyone being worse off. This is the familiar leveling-down objection to equality: that it is irrational to forbid deviations from distribution according to merit if these deviations can make everyone better off than they would be under a system that ensured a closer fit between merit and reward. This objection implies that we accept the market economy because it increases (most) everyone’s opportunity for need-satisfaction as compared to the historical baseline, and as compared to the alternative of a planned economy.

Here Hayek runs into problems. First, is the criterion that everyone—or just most people—be better off? “Most people” will bring Hayek’s position closer to utilitarianism, but he needs to say “everyone” to sustain his claim about the absurdity of complaints of social injustice. Second, what is the appropriate baseline of comparison? No one wants to go back to the feudal order, but are there really only two viable alternatives to it—a planned economy and a pure market order? If we must compare three or more options, including some form of social democracy, most comparisons of pairs of options will show improvements for some at the expense of losses for others, with the result that the Pareto criterion will not rank the alternatives. If so, we must decide whether a given alternative is justified because everyone would be better off than if society were maximally equal—or whether everyone has to be better off than they would be if society were more equal (otherwise we default to the more equal alternative). The latter, more demanding criterion is of course the Rawlsian position.

Hayek avoids confronting these questions by switching to a different sense of “improving people’s chances.” In the passages above, when Hayek speaks of improving everyone’s chances of having their needs
satisfied, he means that every person’s opportunity for need satisfaction is
greater in a market economy than it would be under some alternative,
baseline scenario—either the historical status quo or a planned, egalit-
arian economy. In other passages, however, Hayek (1976, 129) speaks of
maximizing the chances of anyone picked out at random: “Since rules of
just conduct can affect only the chances of success of the efforts of men,
the aim in altering or developing them should be to improve as much as
possible the chances of anyone selected at random.” In other words,
although Hayek initially talks of improving everyone’s chances no matter
what their social position, as compared to some alternative social order,
he switches to the principle of maximizing anyone’s chances, prior to
having been born into a particular social position.

The latter principle involves maximizing aggregate opportunity for
need satisfaction. Maximizing expected opportunity means being willing
to accept that some may have very small chances in life in order that
others who would have had greater chances anyway can have still greater
chances. That would be fine if people voluntarily undertook this gamble
before being born. However, if I am born into the lowest social class
I will naturally complain that I didn’t get a chance to refuse this gamble.

A more plausible view is that to benefit all, inequalities must benefit
those who have less, rather than those who have more. The worst off
may get more in the unequal distribution of a competitive market
economy than they would in an egalitarian centrally directed system
(Hayek 1979a, 14), but do they get more in Hayek’s ideal society than
they would under any feasible liberty-preserving alternative?

Hayek (1976, 131) admits that “it might seem reasonable so to frame
laws that they will tend more strongly to improve the opportunities of
those whose chances are relatively small.” He doesn’t deny that this is
reasonable at the level of principle, but he does deny that it is feasible:
Improving the opportunities of those with less “can rarely be achieved by
generic rules” (ibid.). Yet this is exactly what policies such as income
support and subsidized education do.

Hayek (1976, 130–31) also had an unfortunate tendency to conflate
the maximization of aggregate income with the maximization of
opportunity. In his Australian lectures, for example, he said that “the
productivity-enhancing function of prices . . . depends on their informing
people where they will find their most effective place in the overall
pattern of activities—the place in which they are likely to make the
greatest contribution to aggregate output. If, therefore, we regard that rule of
remuneration as just which contributes as much as possible to increasing the chances of any member of the community picked out at random, we ought to regard the remunerations determined by a free market as the just ones” (Hayek 1979a, 9–10).42 Yet the relationship between income and opportunity is clearly convex. Earning $100,000 as opposed to $50,000 makes a big difference in the extent of one’s opportunities, but earning $1,000,000 as opposed to $950,000, not nearly as much. Hayek simply cannot leap from maximizing average opportunity to maximizing average income.

One reason Hayek did not worry about these philosophical nuances may have been that he thought that no matter which of the various plausible distributive principles one prefers, a small-state market society that protects private property is best. After implausibly arguing that there is no way to help the least well off with generic rules, Hayek (1976, 131) goes on to claim that “the fact which . . . has contributed most during the last two hundred years to increase not only the absolute but also the relative position of those in the lowest income groups has been the general growth of wealth which has tended to raise the income of the lowest groups more than the relatively higher ones.” Hayek cites an interesting statistic: Someone whose income was in the 50th to the 60th percentile of the American income distribution in 1940, but descended to the 30th–40th percentile group by 1960, still had a higher absolute income in 1960 than in 1940. Thus, during this period, the incomes of lower part of the distribution were growing fast enough so that after twenty or thirty years, people in that part of the distribution were making more than the higher-ups used to make. But it is no longer true that income is growing so fast in the lower deciles of the income distribution that descending in the distribution will generally be consistent with one’s income growing.43

Hayek’s Original Position

The final point of similarity between Rawls and Hayek is that they both employed the device of choice under uncertainty to think about principles of institutional design.

How would you design society if you had to choose where your children would be born? You wouldn’t choose an aristocratic society, Hayek argues, despite the attractions of that lifestyle, because your children would likely end up being peasants. Instead you would choose a
modern industrial society that “did not offer such delectable plums to a few but offered better prospects to the great majority” (Hayek 1976, 132). This thought experiment does not support Hayek’s principle of maximizing aggregate chances over the Rawlsian principle of improving everyone’s chances as compared to a baseline of equality.

In the footnote that accompanies this passage, Hayek explains that he himself faced such a choice in deciding which foreign country to place his children in during the early days of the Second World War. Should he send his children to the United States, Argentina, or Sweden? The choice he would have made for himself, knowing his skills and talents, was not necessarily the one he would make for his children, whose talents were yet to develop. Starting out from zero, one would choose America, because their chances there—averaging over all the positions they might occupy—would be greater than in the Old World, with its sharp social distinctions (assuming that they would be placed with a white American family, Hayek says).

However, the choice amongst these alternatives does not distinguish between Hayekian and Rawlsian principles. Was Hayek’s decision motivated by the fact that average chances were better in America than in Europe, or by the fact that the chances for those in the lowest position were better in America than in Europe? Suppose, for example, that Hayek had been choosing between sending his children to Canada or the United States. Suppose that the chances of any child picked at random were greater in America, but that the chances of the least innately talented child would have been greater in Canada. Which country would Hayek have picked?

The main formal difference between Hayek and Rawls on this point is that, like the economist John Harsanyi (1953, 434–45), Hayek allows the agent knowledge of the probabilities of occupying various social positions behind the veil of ignorance, while Rawls does not. Rawls asks what principles of institutional design one would choose, not knowing the precise level of social and technological development, whereas Hayek asks which of a given set of institutional setups one would choose knowing the relevant empirical facts. Thus it would be feasible in Hayek’s setup to gamble on a society with greater average chances at the cost of enduring a worse fate if one ended up in the lowest social position—whereas in Rawls’s setup, without any reliable way to calculate probabilities of ending up in one position or another, we maximize the level of the lowest position. Yet Hayek’s example of
placing one’s children forces the question of whether one would really gamble on avoiding the lowest position. Would he not have been tempted to give priority to the worst off to ensure that his children would at least be helped, to the maximum feasible extent, if their talents or upbringing did not suit them to the demands of the market in their place and time?

Remaining Differences between Hayek and Rawls

The upshot of this discussion is that Hayek’s basic philosophical and normative assumptions do not by themselves dictate his conclusions about law and policy. What generates these conclusions is a set of empirical claims, in particular claims about feasibility.

The most striking example of this occurs in Hayek’s rejection of the value of equal opportunity. Hayek (1976, 84–85) accepts formal equality of opportunity, “la carrière ouverte aux talents,” and he admits that “there is also much to be said in favor of government providing on an equal basis the means for the schooling of minors,” although he doesn’t say that this is a requirement of social justice. He then goes on to point out that such measures “would still be very far from creating real equality of opportunity,” which would require that government “control the whole physical and human environment of all people” (ibid.).

The obvious response is that even if complete equality of opportunity would require a totalitarian state, it is a principle of justice that we attempt to achieve fair equal opportunity until it threatens liberty; then we must stop. At this point Hayek has recourse to the slippery slope. The more government succeeds in equalizing opportunities, the stronger the demand to remove remaining handicaps. “This would go on until government literally controlled every circumstance which could affect any person’s well-being.” Thus “any attempt” to realize equality of opportunity beyond government provision of services that can be justified on other grounds “is apt to produce a nightmare” (Hayek 1976, 84–45). The claim that the political slippery slope presents us with an either/or choice between personal liberty and equality of opportunity is not convincing.

Although the conclusions that Hayek reached about policy were not egalitarian, the fundamental normative principles he accepted do not by themselves block—and in many plausible circumstances support—policies that aim to bring about a more equal distribution of economic
resources. His conception of liberty as independence of will, as well as his claim that rule by law makes coercion less coercive, open the possibility for state action that reduces the occurrence of private domination. Once we acknowledge conceptions of distributive justice not based on individual merit and the possibility of institutional orders intermediate between pure socialism and pure capitalism, Hayek’s espousal of the principle that inequalities should benefit all opens the door to redistribution—in the name of social justice. Or, to be more precise, since the idea of redistribution wrongly suggests a punctual reallocation of resources in violation of established rules, it opens up the possibility of designing social institutions with a view to equalizing distributive outcomes across social positions.

There are two important respects, however, in which Rawls’s view is more egalitarian than Hayek’s. The first has to do with the importance of equal political liberty. Rawls (1999, 197–98 and 247) was aware of the possibility that inequalities that satisfy the difference principle might be so great as to undermine the fair value of political liberties. He thought that unless we take steps to limit the extent of socio-economic inequality or insulate the political process from it, the more advantaged will come to control the society, despite the formal equality of their votes. Hayek was much less worried about this possibility. His main concern was that the perception of legitimacy attached to democracy would encourage legislatures to venture beyond the proper function of making law, giving rise to a discretionary power of command that would inevitably become the object of political struggle. Instead of limiting itself to enacting general, negative rules of individual conduct, legislatures would become involved in the business of day-to-day government, turning the state into a tool for extracting resources from some in order to buy the votes of others. Hayek’s solution was to restrict the scope of state action so that it could not be used in this way, and to reform legislatures so that they could be insulated from interest-group politics (e.g., by electing representatives over the age of 45 to a single 15-year term, after which point they would be guaranteed alternative public employment) (Hayek 1979b, 445–52).

The second remaining difference is more purely normative and concerns the justification of economic inequality. Recent “bleeding-heart libertarians” have claimed that Rawls misunderstood the institutional implications of his difference principle. Jason Brennan (2007, 292–93) argues that a society that uses the state to provide a wide range of
public services and to redistribute income so as to satisfy the difference principle—a Rawlsian “property-owning democracy,” which Brennan calls “Fairness Land”—will have lower growth rates, as compared to a society that relies more heavily on the market—“Pareto-Superior Land.”

The result is that the worst off in Fairness Land will eventually be worse off than they would have been had the society opted for the classically liberal institutions of Pareto-Superior Land. The lesson Brennan draws is that societies that directly aim to satisfy the difference principle may be less successful at doing so than societies that subscribe to more traditional liberal ideals.

However, as John Tomasi (2012, 236) points out, if a society adopts or maintains free markets and private property because this setup best satisfies the difference principle, Pareto-Superior land is Fairness Land. The real issue is not about intentions but about what counts as satisfying the difference principle. According to Brennan and Tomasi, the difference principle requires “maximizing the material shares of the least well-off over time” (ibid.). This, I take it, is also Hayek’s view: Society should maximally benefit the worst off in the long run, and a society based on private property, free markets, and limited government will do just that. Assuming that classically liberal institutions generate higher growth rates overall and at the bottom end of the distribution, Brennan and Tomasi take it for granted that a consistent Rawlsian ought to endorse this institutional scheme. With higher shared growth rates, at some point everyone, including the worst off, is better off than they would have been under more interventionist, less market-friendly Rawlsian institutions. “At what point,” then, “do the least advantaged (and everyone else) in Fairness Land object that they were given a bad deal?” (Brennan 2007, 294).

This objection will be met with another, more powerful objection on the part of the worst off from earlier generations. Unless the growth rate differential is massive, the worst off who are making the sacrifice at time 1 will not be the same worst off who are made better off at time 2. Maximizing long-run growth out of concern for the worst off over the long run means that the worst off in generation 1 must accept inequality that makes them worse off for the sake of raising the prospects of the worst off in generation 2, who will be better off anyway.

In contrast, the orthodox Rawlsian position is that inequality between positions now should raise (or at least not lower) the lower position compared to what it could otherwise have been, not that inequality now
may be justified because it raises the worst off in the long run. Growth is required, but as part of the just-savings principle, which has a definite target: the attainment and preservation of just institutions. There is no need to go on maximizing indefinitely, in Rawls’s view. Except where economic development is necessary for realizing equal basic liberties, justice doesn’t require that the least well off accept more inequality today for the sake of maximizing the level of the lowest position in the long run.\(^{49}\) The focus of Rawls’s principle is how we divide what we produce together today, and what this decision says about the relationship between citizens. In contrast, Hayek is more concerned with maximizing the range of choices people have in the long run—a position that is in some tension with his definition of liberty as independence of will rather than effective range of choice.

* * *

Despite these differences with Rawls, Hayek is in some important ways a closet liberal egalitarian who reaches inegalitarian policy conclusions only by means of equivocation and imagined slippery slopes. What, then, remains of distinctive value in his writings about social justice?

On the left, markets are sometimes viewed as inherently objectionable because they let people callously use each other for selfish gain; only to the extent that they make everyone better off are markets to be tolerated despite this injustice.\(^{50}\) One lesson Hayek has to teach us is that markets and private-property rights are important not just because they are efficient at producing wealth, but because they allow people with very different values and purposes to cooperate in beneficial ways, despite their many disagreements about how society ought to allocate its resources. The great discovery of market society is not how selfishness can be made to serve the public interest, according to Hayek, but how people with radically different ends can be led to cooperate, each acting for his or her own purposes, in a way that benefits others (Hayek 1976, 3–4, 109–10).\(^{51}\)

Second, markets allow us to explore through decentralized trial and error the great many ways of producing the things we want or might discover we want. This process encourages innovation, facilitating unpredictable social and cultural change. Experiments in living also require experiments in producing.
In short, Hayek teaches us that capitalism has virtues other than simply generating wealth. However, what Hayek resists teaching us is that the legal framework of capitalism can be designed to reduce inequality in the name of justice.

NOTES

1. See also Hayek 1973, 142.
2. See also Hayek 1976, 62.
3. “There is apparently no end to the violence that will be done to language to further some ideal and the example of ‘social justice’ has recently given rise to the expression ‘global justice!’ Its negation, ‘global injustice,’ was defined by an ecumenical gathering of American religious leaders as ‘characterized by a dimension of sin in the economic, political, social, sexual, and class structures and systems of global society.’ It would seem as if the conviction that one is arguing for a good cause produced more sloppy thinking and even intellectual dishonesty than perhaps any other cause” (Hayek 1976, 80).
4. Although I will be citing the revised edition of The Theory of Justice (1999), Hayek would have read the original edition (1971). However, the many small differences (and some larger differences) between the two works do not affect any of the points at issue between Hayek and Rawls.
5. Cf. ch. 9 of The Mirage of Social Justice, entitled “‘Social’ or Distributive Justice,” as well as 137 and elsewhere. See also Hayek 1979a, 4; Hayek 1988, 118.
6. I take these terms from Gaus 2007, 84.
7. In a later interview, Hayek partially retracted his endorsement of Rawls, alleging that Rawls had changed his position by the time of Theory. However, Rawls’s position on justice and institutions did not change (see n31 below).

BUCHANAN: Let me raise another point here. In I believe the preface to the second volume of your Law, Legislation, and Liberty, you say—the mirage of social justice—in one sentence you say that you think that you’re attempting to do the same thing, essentially, that John Rawls has tried to do in his theory of justice. People have queried me about that statement in your book.

HAYEK: Well, I perhaps go a little too far in this; I was trying to remind Rawls himself of something he had said in one of his earlier articles [Rawls 1963], which I’m afraid doesn’t recur in his book: that the conception of correcting the distribution according to the principle of social justice is unachievable, and that therefore he wanted to confine himself to inventing general rules which had that effect. Now, if he was not prepared to defend social-distributive justice, I thought I could pretend to agree with him; but studying his book further, my feeling is he doesn’t really stick to the thing he had announced first, and that there is so much egalitarianism, really, underlying his argument that he is driven to much more intervention than his original conception justifies.
The text of these interviews is found in Hayek 1983. The video is available at http://hayek.ufm.edu/index.php?title=Category:James_Buchanan; the discussion of social justice starts at 21:35.

8. In a letter to Rose Wilder Lane in 1946, Rand wrote: “As an example of our most pernicious enemy, I would name Hayek. That one is real poison” (Long 2005, 312).

9. The most comprehensive statement of a Rawls-Hayek synthesis is the “bleeding-heart libertarianism” (http://bleedingheartlibertarians.com) of John Tomasi, particularly chapter 5 of Free Market Fairness (2012). Claude Gamel (2008) also downplays the extent of the gap between Hayek and Rawls.

10. In the Preface to Mirage, Hayek explains that the publication of the volume was delayed by the fact that he had struggled with its central chapter. He had been trying to argue that people would never agree about what social justice required, and that any attempt to make remunerations accord with justice “would make the market unworkable.” He felt that he was “hitting into a void,” however, until he finally realized that “the Emperor had no clothes on,” because the phrase “social justice” simply had no meaning (Hayek 1976, xi).

11. See Mack 1983, 571–72 and Lukes 1997, 68. Similarly, in The Constitution of Liberty Hayek (1960, 11–22) argues that liberty is primarily a characteristic of a relationship between people, not of an individual’s power, capacity, or effective range of choice.

12. “A state of affairs that no one has intended or foreseen may, nevertheless, require action to alleviate suffering or deprivation, and failure to take such action may be justly condemned as unjust” (Lukes 1997, 72). See also Plant 1991, 92–93 and Tebble 2009, 591.

13. This is a point that others have made in response to Hayek. David Miller (1999, 108–9) notes that “it is possible to study the distributive outcomes of a market and to consider how a change in the ground rules might alter these outcomes.” Miller offers the example of laws against discrimination by sex or race in the labor market, which do not abolish the market but merely change its ground rules. “Essentially the same process occurs when the respective rights of landlords and tenants are changed, when consumer protection legislation is introduced, when cartels to fix prices are made illegal, and so forth” (ibid.) David Johnston (1997, 610) also discusses the more or less predictable distributive consequences of legislative decisions about how to design and frame the market.

14. Thus, Hayek (1976, 33) says that it is misleading to call states of affairs just or unjust “in the case of a spontaneous order,” where “the resulting state was not the intended aim of the individual actions. . . . What is called ‘social’ or ‘distributive’ justice is indeed meaningless within a spontaneous order and has meaning only within an organization.”

15. Hayek (1973, 72–123) argues that law did not originally mean legislation and that, originally, judges did not interpret legislative acts but articulated, specified, and attempted to render consistent pre-existing social rules that no one ever consciously invented.

16. I say “primarily” because this is how Hayek generally describes them; e.g., Hayek 1976, 37–38 and 103; Hayek 1979b, 130–32. However, he offers no argument that positive duties could never be sufficiently general to count as part of a system of rules that would be characterized by spontaneous order, and elsewhere he does concede the existence of positive duties of aid; see the discussion of Hayek’s response to Hamowy below. In “Justice and Individual
Rights,” the Appendix to chapter 9 of *Mirage*, Hayek criticized the idea of positive social and economic rights, according to which every citizen or human being is entitled to particular benefits. Because a right to a benefit implies a duty on someone’s part to provide it, recognition of such rights would require that the spontaneous order of the market be replaced with “a deliberately directed organization,” in which people would no longer be able to use their knowledge for their own purposes, but would have to do as instructed by their rulers (Hayek 1976, 103). There are many ways of ensuring that children have education and health care, however, short of replacing the market with a Soviet-style command economy. Here as elsewhere it seems that Hayek is motivated by fear of the slippery slope.

17. See also Hayek 1979a, 4.

18. “The particular content of the order will depend on the concrete circumstances known only to the individuals who obey the rules and apply them to the facts known only to them. It will be through the knowledge of these individuals both of the rules and of the particular facts that both will determine the resulting order” (Hayek 1973, 46).

19. See also Hayek 1976, 79, 80, 85, 91, and 94. Elizabeth Anderson (2005) also remarks on the narrowness of Hayek’s result. What Hayek saw, according to Anderson, was that distributive principles based on assessments of individual merit were incompatible with any social order involving a substantial degree of individual freedom. Given the role of chance in the market, distribution according to merit would require constant state surveillance and interference in order to correct deviations from its standard of merit, leading to “the ultimate busybody state” See also Don Arthur (2008): “For Hayek, ‘social justice’ meant allocative justice—the demand ‘for an assignment of the shares in the material wealth to the different people and groups according to their needs or merits.”

20. The narrowness of Hayek’s critique is also clear in his later attack on the errors of socialism. He remarks that “social justice” has come to mean “distributive justice,” but that distributive justice is “irreconcilable with a competitive market order.” He recognizes that people might be happier if the “relative economic positions of individuals” were just. “Yet the whole idea behind distributive justice—that each individual ought to receive what he morally deserves—is meaningless in the extended order of human cooperation” (Hayek 1988, 118).

21. “Hayek concedes that people may have obligations to help each other even when those so obliged did not cause the distress to be alleviated—indeed, when this distress is the result of an impersonal, spontaneous order” (Lukes 1997, 73). Don Arthur (2008) notes that unlike Ludwig von Mises, Hayek consistently supported government provision of a minimum income and public subsidy of education, and was for this reason criticized by libertarians such as Ayn Rand. Along with other critics, Tebble (2009) suggests that Hayek’s admission that government can provide a minimum income is incompatible with his earlier claim that distributive justice is unfeasible, since a public minimum will lead to there being less inequality than there would otherwise have been. In contrast, I think that Hayek’s support for some form of income support outside the market simply shows that he was rejecting only a very specific kind of distributive justice, i.e., the kind that is based on individual merit.

22. In this work, Hayek (1960, 87) distinguished patterns of distribution in general (e.g., more or less equal) from distribution according to individual merit: “Our objection is against all attempts to impress upon society a deliberately chosen
pattern of distribution, whether it be an order of equality or inequality. We shall
indeed see that many of those who demand an extension of equality do not
really demand equality but a distribution that conforms more closely to human
conceptions of individual merit and that their desires are as irreconcilable with
freedom as the more strictly egalitarian demands."

23. See also Hayek 1979b, 102–104, and Hayek 1979a, 39. Hayek’s argument in
Social Justice, Socialism and Democracy (1979a) is less about fairness than about a
slippery slope towards an expansion of discretionary political power. Any
deviation from equal treatment under law, even “discrimination” to help the
least fortunate (especially when labelled “social justice”), threatens to “open the
floodgates to arbitrariness,” by which Hayek means the use of government to
extract resources from some in order to buy the votes of others.

24. See also Hayek’s disparaging remarks about Roosevelt’s Four Freedoms (Hayek
1976, 101–6).

25. But see Gamel 2008, 115. Gamel argues that Hayek has a negative conception of
liberty, claiming that if Hayek were true to his conception of liberty as the
absence of coercion, he ought not support state provision of a minimum income,
and that if he really believed such a policy is legitimate, he would have to
endorse a more positive conception of liberty. In contrast, I take Hayek’s
conceptions of liberty and coercion to be fundamentally republican in character,
making his support for state provision of a minimum income consistent.

26. See Pettit 1997, 51–80.

27. What Hayek (1960, 20–21) actually said was that “by ‘coercion’ we mean such
control of the environment or circumstances of a person by another that, in
order to avoid greater evil, he is forced not to act according to a coherent plan of
his own but to serve the ends of another.” He also says that coercion occurs
“when one man’s actions are made to serve another man’s will, not for his own
but for the other’s purpose” (ibid., 133). Coercion implies that “the alternatives
before me have been so manipulated that the conduct the coercer wants me to
choose becomes for me the least painful one” (ibid.).

28. Cf. Rousseau 1762, book 2, ch. 11.

29. “There are also many positive acts for the benefit of others, which he may
rightfully be compelled to perform; such as, to give evidence in a court of justice;
to bear his fair share in the common defence, or in any other joint work
necessary to the interest of the society of which he enjoys the protection; and to
perform certain acts of individual beneficence, such as saving a fellow-creature’s
life, or interposing to protect the defenceless against ill-usage, things which
whenever it is obviously a man’s duty to do, he may rightfully be made
responsible to society for not doing. A person may cause evil to others not only
by his actions but by his inaction, and in either case he is justly accountable to
them for the injury” (Mill 1859, 224–25).

30. A conception of coercion is moralized if it counts as coercive only those threats
of harm that violate people’s rights, such that laws against murder don’t count as
coercive because one has a right not to be murdered. A conception of coercion is
unmoralized if it counts fully justified threats as coercive nonetheless.

31. Hayek picks out a statement of this point from Rawls’s 1963 “Constitutional
Liberty and the Concept of Justice” and comments that he cannot find a
comparably clear statement of the view in A Theory of Justice. In his later
interview with Buchanan, Hayek suggests that Rawls’s views changed. How-
ever, there is no reason to think that this is so. Rawls’s 1963 paper said that the
task of identifying a just distribution of things to particular people had to be abandoned as mistaken in principle. In *Theory* the same ideas recur in Rawls's discussion of pure procedural justice: "If it is asked in the abstract whether one distribution of a given stock of things to definite individuals with known desires and preferences is better than another, then there is simply no answer to this question" (Rawls 1999, 76). In both works, however, he insisted that the basic institutional structure of society could be appraised as just or unjust in terms of its consequences for the distribution of benefits and burdens across social positions. In "Constitutional Liberty and the Concept of Justice," we find Rawls arguing that "inequalities as defined by the institutional structure or fostered by it are arbitrary unless it is reasonable to expect that they will work out to everyone's advantage" (Rawls 1963, 75). By "inequalities," he said that he meant "differences in the benefits and burdens attached to [offices or positions] either directly or indirectly, such as prestige, wealth, and liability for taxation and compulsory services." People don't object to the existence of different positions, but to the rewards attached to them. "Thus [people] may complain about the pattern of rewards and honors set up by an institution (e.g., the privileges and salaries of government officials) or they may object to the distribution of power and wealth which results from the various ways in which men avail themselves of the opportunities allowed by it (e.g., the concentration of wealth which may develop in a free-enterprise economy allowing large entrepreneurial and speculative gains)" (ibid.). In "Justice as Fairness" (1958, 47), he had already made clear that justice was the first virtue of social institutions or "practices," and that practices included "markets and systems of property" as well as "trials and parliaments."

32. "What a person does depends upon what rules say he will be entitled to, and what a person is entitled to depends on how he acts. The distribution which results is arrived at by honoring the claims determined by what people undertake to do in light of these legitimate expectations" (Hayek 1976, 74).

33. Philippe Van Parjis (2003, 216) has argued that when understood to apply across social positions, the difference principle is "far more responsibility-friendly (or ambition-sensitive) and hence less egalitarian (in outcome terms) than is generally understood."

34. See Kymlicka 1990, 72–75.

35. It is also worth pointing out that Rawls (1999, 265, emph. added) defines his equal-opportunity principle in terms of social positions: "Although the internal life and culture of the family influence . . . a child's motivation and his capacity to gain from education, and so in turn his life prospects, these effects are not necessarily inconsistent with fair equality of opportunity. Even in a well-ordered society that satisfies the two principles of justice, the family may be a barrier to equal chances between individuals. For as I have defined it, the second principle only requires equal life prospects in all sectors of society [i.e., across all sectors] for those similarly endowed and motivated. If there are variations among families in the same sector in how they shape the child's aspirations, then while fair equality of opportunity may obtain between sectors, equal chances between individuals will not. This possibility raises the question as to how far the notion of equality of opportunity can be carried; but I defer comment on this until later (§77). I shall only remark here that following the difference principle and the priority rules it suggests reduces the urgency to achieve perfect equality of opportunity. “Perfect” equality of opportunity would require equality of opportunity within
as well as between sectors; fair equality of opportunity requires only equality across sectors, averaging over the idiosyncratic differences between individual families within each social position.

36. This critique of Nozick’s argument about liberty and patterns is originally due to Cheyney C. Ryan (1977) and G. A. Cohen (1995). (Cohen’s Wilt Chamberlain paper was first published in 1977.) See also Kymlicka 1990, 102–27 and Wolff 1991, 73–118.

37. “Hayek contradicts his claim that impersonal orders should not be judged against standards of justice by using just such a standard—a utilitarian standard—to justify the paradigm case of a spontaneous order, the market” (Lukes 1997, 74).

“The claim that the market generates greater aggregate wealth than any alternative economic order constitutes a prediction about a determinate outcome of a spontaneous order. If the market order can be defended by reference to this particular outcome, it is not evident why other particular outcomes, such as the generation of an equal distribution of wealth, could not constitute a valid basis for the defense of alternative social arrangements” (Johnston 1997, 87).

38. John Gray (1982), Steven Lukes (1997, 74), and David Johnston (1997, 613) attribute a utilitarian principle to Hayek, i.e., maximal aggregate preference satisfaction.

39. Among the standard objections to taking utility as the variable to be maximized are that some people may get utility from injustice, that some people may be better at producing utility than others, and that if we believe in individual responsibility it is the opportunity for welfare that we want to maximize, not its actual achievement.

40. See also Hayek 1976, 72.

41. See also ibid., 32.

42. Also: “If it were . . . true that the central direction of the means of production could effect a collective product of at least the same magnitude as that which we now produce, it would indeed be a grave moral problem how this could be done justly. This, however, is not the position in which we find ourselves. For there is no known way, other than by the distribution of products in a competitive market, to inform individuals in what direction their several efforts must aim so as to contribute as much as possible to the total product” (Hayek 1988, 7, emph. added).

43. See, for example, the U.S. Census bureau’s historical income table for families from 1947 to present, which gives the upper limits in 2007 dollars of the quintiles of the income distribution: http://www.webcitation.org/query?url=http%3A%2F%2Fwww.census.gov%2Fhhes%2Fwww%2Fincome%2Fhistinc%2F01AR.html&date=2009-04-12.

44. The example is suggested by the case that Thomas Nagel (1979, 123–24) puts forward of a family that has two children, one of whom is disabled, and must choose between moving to a troubled neighborhood in the city, which will bring a small benefit to the disabled child due to access to medical services and special education, or to a pleasant semi-rural suburb, which will bring larger benefits to the other child.

45. I note in passing that the differences between Rawls and Harsanyi can be overstated. Rawls argues for maximin only in the dimension of social primary goods, things like income. Part of the reason for “maximinizing” these goods is that the parties care little for gains in this dimension, beyond some level, but greatly fear falling below this level. They want to protect their so-called moral
powers, which are the ability to form, revise, and pursue a conception of the good (the contents of which they don’t know) and the capacity to have and act in accordance with a conception of justice. Having some income and wealth is essential for that; having a lot is not (Rawls 1999, 134–35). In other words, past a certain point, greater amounts of social primary goods make a sharply declining contribution to the parties’ fundamental interests as citizens. For a discussion of the relationship between utilitarianism and Rawls’s Section 26 argument for maximin, see Mandle Forthcoming.

46. See also Hayek 1960, 92–93.
47. See also Hayek 1976, 137–42 and Hayek 1960, 100.
48. Hayek (1979a, 11) has another, even less-plausible argument against state action in service of fair equality of opportunity, which is that it will reduce the incentive parents face to work hard and make maximally productive decisions so as to be able to pass on wealth to their children. Here, Hayek seems to be saying that we should not sacrifice any bit of aggregate wealth for the sake of fair equality of opportunity.

49. “It is also characteristic of the contract doctrine to define a just society as the aim of the course of accumulation. . . . In this respect, justice as fairness contrasts with utilitarian views (§41). The just savings principle can be regarded as an understanding between generations to carry their fair share of the burden of realizing and preserving a just society. . . . Finally, the last stage at which saving is called for is not one of great abundance. . . . Justice does not require that early generations save so that later ones are simply more wealthy. Saving is demanded as a condition of bringing about the full realization of just institutions and the equal liberties. . . . It is a mistake to believe that a just and good society must wait upon a high material standard of life. What men want is meaningful work in free association with others, these associations regulating their relations to one another within a framework of just basic institutions” (Rawls 1999, 257).

50. The view I have in mind here is G. A. Cohen’s, as reflected in his comments about how capitalism “corrupts humanity” in the envoi to his If You’re an Egalitarian, How Come You’re So Rich? After many years of service at a dress-making factory, Cohen’s father was abruptly dismissed, simply because maximizing shareholder profit required it. Cohen (2000, 181) uses this incident to illustrate the way in which “business turns human producers into commodities.”

51. “In the Great Society we all in fact contribute not only to the satisfaction of needs of which we do not know, but sometimes even to the achievement of ends of which we would disapprove if we knew about them. We cannot help this because we do not know for what purposes the goods or services which we supply to others will be used by them. That we assist in the realization of other people’s aims without sharing them or even knowing them, and solely in order to achieve our own aims, is the source of strength of the Great Society. So long as collaboration presupposes common purposes, people with different aims are necessarily enemies who may fight each other for the same means; only the introduction of barter made it possible for the different individuals to be of use to one another without agreeing on ultimate ends” (Hayek 1976, 109–10). This insight has been emphasized recently by Gerald F. Gaus (2010, 374–75) in his “jurisdictional” account of property rights.
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