Why the Basic Structure?

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I

John Rawls famously holds that the basic structure is the ‘primary subject of justice.’ By this, he means that his two principles of justice apply only to a society’s major political and social institutions, including chiefly the constitution, the economic and legal systems, and (more contentiously) the family structure. This thesis — call it the basic structure restriction — entails that the celebrated difference principle has a narrower scope than one might have expected. It doesn’t apply directly to choices that individuals make within the basic structure. Individuals can live up to the demands of justice simply by obeying whatever rules

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2 More explicitly, Rawls defines the basic structure as ‘the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time’ (*Justice as Fairness*, 10). On the idea that the various institutions that constitute the basic structure form a system together, see notes 35 and 61.
are set by, and by doing what is necessary to sustain, the basic structure; they needn’t attempt to benefit maximally the worst off through their personal choices. Nor does the principle apply to interactions taking place beyond the basic structure, on the international stage. International actors can live up to the demands of justice by observing a comparatively modest ‘duty of assistance’ toward severely destitute societies; they needn’t make it their aim to benefit maximally the world’s poorest individuals.

The difficulties begin when you ask why the scope of justice should be so restricted. Rawls’s remarks on the matter are sparse and certainly don’t add up to anything like a sustained argument. As a result, there is much debate about how to understand his position and, more fundamentally, about how defensible the idea of a basic structure restriction truly is. Mostly, the parties cluster into two camps. In one, you have those who take Rawls at his word when he writes that the basic structure is the primary subject of justice because of the ‘pervasive influence’ it exerts on individuals’ life prospects. They typically go on to conclude that the basic structure restriction is untenable, since any concern with pervasive influence gives one reason to focus on much beside the basic structure. Thus G.A. Cohen argues that the choices made by one’s fellow citizens can exert an influence on one’s life prospects comparable to that of the basic structure, while countless cosmopolitans

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3 As Rawls puts it, the difference principle does not apply ‘to the decisions of individuals and associations, but rather to the institutional background against which these transactions and decisions take place.’ (Political Liberalism, 283; cf. Justice as Fairness, 54) For a particularly explicit statement of the general idea, see Justice as Fairness, 10-11.

4 See Rawls’s brief comments on international justice in Theory of Justice (at 331-2), and the fuller discussion in The Law of Peoples (Cambridge, MA: Harvard University Press 1999).

5 See, e.g., Theory of Justice, 82, and Justice as Fairness, 10.


As far as Rawls interpretation is concerned, neither view seems quite correct. Rawls is elusive about his reasons for embracing the basic structure restriction, but he is more explicit in drawing the line between what is part of the basic structure (the legal system, the economic structure, the family) and what is not (individual choices, national borders, churches, universities). The two standard views — call them the pervasive influence view and the coercion view — have strikingly little success when it comes to accounting for this aspect of Rawls’s position. The shortcoming is most obvious in the case of the pervasive influence view, which entails that the primary subject of justice should include far more than Rawls allows, to the point of rendering the very notion of a basic structure restriction meaningless. But the coercion view has its own troubles, notably in explaining Rawls’s claim that the basic structure should include the family but exclude borders, when a focus on legal coercion would seem to require precisely the opposite.\footnote{For Rawls’s position on the family, see Political Liberalism, 258. On the difficulties that the case raises for the coercion view, see Cohen, ‘Where the Action Is,’ esp. 4 and 22-3 (117-18 and 137-8). Note that the coercion view is also difficult to square with the texts. Nowhere does Rawls explicitly say that the basic structure is the primary subject of justice because it is coercive. When he does speak of coercion, it is usually to stress that political power is necessarily coercive (see, e.g., Political
There are deeper problems with these two views. Textual interpretation aside, we need to ask what could lend the basic structure the special importance that Rawls claims for it and, more generally, what could mark something as the primary subject of justice. These questions have deep ramifications. The idea that justice has a primary subject is closely tied to the notion of a domain of the political: presumably, if something sets political philosophy apart from the rest of morality, it is partly its distinct subject matter. In this way, an explanation of the basic structure’s importance points to a broader conception of the political. One of my central claims will be that the two standard views point to conceptions of the political that are in tension with the fundamental commitments that ground the Rawlsian outlook. Those who are attracted to the spirit of Rawls’s approach, if not necessarily to his pronouncements on the basic structure, should therefore think twice before embracing either of those views.

Once again, the problem is particularly glaring in the case of the pervasive influence view, which rests on the thought that political philosophy is fundamentally concerned with the distribution of benefits and burdens among individuals. I argue that this conception clashes with one of Rawls’s most compelling insights: that political philosophy should start with a conception of the person — specifically, with a conception of persons as free and equal. The coercion view fares better on this count, since it ties the basic structure’s special importance for justice to its impact on a person’s freedom, but I claim that the view rests on an excessively formalistic conception of the ways in which a person’s freedom can be undermined. The Rawlsian conception of the person, with its focus on the ability to set and pursue ends for oneself, calls for a more nuanced approach.

I advocate a different take on the basic structure’s special importance. I contend that the main concern of justice is neither pervasive influence broadly construed nor legal coercion narrowly construed but rather a more complex kind of impact that I call controlling influence. Roughly, structures and institutions exert controlling influence on a person to the extent that they set rules and constraints through which the person has to act to exercise her capacity for a conception of the good. I argue that the basic structure is the primary subject of justice because it exerts controlling influence. Whether a given structure or institution is also

\textit{Liberalism}, 136 and 217, two passages that Blake takes to provide crucial support for his reading; see ‘Distributive Justice,’ 285-6).

10 I am grateful to an anonymous reviewer for pressing me to make this point explicit.
part of the primary subject of justice — whether it is subject to the same kind of principles as the basic structure — depends on whether it exerts a similar influence.\textsuperscript{11} I believe that this approach provides a more plausible explanation of the basic structure’s importance than do the two standard views, and one that better reflects the complexity of the Rawlsian outlook. Interestingly, as I explain below, the approach also makes sense of some puzzling features of Rawls’s view, such as how he might have thought that the basic structure includes the family structure but not borders. I should stress, however, that my aim in discussing these cases is not to defend my view as an interpretation of Rawls’s position. Rather, I seek to show that the idea of controlling influence provides guidance in particularly difficult cases and, more generally, that it supports a stable conception of the basic structure restriction.

II

To get a sense of how Rawls’s position has been construed by his critics, and also to lay down the framework within which the debate on the basic structure restriction has mostly taken place, it will be useful to start with a brief look at the pervasive influence view. And since no one has had a greater impact on the shape of the debate than G.A. Cohen, his influential line of attack on Rawls’s position is the obvious place to begin.

The reasoning is familiar.\textsuperscript{12} Take two societies with identical basic structures, each set up so as to maximize the life prospects of the worst off. Assume (as Rawls himself does) that each basic structure includes a market economy allowing some individuals to command significantly higher salaries than others, because those who have special marketable talents can hold out for higher wages by refusing to work or by working less productively until they get what they want.\textsuperscript{13} Finally, imagine

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11 I am taking on board an assumption that the two standard views share: that what justifies focusing on the basic structure has to do exclusively with the kind of impact it has on individuals. The assumption could be questioned; indeed, Rawls himself does not accept it (see \textit{Justice as Fairness}, §§15-16). I retain it here because there are fruitful possibilities within the logical space circumscribed by the assumption that have received too little attention, and because an explanation of the basic structure’s importance in terms of its impact on people’s lives would seem most philosophically satisfying. I am grateful to two anonymous reviewers for prompting me to clarify this aspect of my discussion.

12 See Cohen, ‘Where the Action Is.’

13 The intuitive reasoning for allowing such dealings is that the talented would be
that in one society the dominant ethos is unapologetically capitalistic: the ‘self-seeking choices of high-flying marketeers’ are seen as acceptable, even laudable. In the other society, a more egalitarian ethos prevails: individuals recognize a personal duty to improve the lot of the worst off, and holding out for higher wages is frowned upon.

The basic structure restriction seems to imply that, from the standpoint of justice, there is nothing to choose between these two societies. One may be more caring or charitable than the other, but so long as their basic structures are identical, the two must be equally just. This can’t be right, Cohen insists. Rawls takes justice to be concerned with the basic structure because of its pervasive influence on individuals’ life prospects. But surely the ethos that prevails in a society will have an influence that is, if not quite as great as that of the basic structure, at least sufficient to raise serious concerns of justice? After all, assuming that it is possible for the talented to maintain their productivity without the incentive of higher wages (an assumption that seems plausible, at least for work that is not unusually unpleasant), the worst off are likely to fare significantly better when an egalitarian ethos prevails than when a capitalist one does. Why then wouldn’t justice require individuals to do what they can to uphold an egalitarian ethos in their society? If Rawls rejects the possibility outright, isn’t it because an institutionalist bias makes him lose sight of what distributive justice should be ultimately concerned with, namely, the ‘pattern of benefits and burdens in society’?

Cohen takes this line of reasoning to establish that the basic structure restriction is inwardly unstable: our reasons for focusing on the basic structure demand that we also focus on what goes on within the basic structure — on the prevailing social ethos and on the individual choices that sustain it. Similar considerations have been invoked to argue that the basic structure restriction is also outwardly unstable. The reasoning is a simple variation on Cohen’s theme. However great an impact the

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less productive without appropriate incentives, leading to worse prospects for all, including the worst off. Cohen discusses this argument at length in his ‘Incentives, Inequality, and Community,’ in The Tanner Lectures on Human Values, Grethe Peterson, ed., vol. 13 (Salt Lake City: University of Utah Press 1992), 263-329 (reprinted with minor changes as chapter 1 of Rescuing Justice and Equality). Rawls himself sometimes downplays the role of incentives in explaining why inequalities are necessary (see, e.g., Political Liberalism, 270).

14 ‘Where the Action Is,’ 5 (118).
15 Ibid., 20-2 (134-7).
16 Ibid., 12 (126).
basic structure may have on individuals’ life prospects, various institutions and arrangements beyond the basic structure will have a comparable influence. International organizations such as the World Bank and the World Trade Organization, along with the innumerable agreements among states concerning the movements of goods and persons, have a considerable impact on the life prospects of individuals, and especially on the prospects of the worst off individuals in the poorest countries, who should be of particular concern to Rawlsians. The same holds for immigration rules adopted by rich countries. Why should justice be any less concerned with these factors than with the workings of a society’s basic structure?

Staring at these arguments for a while, you start to wonder how anyone could take the basic structure restriction seriously. Upon closer inspection, however, you notice that the reasoning rests on a peculiar conception of pervasive influence. What is taken to explain the basic structure’s central importance here is chiefly that it has a very great influence on the life prospects of those subject to it;\(^\text{17}\) in short, pervasiveness is seen primarily as a matter of magnitude. If you represent a person’s life prospects as the set of expected payoffs associated with the different options open to her, then the thought is that how the basic structure is set up makes a great difference to the value of those expected payoffs. When Cohen and his followers claim that individual choices or international actors can have an influence comparable to that of the basic structure, they just mean that these factors can affect an individual’s life prospects, thus understood, on the same scale as the basic structure does.

This way of looking at the matter evidently strikes many philosophers as natural, and it has its attractions. For one thing, the basic structure does have a very great influence in the relevant sense: it makes all the difference to the life prospects of one born with no marketable talent whether she lives under institutions that embody the principles of laissez-faire capitalism, say, or those of Rawls’s theory. Moreover, influence on such a scale undoubtedly calls for justification, all the more so given two facts that Rawls repeatedly stresses: that individuals are typically born subject to a given basic structure and hence have no say in the matter; and that setting up the basic structure in a particular way is something we do collectively and hence something for which we are

\(^{17}\) I say ‘chiefly’ because it would be odd to speak of pervasive influence unless the impact was also wide-ranging in some way. But that idea plays a derivative role on the pervasive influence view: that the basic structure has an impact on various aspects of individuals’ lives compounds the magnitude of its influence but doesn’t make it a different kind of influence.
accountable. The view also supports the thought that the basic structure’s justification will involve something like the difference principle. How can we justify affecting individuals’ life prospects on the scale we do collectively through the basic structure? By making sure that no one can reasonably complain about how her prospects are affected, which is precisely what the difference principle aims to guarantee.

As I suggested already, given how this view fails to make sense of the basic structure restriction, it is hard to believe that it adequately captures Rawls’s thinking. But the deeper problem is that Cohen and his followers are operating with an impoverished picture of political philosophy. As they see it, a theory of distributive justice fundamentally aims to answer two questions. First, what should the metric of justice be — that is, with the distribution of what exactly should justice be concerned? Second, how should the relevant goods be distributed? Construed along these lines, Rawls’s theory boils down to two simple theses. First, the metric of justice should be drawn in terms of primary goods (more precisely, in terms of ‘the index of [primary] goods which a representative individual can look forward to’ over the course of her

18 See Theory of Justice, 7 and 88.

19 Rawls’s intuitive argument for his principle is very much in this spirit. If the basic structure conforms to the difference principle, then its impact is acceptable to those at the bottom of the expectations ladder, since things are set up to make their prospects as good as possible, and hence to work maximally to their benefit. More trivially, its impact is also acceptable to those at the top of the ladder, since they cannot reasonably complain about their lot to begin with. See Theory of Justice, 130-1.

20 Seminal discussions of this question include Amartya Sen, ‘Equality of What?’ in Choice, Welfare and Measurement (Cambridge, MA: MIT Press 1982), 353-69; Ronald Dworkin, Sovereign Virtue: The Theory and Practice of Equality (Cambridge, MA: Harvard University Press 2000), chap. 1-2; Richard Arneson, ‘Equality and Equal Opportunity for Welfare,’ Philosophical Studies 56 (1989) 77-93; and G.A. Cohen, ‘On the Currency of Egalitarian Justice,’ Ethics 99 (1989) 906-44 (defending respectively capabilities, resources, opportunity for welfare, and access to advantage as metrics for egalitarian justice). I focus on the case of primary goods in the text because I am mainly concerned with the Rawlsian outlook, but the point I make holds across conceptions of the metric of justice. It rests on a general distinction between thinking that justice is primarily concerned with factors that determine how good individuals’ prospects are according to the relevant metric, and thinking that it is primarily concerned with factors that exert controlling influence over individuals’ ability to adopt and pursue a conception of the good (on which more below).

21 Theory of Justice, 79. For Rawls’s reasons for focusing on primary goods rather than welfare, see notably ibid., 80-1, and Political Liberalism, 183-7. Note that the fundamental concern of justice could not be primary goods as such on a Rawls’s
Second, as stated by the difference principle, justice requires priority for the worst off. 22

This outlook plainly invites a focus on the magnitude of the basic structure’s influence. Once a metric of justice is chosen, it is tempting to think that, if anything deserves to count as the primary concern of justice, it must be whatever has the greatest impact on a person’s life prospects, measured in terms of that metric. In the context of Rawls’s theory, this would mean that the primary subject of justice comprises whatever structures or institutions play a dominant role in determining how well a person can expect to do over the course of her life in terms of primary goods — for short, whatever structures or institutions play a dominant role in determining how good a person’s options are. Since many things beside the basic structure have a great influence on a person’s options, it’s a short step to the conclusion that the basic structure restriction is untenable.

Now, there is no doubt that justice is concerned with how good a person’s options are: no society could be just that failed to provide minimally adequate options for all its members. It does not follow that the basic structure’s importance has to be understood exclusively in those terms. The connection between the metric and the primary subject of justice need not be so direct. You might think that the latter is

view, given how he maps out his ‘social division of responsibility’ between society and the individual. According to that principle, society is responsible ‘for maintaining the equal basic liberties and fair equality of opportunity, and for providing a fair share of the other primary goods for everyone within this framework’; individuals, by contrast, are in charge of ‘revising and adjusting their ends and aspirations in view of the all-purpose means they can expect, given their present and foreseeable situation.’ (‘Social Unity and Primary Goods,’ in Collected Papers, Samuel Freeman, ed. [Cambridge, MA: Harvard University Press 1999], 359-87, at 371; cf. Political Liberalism, 189) On such a picture, how well different individuals end up doing in terms of primary goods will depend on matters that are within their sphere of responsibility — what specific ends they choose to pursue, how they choose to do it, and so on. I take the thought to be that, so long as society has done its share by providing fully adequate options (including, crucially, the most adequate set of options possible for the worst off), and so long as all remain above a certain threshold, how successful each person is at securing primary goods is no concern of justice.

22 To be precise, justice requires priority for the worst off for some primary goods — income and wealth, the social bases of self-respect, and what Rawls calls ‘powers and prerogatives of offices and positions of responsibility’ (‘Social Unity,’ 362). Basic liberties and what Rawls sometimes calls ‘fair opportunities,’ which are also primary goods, are to be secured equally for all citizens. Since our focus here is mostly on the application of the difference principle, we can leave these complications aside.
determined on grounds that are partly independent of the former; or you might think that they both spring from some more fundamental commitment. In what follows, I defend a version of the second line of thought. I maintain that the reasoning that justifies adopting primary goods as the metric of justice also supports taking the basic structure to be the primary subject of justice. Both moves are required by the conception of the person that grounds the Rawlsian outlook.

III

Recall how Rawls construes the role of primary goods. He is careful to stress that the list of primary goods is meant neither as a proxy for psychological well-being nor as a means to ensure that individuals are as successful as possible in their various pursuits. In drawing the list, we do not ‘try to estimate the extent to which individuals succeed in advancing their ends’; rather, the aim is to identify ‘social background conditions and all-purpose means generally necessary for forming and rationally pursuing a conception of the good.’

I take this to mean that primary goods are connected to a person’s freedom broadly construed: they provide background conditions and means that are essential for a human being to exercise her capacity to set and pursue ends.

This should come as no surprise. The conception of persons as free and equal is among the most fundamental commitments of the Rawlsian outlook. It finds a particularly clear expression in the argument for the priority of liberty, but it also plays a central role in drawing the list of primary goods. This conception calls for granting ‘regulative primacy’ to a person’s interest in developing and exercising the capacities that are essential to her standing as free and equal. Accordingly, the chief concern in drawing a list of primary goods is to identify the conditions that allow individuals fully to develop and exercise these capacities, including, crucially for our purposes, ‘the capacity to decide upon, to revise, and rationally to pursue a conception of the good.’

23 ‘Social Unity,’ 370; see also Political Liberalism, 187-8.

24 ‘Social Unity,’ 365. Rawls associates two capacities, or moral powers, with his conception of persons as free and equal: the capacity for a sense of justice and the capacity for a conception of the good (see ibid., and Justice as Fairness, 18-19). Primary goods are chosen in light of the fundamental interest individuals have in developing and exercising these two moral powers, as Rawls explicitly states when he writes (in a more precise variation of the passage I quoted above) that primary goods are ‘various social conditions and all-purpose means that are generally necessary to enable citizens adequately to develop and fully exercise their
Rawls aptly puts it, primary goods are ‘things citizens need as free and equal persons.’

I believe that the basic structure’s special importance should also be understood in terms of its impact on a person’s ability to adopt and pursue a conception of the good. Now, to be fair, this claim is not exactly inconsistent with the picture favored by Cohen and his followers. It is possible to accept the conception of the person from which Rawls starts and yet think that the basic structure affects a person’s ability to set and pursue ends chiefly through its impact on how good her options are, measured in terms of primary goods. But this underplays how profound the basic structure’s influence is. By setting up the basic structure one way or another, we do not merely make a person’s options better or worse; we set up a whole web of rules and constraints that a person must follow to exercise her capacity for a conception of the good. We establish the rules of the game, as it were — the rules of a game that individuals have no choice but to play. This is what accounts for the unique issues of justification that the basic structure raises.

two moral powers, and to pursue their determinate conception of the good’ (Justice as Fairness, 57). The point I want to make rests specifically on a person’s interest in developing and exercising her capacity for a conception of the good, so I leave aside the capacity for a sense of justice.

25 Political Liberalism, 180; emphasis added. See also ‘Social Unity,’ 365 ff.

26 I should acknowledge that I am pulling Rawls’s theory in a broadly Kantian direction by stressing its reliance on an underlying idea of freedom. But I am not claiming that Rawlsians ought to embrace Kant’s austere approach to political philosophy. Kant is committed to a number of radical theses that are difficult to square with the Rawlsian outlook. Most fundamentally perhaps, Kant holds that political philosophy properly construed starts from the idea that individuals have a right to freedom — a right entailing that restrictions on freedom can be justified only in terms of freedom itself. Nothing in the Rawlsian framework supports such a rigid view of the justification of coercion. On a Rawlsian view, coercion is justified when it is carried out by legitimate institutions making a credible attempt to live up to the demands of justice. The conception of persons as free and equal plays a crucial role in determining the content of the demands of justice, but the idea of freedom itself need not play a direct role in justifying each instance of coercion. On the right to freedom, see my ‘Kant on the Right to Freedom: A Defense,’ Ethics 120 (2010) 791-819; Arthur Ripstein, Force and Freedom: Kant’s Legal and Political Philosophy (Cambridge, MA: Harvard University Press 2009), chap. 2. Note that Ripstein also emphasizes the Kantian dimension of Rawls’s theory in his ‘The Division of Responsibility and the Law of Tort,’ Fordham Law Review 72 (2004) 1811-44.

27 On the idea that the basic structure should be understood as a web of rules, see Theory of Justice, 47, where Rawls defines the basic structure in terms of institutions, and institutions in terms of systems of rules.

28 This way of putting the point brings out how significant it is that individuals are
In what sense exactly does the basic structure set rules and constraints that a person must follow? The thought is best illustrated by considering what normally forms the core of a basic structure: the legal system. Taken as a whole, the legal system sets rules and constraints through which a person must act if she is to exercise her ability to set and pursue ends. In one sense, this is obvious. Through its different branches — most explicitly, through the criminal law — the legal system proscribes various actions that you might otherwise want to carry out. As proponents of the coercion view emphasize, such coercive interference plainly calls for justification. Yet this way of putting the matter fails to convey the full breadth of the basic structure’s influence. It overlooks how, even if you are not inclined to do anything illegal, you still have to act through the legal system to pursue your projects. What positions you can occupy in society, and how you can move from one to another, are matters that the legal system influences at every turn — by recognizing (or not) different rights and liberties, by carving out specific rules of property and contract, and so on. In short, the legal system determines how a person can acquire and use means to pursue her conception of the good. The thought runs deep. Pursuing a conception of the good normally requires the use of some external objects, and it is the legal system that regulates the use of such objects in a given territory. Moreover, pursuing one’s conception of the good normally requires entering into certain kinds of relations with others — employment, contract, and so on — that are also regulated by the legal system. The legal system thus governs a person’s interactions with the external world at the most fundamental level. It is, as Rawls born subject to a given basic structure. Being born to a basic structure is not simply being born to a certain set of expected payoffs. It is being born to a set of rules and constraints that will impact at every turn how one can lead one’s life. In that sense, it is very much like being born in the middle of a game that one has no choice about playing — a game whose rules are remarkably far-reaching in their application, moreover, so that they regulate much of one’s life. Obviously, no ordinary game could justifiably be imposed in this way. Indeed, one reason to think that the choice of principles of justice in the original position can yield a definite result is that, by any reckoning, the basic structure must meet extraordinarily demanding conditions if imposing so extensive a set of rules on those born to a given society is to be acceptable.

29 I say ‘normally’ because, on the view I am putting forward, it is conceivable (if unlikely) that a society could have a basic structure without having a legal system properly speaking. I consider the possibility in section V.

30 For a parallel claim about the basic structure in general, see Theory of Justice, 7.
puts it, the structure ‘within which the pursuit of all other activities takes place.’

One might question the generality of this claim. Does a person really have to act through the legal system regardless of her determinate conception of the good? What about someone who subscribes to an ascetic ideal rejecting the need for property and contract rights, perhaps bypassing the legal system altogether? One ground for skepticism about this possibility is that the legal system regulates the use of physical space itself, which is arguably essential for any human project. Even leaving that aside, the question is not whether every conceivable conception of the good is ultimately pursued through the legal system. On a Rawlsian view, the central concern is a person’s fundamental interest in realizing and exercising her ‘capacity to decide upon, to revise, and rationally to pursue a conception of the good’ — not just her interest in pursuing the specific conception of the good she has adopted. The nuance is significant. Someone who adopts a conception of the good that requires virtually no interaction with the legal system cannot be tied to that particular conception: she must be free to change it as she sees fit. Regardless of one’s conception of the good, then, the legal system’s impact on one’s ability to form and to revise a conception of the good remains of the first importance.

My contention is that the basic structure is the primary subject of justice because it exerts the kind of influence I have just ascribed to the legal system: it sets rules and constraints that determine how a person can exercise her capacity for a conception of the good — rules and constraints through which a person has no reasonable choice but to proceed if she is to adopt and pursue a conception of the good. This is

31 *Theory of Justice*, 207.

32 ‘Social Unity,’ 365; emphasis added. Note that, in this passage, Rawls draws a distinction between persons ‘highest-order interests’ in realizing and exercising the two moral powers and their ‘higher-order (as opposed to ... highest-order) interest in advancing [their] determinate conceptions of the good’ (ibid.), a distinction that is very much in the spirit of the point I am making here.

33 As Rawls puts it, ‘in justice as fairness individuals are not identified with their actual or possible plans but are viewed rather as beings that have a capacity for forming, adopting, and changing these plans, should they be so moved; and who give priority to preserving their liberty in these matters’ (‘Fairness to Goodness,’ in *Collected Papers*, 267-85, at 283; cf. *Theory of Justice*, 131-2).

34 This way of putting the point echoes an important aspect of Rawls’s argument for adopting primary goods as a metric of justice. Rawls doesn’t argue that primary goods are essential for the pursuit of any conception of the good whatsoever but rather that pursuing a conception of the good will normally require primary goods.
what I refer to as controlling influence. It should be clear that, from the point of view of a person’s ability to set and pursue ends, this is a much deeper kind of influence than pervasive influence as commonly understood. A structure exerting controlling influence affects a person’s ability to adopt and pursue ends at every turn: it effectively structures the social world within which she must adopt and revise a conception of the good and pursue her specific ends. By contrast, a structure exerting pervasive influence merely influences the range of possibilities open to a person, notably by making it the case that she can afford more or fewer goods than she could if things were set up differently. Such a structure does not set rules that determine in general how a person can exercise her capacity for a conception of the good.

Admittedly, there are circumstances in which the distinction I am stressing between controlling influence and pervasive influence will seem immaterial. When a person’s options are sufficiently bad, any improvement can make all the difference to her ability to set and pursue ends for herself. Indeed, you may think that any attractive option can exert something like controlling influence on a person who is destitute, and hence that the distinction essentially collapses. Such cases need not detain us. All parties to our debate agree that human beings have a right to minimally adequate options, regardless of where they are or of what institutions they are subject to. The question is, why should the presence of a basic structure be thought to give rise to more exacting demands of justice? The answer must turn on the impact that the basic structure has on those who are above the threshold of minimally adequate options, since that is where its presence is thought to make a difference.

All this remains fairly abstract. In order to put some flesh on the idea of controlling influence, we need to consider how it works in particular cases. Most of the structures and institutions that Rawls includes in the basic structure raise no special difficulties on the present view, since they are part of the legal system broadly construed — I am thinking here of ‘[t]he political constitution with an independent judiciary, the legally recognized forms of property, and the structure of the economy

He adds, ‘That the primary goods are necessary conditions for realizing the powers of moral personality and are all-purpose means for a sufficiently wide range of final ends presupposes various general facts about human wants and abilities, their characteristic phases and requirements of nurture, relations of social interdependence, and much else’ (‘Social Unity,’ 367). We can take the thought on board for present purposes and say that, given various general facts about human nature, and given what the basic structure is like, a person has no reasonable choice but to operate through the basic structure to adopt and pursue a conception of the good.
(for example, as a system of competitive markets with private property in the means of production).\(^{35}\) The hard cases are those in which the connection to the legal system is tenuous or equivocal — cases having to do with the family structure, patterns of individual choices, international actors, or state borders. In the next section, I consider some cases that bring out the contrast between controlling influence and pervasive influence. In section V, I turn to the more subtle contrast between controlling influence and coercion, considering again some specific cases that illustrate how the two views come apart. Finally, in section VI, I say a few words about the particularly elusive case of the family.

Before moving on to these more concrete issues, however, a potential objection deserves to be entertained. I have argued that, on a properly Rawlsian outlook, the primary focus is not on the distribution of benefits and burdens as such but rather on a person’s ability to set and pursue ends for herself. This highlights the importance of the conception of the person in Rawls’s theory, but it may be thought to do so at the cost of rendering mysterious the role of the difference principle. Not so. The view simply calls for a more careful account of the matter. The difference principle does not come into play out of direct concern for how good individuals’ prospects will be under different sets of rules. It comes into play because we collectively impose on each other a system of rules and constraints that determine how we can engage in economic cooperation with each other and, more broadly, how we can go about living our lives. We must ensure that these rules can be justified to all, especially given that they are imposed on individuals from the moment of birth. The central argument of *A Theory of Justice* can be seen as aiming to establish what conditions such a system of rules has to meet for its imposition to be justified. One crucial condition is that

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35 *Justice as Fairness*, 10. Bear in mind that Rawls considers the basic structure primarily as a system of institutions working together (see the passage quoted in note 2 above). Accordingly, we need not establish that each part of the basic structure exerts controlling influence on its own. From the standpoint of justice, given that we are considering institutions that work together, the chief concern is the joint influence that the institutions exert on the lives of individuals. Matters are different when one considers structures that are not institutionally integrated in the basic structure. In such cases, one has to ask whether the structure in question exerts controlling influence either on its own (as I suggest below the family structure does) or by affecting the basic structure’s workings at a sufficiently deep level (as I suggest below a sexist ethos does). Of course, we can still say, as Rawls does for the family, that a structure that is not institutionally integrated should count as part of the basic structure because it meets the relevant criterion. Nothing hangs on this, but it is important to be clear about how the criterion operates in the different cases.
the system must not let morally irrelevant factors play an undue role in determining a person’s success in pursuing her conception of the good. By requiring that the whole basic structure be set up so as to work to the greatest possible advantage of the worst off, who have the most grounds for complaint, the difference principle contributes to ensuring that this condition is met. When the difference principle is satisfied, the reasoning goes, no one can complain about the specific factors that allow some individuals to get ahead under the rules of the basic structure: by hypothesis, any alternative set of rules would be even less favorable to those at the bottom of the ladder.

This account is perhaps more convoluted than the one suggested by the pervasive influence view, but it better captures the role played by the idea of moral arbitrariness in Rawls’s argument. Rawls’s point is not that we are collectively responsible for ironing out the effects of brute luck on the life prospects of individuals, as if our task was to right the wrongs of the universe. As he puts it, ‘[t]he aim ... is not to eliminate social contingencies from social life.’ Indeed, justice is not concerned with contingencies of race or gender or talent as such; in Rawls’s famous phrase, these are ‘neither just nor unjust.’ It is concerned with ‘the way the basic structure, by setting up inequalities, uses those contingencies to meet certain social purposes.’ In other words, moral contingencies matter only to the extent that they are invoked in criteria according to which the basic structure defines social positions — hence, only to the extent that they factor into a system of rules that exerts controlling influence.

IV

The idea of controlling influence can shed light on cases that Cohen and his followers have thought particularly troublesome for the basic struc-


37 Political Liberalism, 283.

38 Theory of Justice, 87.

39 Justice as Fairness, 55; emphasis added; cf. 124, and Theory of Justice, 156.
ture restriction. Take first Cohen’s claim about the impact of a capitalist ethos. Such an ethos may have a significant impact on how well individuals can hope to do, but it seems to me doubtful that, in an otherwise just society, it would exert anything amounting to controlling influence. Recall that we are to imagine a society whose basic structure is *perfectly just*, but in which most individuals favor unconstrained self-seeking behavior, and in which the talented tend to hold out for the highest salaries they can squeeze out of the market. Such dealings may exacerbate the plight of the worst off by lowering the payoffs associated with various activities they might undertake. But the impact is unlikely to amount to anything like controlling influence if the basic structure fully satisfies the difference principle. Under such circumstances, the capitalist ethos will not define the positions in which individuals find themselves, nor determine how these positions are obtained, nor change the rules of the basic structure in any profound way. It will merely affect how well different individuals are likely to succeed within the rules set by the basic structure.\(^{40}\)

To see this, think again of our two societies with identical basic structures but different prevailing outlooks — one more openly capitalist, the other more egalitarian — and consider each society’s worst off individual. By hypothesis, they are subject to similar laws, similar regulations, similar taxation rates. Their states provide similar social programs, comparable access to education and health care, and so on. Indeed, since we assume that each society’s basic structure fully satisfies the difference principle, each individual is subject to institutions that are set up so as to make the life prospects of someone in her situation as good as possible. With all that in place, what should we say if one person fares slightly less well than the other — say, earns a few thousand dollars less per year — because of the ethos that prevails in her society? So long as both have fully adequate standards of living, as the basic structure guarantees, I don’t see why the difference would be a fundamental concern of justice, any more than it would be a fundamental concern of justice if a similar difference resulted from one

\(^{40}\) Let me emphasize that I am concerned here specifically with the kind of ethos that Cohen himself considers: an ethos that allows the talented to hold out for higher wages. I am not claiming that *any* ethos that capitalism might inspire would fail to exert controlling influence over individuals (what I say about a sexist ethos in the next section should make this clear). Also, as I stress in the text, I follow Cohen in considering the impact of the relevant ethos only in a society whose basic structure conforms to the difference principle. Undoubtedly, this kind of ethos is more likely to exert controlling influence if the basic structure is sufficiently unjust, since those at the bottom of the ladder will then be highly vulnerable.
society’s being slightly poorer than the other. If our two individuals are subject to systems of rules that aim to maximize their prospects, and if the two systems make equally credible attempts to do so, then the rest is just a matter of one person’s having a bit more stuff than the other.

Turn now to the cases that have generated the most heated debates in recent years — those having to do with the various agents operating on the international stage. Here matters are more complex. Rules imposed by institutions such as the World Trade Organization or enforced at the borders of rich states clearly have a tremendous impact on the living standard of the globally worst off. On the traditional pervasive influence view, that suffices to make them part of the primary subject of justice. On the present view, however, the question is not so straightforward. We need to ask whether these institutions exert controlling influence on individuals’ ability to set and pursue ends for themselves — whether they shape the social landscape in which individuals must act. By and large, cosmopolitans have ignored that question and focused instead on what they see as the morally arbitrary character of the impact of international institutions.41

An important exception to this trend is worth mentioning. In their response to a provocative argument presented by Thomas Nagel, Joshua Cohen and Charles Sabel have taken great care to bring out the rule-making function of international institutions and painstakingly argued that the rules that international organizations impose on various countries can be similar in their impact to the rules that the domestic basic structure imposes on individuals.42 In my view, that is precisely the kind of case that needs to be made to show that the difference principle properly extends to the international sphere. Discussing their proposal in detail would take us too far afield, but I do want to mention some grounds for (qualified) skepticism about the analogy they draw between the rules set by international institutions and those set by domestic institutions, mostly by way of clarifying what I take to be at stake here.

The case for skepticism is straightforward. The basic structure has special significance because it sets rules and constraints through which individuals have no reasonable choice but to act. As we saw above, 41

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41 I am thinking here of the familiar claim that the moral arbitrariness of a person’s being born on one side of a border rather than the other is sufficient to justify applying something like the difference principle at the international level. See, e.g., Charles R. Beitz, ‘Cosmopolitan Ideals and National Sentiment,’ The Journal of Philosophy 80 (1983) 591-600; Tan, Justice without Borders.

human projects require means, and the ownership of means in a given territory is established through the rules of the basic structure; hence, there is no getting around or ignoring these rules: I have to act through them if I am to have projects at all. It is not obvious that international institutions have a similar impact. How I can have means at my disposal — how I can acquire and use objects, how I can enter into contracts with others, and so on — is determined in the final instance by the domestic rules of the state in which I act. Accordingly, these are the rules that primarily call for justification. Of course, there may be individual projects for which international rules have priority. But that only shows that those rules have an impact on the pursuit of certain specific projects, which is quite different from setting rules through which a person must act to exercise her capacity for a conception of the good.

Note that these grounds for skepticism do not apply when international actors have the power to impose rules on a country that effectively change the shape of its basic structure — a scenario that has become alarmingly familiar in recent years. In such cases, it seems clear that the actors can exert controlling influence, since they have the power to alter the very workings of the basic structure. They must accordingly be subject to the same standards of justice as the basic structure itself. The thought is straightforward. If the rules of the basic structure are subject to certain principles of justice in virtue of the type of impact they have on individuals, then any actor that has the power to modify the content of those rules, and hence to modulate their impact, must be subject to the same principles of justice whenever it exercises that power. Thus, if the basic structure of a society has to satisfy the difference principle, then an international actor that influences the workings of that structure can do so only provided that it doesn’t thereby hinder the principle’s satisfaction. This isn’t to say that an actor’s wielding its power in accordance with this requirement is sufficient to justify its intervention; concerns about democratic legitimacy still arise. But it is plainly necessary.

43 Compare a point made by Andrea Sangiovanni, who argues against the idea that ‘only states exercise authority over property entitlements.’ He mentions the following counter-examples: ‘The TRIPS agreement sets justiciable standards for intellectual property rights ... international law confers legal rights to the appropriation and sale of natural resources as well as the right to borrow internationally; international antitrust law regulates cross-border mergers and acquisitions; IMF conditionality agreements fundamentally shape domestic social and economic policy’ (‘Global Justice, Reciprocity, and the State,’ Philosophy & Public Affairs 35 (2007) 3-39, at 14n20). The last case is a particularly clear example of the kind of impact on the rule-setting workings of the basic structure that I have in mind here.
Whether a given international actor has the power to exert controlling influence over an individual is ultimately an empirical question, one whose answer depends on the means at the actor’s disposal, but also on the strength of the domestic legal system, and on the individual’s specific vulnerabilities. These are often difficult matters to ascertain. I certainly don’t deny that, as things stand, the poorest individuals living in the most destitute countries are so vulnerable that the local outpost of a multinational corporation can set constraints that they have no reasonable choice but to follow.\footnote{The controlling influence view implies, plausibly enough, that the principles of justice that apply to international actors become more stringent when they interact with individuals who are particularly vulnerable. This allows us to say that the impact of a multinational corporation on the world’s poorest individuals is a primary concern of justice without endorsing a similar conclusion concerning its impact on (say) French citizens. This is in line with Rawls’s claim that the international duty of assistance toward the world’s poor has a ‘cutoff point’ (see \textit{Law of Peoples}, 119).} Nor do I deny that entire countries can effectively be held hostage by multinational corporations. What I mean to emphasize is that the sheer fact that a given international actor could improve the lot of certain individuals by behaving differently doesn’t by itself establish that the actor is subject to something like the difference principle. We need to ask whether the actor exerts controlling influence — either directly, through its impact on the individuals’ ability to set and pursue ends for themselves, or indirectly, through its impact on the domestic basic structure.

The contrast between controlling and pervasive influence should be clear enough at this point. What may seem less clear is how my view differs from the coercion view that Michael Blake and Thomas Nagel, among others, have defended. Is controlling influence just coercion under a new guise? A closer look at Michael Blake’s influential articulation of the coercion view will dispel that worry, and also help us sharpen the contours of the idea of controlling influence.\footnote{The view put forward by A.J. Julius in his remarkable discussion ‘Basic Structure and the Value of Equality,’ \textit{Philosophy \& Public Affairs} 31 (2003) 321-55, could also have served as a foil here. I focus on Blake’s view instead because it is more likely to be familiar, and because its comparative simplicity allows for a sharper contrast with the idea of controlling influence. Still, for those who are acquainted with Julius’s view, it may be useful to point out some respects in which our views differ. What primarily calls for justification on Julius’s view is}
Blake maintains that the basic structure is the primary subject of justice because it consists of institutions that are coercively imposed on individuals. Although he doesn’t say precisely how coercion is to be understood in this context, he insists on one central characteristic: it is ‘an intentional action, designed to replace the chosen option with the choice of another.’ Why this should call for special justification is not hard to see. Coercion interferes with a person’s choices and is therefore (at least *prima facie*) incompatible with individual autonomy, which Blake takes to be the foundational value of liberal theories of jus-

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*framing*, a quite general moral relation which obtains whenever A acts with the intention of leading B to act in A’s interest, and which is problematic for the quite general reason that, when not justified, it involves treating another as a mere means (see 328). The basic structure is normatively significant, the thought goes, because how we set it up will lead people to do some things rather than others — that is, because framing can take place *through the basic structure*. The key question, on Julius’s view, is how such framing can be justified. For complex reasons (including that individuals don’t normally have a choice about being subject to the basic structure’s impact), he thinks that framing that is mediated by the basic structure calls for a special kind of justification, one that is distributive and egalitarian in character; hence the role of the difference principle (see 333-5).

Two contrasts are particularly worth emphasizing here. First, on Julius’s view, the basic structure’s special importance is not essentially tied to the systematic impact it has on a person’s ability to set and pursue ends. What matters is that how it is set up will lead some people to do one thing rather than another, and that those who are subject to this impact are given no choice about the matter. A structure need not exert the kind of systematic impact that I take to be characteristic of the basic structure to meet these two conditions (for instance, large corporations often have the kind of impact that Julius worries about without exerting controlling influence). Second, the notion of framing makes essential reference to individual intentions, an idea that has no counterpart in the view I advocate. As I see it, what calls for justification is a certain kind of collective structuring of the social world. Whether I support the basic structure because I think that it will lead others to serve my interests, or out of a sense of duty, or for whatever other reason, makes all the difference to how virtuous I am but no difference to the principles of justice that apply to the basic structure. So long as the basic structure has the relevant kind of impact, all that matters is whether we together have control over the structure in a way that makes us collectively accountable (see *Theory of Justice*, 88 and 479).

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46 Blake, ‘Distributive Justice,’ 272. Most of the examples that Blake considers involve the threat of force, but he does not see this as necessary for coercion, as evidenced by his suggestion (at 265) that exploitative trade relationships can be coercive. Since Blake professes general agreement with Alan Wertheimer’s views on the issue, however, we can probably take him to be committed to the view that some form of threat of making the patient less well-off than she ought to be is required for coercion, even if such threats need not involve the use of force. See Alan Wertheimer, *Coercion* (Princeton: Princeton University Press 1987).
On this view, the aim of Rawls’s principles of justice is to reconcile the basic structure’s coercive character with the autonomy of those to whom it applies. This is done by securing the hypothetical assent of all society’s members — or, as Blake puts it in a Scanlonian moment, by ensuring that no one can ‘reasonably reject’ the coercive imposition of the basic structure. The role of the difference principle is thus to legitimize the imposition of the part of the basic structure that has to do with the allocation of goods, which Blake broadly identifies with the private law. Roughly, the idea is that we ensure that no one can object to the allocation of goods carried out through property and contract law by arranging the basic structure so that it works to the advantage of all, and especially of the worst off. So long as we do this, the reasoning goes, no one can reasonably reject the coercive power involved in the basic structure’s allocation of goods to individuals.

There are undeniable similarities between this story and the one I have told above. I have stressed the central importance of a person’s ability to adopt and pursue a conception of the good; Blake clearly understands the notion of autonomy along related lines. But there are also significant differences between controlling influence and coercion.

47 See ‘Distributive Justice,’ 266-73. I take Blake’s focus on autonomy to aim, among other things, to counter G.A. Cohen’s contention that the coercion view imposes an arbitrarily narrow conception of justice. Cohen asks, ‘why should we care so disproportionately about the coercive basic structure, when the major reason for caring about it, its impact on people’s lives, is also a reason for caring about informal structure and patterns of personal choice? To the extent that we care about coercive structure because it is fateful with regard to benefits and burdens, we must care equally about the ethics that sustain gender inequality, and egalitarian incentives.’ (‘Where the Action Is,’ 23 [138]; see also 21 [136]) The charge is unfounded if liberals are ultimately concerned with autonomy, as Blake contends. Scheffler makes a similar point in more strictly Rawlsian terms when he writes that, ‘given the status of individuals as free and equal, the establishment of coercive institutions poses a special justificatory problem’ (‘Is the Basic Structure Basic?’ 124).

48 ‘Distributive Justice,’ 274. For T.M. Scanlon’s view, see What We Owe to Each Other (Cambridge, MA: Harvard University Press 1998).

49 This cannot be a strict identity, since the law of taxation is also relevant to the allocation of goods (as Blake recognizes; see ‘Distributive Justice,’ 276).

50 It is of course the basic structure as a whole that is to be arranged to benefit maximally the worst off, not the institutions of property and contract law considered in isolation. On this point, see Ripstein, ‘The Division of Responsibility and the Law of Tort.’

51 See ‘Distributive Justice,’ 270, where he quotes approvingly Rawls’s conception of rational autonomy as the capacity to ‘form, to revise, and to pursue a conception of the good, and to deliberate in accordance with it’ (Political Liberalism, 72).
Both notions denote a constraint on an individual’s ability to adopt and pursue projects, but they rest on different conceptions of how the constraint operates. This comes out in Blake’s explanation of the special role he takes the private law to play in Rawls’s theory of justice. On his view, to explain why contract law is part of the primary subject of justice, you need to show that it is fundamentally coercive. Accordingly, he argues that ‘[e]nforcing a contract ... is ultimately legitimating the use of force; and that, we must agree, is something which stands in need of justification from within a liberal theory premised upon autonomy.’

52 This will not convince everyone. To the extent that individuals have control over the contractual obligations into which they enter, it is at least up for debate whether such obligations are in tension with autonomy. The idea of controlling influence suggests a more intuitive take on the matter. We can say, along with H.L.A. Hart, that contract law is best understood as conferring legal powers on individuals, not as coercing them in the way the criminal law does, and yet maintain that contract law remains a primary concern of justice because it is part of the system that determines how individuals can pursue projects in general.

53 Although I am free to enter into a given contract or not as I see fit, I have no choice but to go through contract law if I want to acquire an enforceable right to another’s action (something I may be able to do without, but whose general impossibility would seriously constrain my ability to adopt and pursue a conception of the good as I see fit). Like private law’s other branches, contract law thus engages my freedom at the deepest level — not because it is coercive but because, along with

52 Blake, ‘Distributive Justice,’ 278. Blake adds, ‘All the forms of legal rules we use are ultimately backed up with coercive measures that implicate the liberal principle of autonomy’ (ibid.). He goes on to quote approvingly Robert Cover’s view that ‘every judicial act is an act of implicit violence’ (cited at 279; see Robert M. Cover, ‘Violence and the Word,’ Yale Law journal 95 [1986] 1601-30).

53 See H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press 1961), 27-9. Interestingly, Blake takes this passage to support his position: he insists that Hart sees contract as ‘a limited grant of (coercive) legislative power’ (‘Distributive Justice,’ 277). This contradicts the spirit of the passage, which aims to stress the difference between criminal and tort law on the one hand, and contract law on the other. Thus Hart insists that ‘[l]egal rules defining the ways in which valid contracts or wills or marriages are made do not require persons to act in certain ways whether they wish to or not. Such laws do not impose duties or obligations. Instead, they provide individuals with facilities for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law’ (The Concept of Law, 27-8; see also 35-42). Blake would need to say more to explain exactly how such a system is in tension with individual autonomy.
the rest of the basic structure, it exerts an inescapable influence on my ability to set and pursue ends.

Blake’s view of contract law reflects a temptation that is endemic to the coercion approach: reducing the entire basic structure to the legal system, and reducing the entire legal system to its coercive aspect. Ultimately, this leads to viewing the entire basic structure on the model of the criminal law. The outlook has a hard-nosed quality that can be attractive, as Blake’s and Nagel’s discussions well show, but it yields a rigidly formalistic conception of the political. The controlling influence view allows for more flexibility. It acknowledges coercion as an important concern, because coercion is a crucial tool for wielding controlling influence. Yet it also recognizes that controlling influence can be exerted in ways that are not coercive in the narrow sense but that nevertheless raise fundamental concerns from the point of view of a person’s ability to set and pursue ends. What I have in mind here will become clearer if we look at specific situations in which the ideas of controlling influence and of coercion come apart. Such situations are relatively rare — exerting controlling influence over a large group of individuals will normally require coercion, and much of the coercion we encounter takes place through the legal system, which exerts controlling influence. But I want to highlight some important exceptions, which I believe jointly show that the presence of coercion is neither necessary nor sufficient to make an institution a primary concern of justice.

Take first the case of borders. Some cosmopolitans have invoked the fact that states use force to keep foreigners out to argue that, even on the coercion view, Rawls’s principles of justice should apply to the international sphere.54 Blake himself explicitly rejects the idea that borders could be subject to the difference principle as such, but given their

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54 See Abizadeh, ‘Cooperation, Pervasive Impact, and Coercion,’ 348-52, as well as his ‘Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders,’ Political Theory 36 (2008) 37-65. For an insightful critical discussion of Abizadeh’s position, see David Miller, ‘Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh,’ Political Theory 38 (2010) 111-20. I should stress that, when I speak of borders in what follows, I mean to refer specifically to their function in keeping foreigners out (call this external borders). Borders also determine when citizens can leave their own country (call this internal borders). On the view I defend, there is a fundamental difference between the two aspects. My country’s external borders lie outside the basic structure to which foreigners are otherwise subject. By contrast, its internal borders are an integral part of the domestic legal system and hence of the basic structure. Internal borders are therefore subject to the same standards of justification as any other restriction that the state may place on its citizens’ freedom of movement, namely, the standards of justification that apply to the basic structure as a whole (which, on Rawls’s view, include an explicit protection for freedom of movement; see, e.g., Justice as Fairness,
coercive character, it is hard to see how he could deny that they are part of the primary subject of justice and therefore subject to standards of the most stringent kind. This is not what the controlling influence view suggests (incidentally, nor is it Rawls’s view of the matter). Borders may be coercive, but they don’t set rules that you have to work through to pursue projects in general; they merely exclude certain specific options by restricting the territory that is accessible to you. This may influence how successful you are at pursuing your chosen conception of the good, but it does not amount to laying down a web of rules through which you have no reasonable choice but to operate to exercise your capacity for a conception of the good. It is thus not surprising that borders are not subject to the same standards of justification as the basic structure, which does have this deeper kind of impact on your ability to set and pursue ends.

Of course, the type of influence that foreign borders exert on someone will depend on a number of factors — most obviously, on whether the person has an adequate space within which to set and pursue her ends. For one who lives in a country lacking minimally acceptable material conditions or a reasonably just basic structure, the rules set by foreign borders may be the ones that matter most: a hurdle that one must clear to be able to exercise one’s capacity for a conception of the good to any decent extent. There is no doubt that, as things stand, a great many people find themselves in such a dire situation. For those who fall below the threshold of acceptable options in this way, how the borders of rich countries operate will be a matter of pressing and fundamental justice.

58). The point is in keeping with the common view that a country’s locking in its citizens is much harder to justify than its keeping out foreigners.

55 For Blake’s discussion of borders, see ‘Distributive Justice,’ 280n. Borders obviously have ‘different aims and purposes’ than does the private law, so any principles applying to them will have to take into account their ‘peculiar nature and special requirements’ (Justice as Fairness, 11). The question remains, however, whether borders raise problems of justification that are of the same nature as those raised by the basic structure. If they do, then they are part of the primary subject of justice; we just need to figure out what principles are appropriate for them.

56 Going back to an idea introduced above (see section III), you could say that being born to a given basic structure is like being born to a particular game whose rules you have no choice but to follow, while being born subject to the borders of other states is like not being allowed to take part in other games, some of which may promise higher yields than the one you are currently playing. My claim is that the former situation is subject to more stringent standards of justification than the latter, especially if the rules of the game determine how you can lead your life more or less at every turn (as the rules of the basic structure do).

57 The thought that borders raise different concerns with respect to different
But the point remains that the influence of foreign borders doesn’t raise similar issues for individuals who do have adequate options. Rawls thus seems correct to hold that states have greater discretion in determining how they set up their external borders than they do in determining how they set up their domestic institutions. The thought may have limited applicability in a profoundly unjust world, but it still shows that the coercive character of borders is not sufficient to make them a primary concern of justice.

Other cases suggest that the presence of coercion is also not necessary to make an institution a primary concern of justice. Consider first an example of Andrea Sangiovanni’s. He asks us to imagine a society in which the police powers are destroyed by a terrorist attack, but in which the state otherwise continues to operate as before. As he describes the situation, ‘the legislature meets regularly; laws are debated and passed; contracts and wills drawn up; property transferred in accordance with law; disputes settled through legal arbitration, and so on.’ In short, individuals continue to obey the system as they did before, but out of solidarity rather than fear of punishment. Sangiovanni claims, not implausibly, that the new order would be subject to the same principles of justice as was the old, coercive legal order. If this is correct, then taking coercion out of the picture leaves the primary subject of justice unchanged. However, since Sangiovanni explicitly assumes that the basic structure after the attack continues to set the rules through which individuals have to pursue their projects, his point is consistent with — indeed, it seems to me to support — the thought that what really matters is controlling influence.

A similar conclusion can be reached by going back to G.A. Cohen’s more down-to-earth concern with individual choices. On Blake’s view, the very idea that patterns of individual choices could be part of the individuals should not be controversial. It seems overwhelmingly plausible that the restrictions France places on immigration raise fundamental concerns of justice with respect to citizens of poor African countries, but not with respect to American citizens, even if the restrictions deprive the latter of options that they greatly value. A conception of the good that requires living specifically in France for its pursuit has to be, from the point of view of justice, on a par with one that requires plovers’ eggs. Such ‘expensive preferences’ cannot ground claims of justice on a Rawlsian view, since it is the individual’s responsibility to revise such ends in light of the means she can expect to have, not others’ responsibility to supply her with the needed means (see again the principle of social division of responsibility in ‘Social Unity,’ 371). On expensive preferences, see Dworkin, Sovereign Virtue, chap. 1.

58 See Law of Peoples, 8-9 and 39n.

primary subject of justice is a non-starter, since they are not backed by coercion in the relevant sense. The controlling influence view invites a more nuanced assessment. Patterns of individual choices that are not outright coercive can still be a primary concern of justice if they exert controlling influence over individuals. I argued above that this is not the case for the pattern of choices constituting a capitalist ethos. In a society with a just basic structure, the presence of such an ethos may worsen some individuals’ prospects, but it does not set deep constraints on a person’s ability to adopt and pursue projects. However, consider Cohen’s other favorite example: a pattern of choices constituting a sexist ethos. This seems to me a different kind of beast. If sufficiently prevalent, such an ethos has the potential to influence the workings of the basic structure at the deepest level: it can effectively change the rules and constraints through which a woman has to work to adopt and pursue a conception of the good. The point is sadly familiar. In a sexist society, regardless of what the law says, women are effectively subject to all sorts of special rules and constraints on how they can pursue projects, what career paths they can choose, where they can go, what positions they can hold, and so forth. If the ethos runs deep enough, there may even be constraints on what women can conceive of doing. In these ways, a sexist ethos can alter the entire web of rules and constraints that constitute the basic structure, an impact that goes far beyond anything the capitalist ethos described by Cohen could do.

To illustrate, think again of our two societies with identical basic structures, but assume now that they differ in that one is plagued by a predominantly sexist ethos, while the other benefits from a more egalitarian outlook. It seems plainly wrong to say that the difference between the situations of women in these two societies can be understood in terms of expected payoffs, as if the chief impact of a sexist ethos was to make women somewhat worse off than they otherwise would be. In a truly sexist society, more or less all rules — laws about employment, property, and so on — apply differently to women than they do to men. Hence, even if the basic structures of our two societies are in appearance similar, women in the sexist society are effectively subject to a different web of rules than their counterparts in the egalitarian society.

The impact of a sexist ethos is thus a primary concern of justice, not because it involves coercion as Blake understands it, but because it modulates the basic structure’s impact on women’s lives in a manner that amounts to controlling influence. If this is correct, then the presence of a sexist ethos can justify measures that the presence of a capitalist ethos cannot. What these measures would look like concretely is a difficult question, but the general thought is that it would be justifiable to set up a society’s basic structure so as to eradicate a sexist ethos, but
not a capitalist one, because the former undermines citizens’ ability to adopt and pursue a conception of the good in a way that the latter does not. Only if we focus narrowly on the options available to citizens will we be tempted to say, along with Cohen, that both cases raise fundamental issues of justice. And only if we operate with a relatively blunt notion of coercion will we be tempted to say, along with Blake, that neither does.

VI

That leaves the mysterious case of the family. As I said at the outset, the coercion view has trouble explaining Rawls’s inclusion of the family in the basic structure. And note that it will not do to say that only legal rules applying to the family are part of the basic structure. We already know that the legal system as a whole is part of the basic structure; if Rawls goes out of his way to say that the family is also included, it must be because he thinks of it as an institution that goes beyond the legal realm, an institution with its own rules and practices, only some of which are legally entrenched. We need to ask why the family in that sense should count as part of the basic structure rather than as a private association formed within that structure, like a church or a corporation.

The pervasive influence view offers a straightforward answer. The family should count as part of the basic structure because it has an impact on the life prospects of its members — and in particular of women — that is immeasurably greater than that of other private associations. As G.A. Cohen puts it, the family structure is ‘fateful for the benefits and burdens that redound to different people, and in particular to people of different sexes.’ One could reply, however, that the family does not obviously have a greater impact on individual life prospects than all other private associations (think of how demanding religions

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60 Note that the question here is not whether morality, or perhaps a sincere acceptance of the justification for the difference principle, may require one to promote an egalitarian ethos in one’s society (for the latter suggestion, see Seana Valentine Shiffrin, ‘Incentives, Motives, and Talents’ Philosophy & Public Affairs 38 [2010] 111-42). The issue is whether the presence of an inegalitarian ethos is a primary concern of justice, where this is taken to warrant certain types of institutional interventions that infringements of morality more broadly construed do not.

61 This means that, unlike the different branches of the legal system, the family is not institutionally integrated into the basic structure (see note 35 on this). Hence, we must consider the family’s impact in isolation, as we did with foreign borders.

62 ‘Where the Action Is,’ 22 (137).
can be). In any case, given the shortcomings of the pervasive influence view, a different account of the family’s special status would be welcome.

The key to such an account is to look at the family in a different light than is commonly done. Authors who discuss the role of the family in Rawls’s theory tend to focus on the traditional vulnerability of women within the family and on related problems of gender equity. There are obvious reasons for this focus, but I suspect that it underplays what is most distinctive about the family from the standpoint of justice. A family is not merely an imperfect voluntary association in which one party is systematically vulnerable to the other. From the point of view of its most vulnerable members, it is not a voluntary association at all: children are simply born subject to a given family structure. It is mainly because of that fact, I want to suggest, that the family, unlike other private associations, is part of the primary subject of justice.

Perhaps this means that the family is not such a problematic case for the coercion view after all. Disciplinary measures adopted by parents may be sufficiently akin to legal coercion to justify the family’s inclusion in the basic structure even on that view. But the controlling influence view provides a richer account of the matter. Children are born to a given family and are thereby subject to a system of rules and constraints about which they have no say whatsoever. These rules exert controlling influence over them in the deepest sense, affecting what they can do, but also who they can become. In a society with a just basic structure, adult women are not subject to such controlling influence within the family: rights and opportunities guaranteed by the

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63 See notably Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books 1989). I do not mean to minimize the importance of Okin’s concerns, but it is worth noting the subsidiary role that children play in her explanation of the family’s relevance to justice. She emphasizes that a just family is necessary for the healthy moral development of children (see 99-100). Otherwise, she mostly focuses on child care (including women’s role as primary care givers) and on questions of gender identification. These are obviously important issues, but I am not sure that they capture the main difference between the family and other private associations. Rawls himself was largely convinced by Okin’s arguments; see ‘The Idea of Public Reason Revisited,’ in *Collected Papers*, 573-615, at 595-601.

64 If that were the case, the treatment of the family would fall under nonideal theory, which Rawls never suggests. On the distinction between ideal and nonideal theory, see *Theory of Justice*, 216-18.

65 Note by contrast that, however demanding they might be, religions normally count as voluntary associations for political purposes. See *Political Liberalism*, 221-2, and ‘The Idea of Public Reason Revisited,’ 599n68.
legal system secure their ‘equality and independence.’ But even in a perfectly just society, one would expect children to be subject to their family’s controlling influence, because they need to be subject to special rules to develop into responsible adults, and because, given various facts about human nature, it seems best if these rules are normally set within the family. Controlling influence is thus central to the family’s operation. This doesn’t mean that the difference principle itself should apply directly to the family: the family has special aims — educational ones, most notably — that call for principles other than those that hold for society as a whole. But it does mean that justice is no less directly concerned with the constraints that parents impose on their children than it is with the rest of the basic structure, and hence that a complete theory of justice would have to include principles to regulate the family structure’s inner workings.

VII

I have defended an account of the basic structure restriction that seeks a middle ground between two extreme views, one holding that justice should be concerned with any structure that can make a significant difference to individuals’ life prospects, the other, that it should be concerned only with structures that involve legal coercion. Against the first view, I have claimed that the fundamental concern of a Rawlsian theory of justice is not how much stuff a person has, or how good her options are, but whether her ability to adopt and pursue a conception of the good is unduly restricted. Against the second view, I have invoked the cases of sexist choice patterns and of state borders to show that the presence of coercion is neither necessary nor sufficient for a structure to interfere objectionably with an individual’s ability to adopt and pursue a conception of the good. I have argued instead that justice is primarily concerned with structures that exert controlling influence over individuals’ lives — structures that set rules and constraints through which

67 Rawls tends to be vague on this issue, saying both that principles of political justice set constraints on the family’s internal life but also that, on this general matter, ‘society has to rely on the natural affection and goodwill of the mature family members’ (‘The Idea of Public Reason Revisited,’ 598). I suspect that his theory has more definite implications than this suggests for the principles that should apply within the family (which would presumably include some suitable equivalent of the principle of fair equality of opportunity), but I cannot pursue the matter here.
an individual has no reasonable choice but to act if she is to adopt and pursue a conception of the good.

The difficulties encountered by the two traditional views have a common structure: each view puts forward an excessively straightforward explanation of the basic structure’s importance; as a result, each fails to account for the complexity of the domain of the political. I have tried to show that the controlling influence view does better on this count, avoiding both the overly broad conception of the political that motivates the pervasive influence view and the overly rigid conception that underlies the coercion view. The various cases I discussed above were primarily intended to show that, properly understood, the basic structure restriction is better motivated and more stable than it has generally been taken to be, but they also illustrate how the controlling influence view brings out complexities in the primary subject of justice that the traditional views tend to brush under the rug.

The controlling influence view also accounts for the outward stability of the basic structure, and here too there are complex lessons to be drawn. As we saw above, whether an international actor exerts controlling influence over some individual will depend on several factors, including the actor’s power, the individual’s specific vulnerabilities, and the strength of the relevant domestic legal system. Whether foreign borders exert controlling influence over someone will likewise depend on how adequate the person’s options are. The view I advocate thus has the virtue of flexibility. For instance, it can account for the thought that multinational corporations should be held to stricter standards when they deal with poor individuals in weak states than when they deal with citizens of rich countries. On the other hand, identifying the international structures with which justice should primarily be concerned will be a complicated task on this view, calling for difficult judgments about the circumstances under which a person has no reasonable
choice but to act through the rules and constraints set by certain international actors, be it large corporations or foreign states. In this way, the approach sends us back to hard philosophical questions about what constitutes an acceptable human life, what counts as having reasonable alternatives, and so on. This is not a flaw, since it would be astonishing if we could address questions of international justice without taking on such issues. But it does mean that developing a satisfying theory of international justice within a Rawlsian framework will require more work than has generally been acknowledged.\footnote{For extremely helpful comments and suggestions, I am grateful to Brian Hutler, A.J. Julius, Michael Kessler, Doug MacKay, Jonathan Peterson, Arthur Ripstein, Patrick Turmel, Stephen J. White, and two anonymous reviewers for this journal. I also wish to acknowledge my debt to UCLA’s Law and Philosophy Program, which provided generous financial support and an exceptionally stimulating environment for a crucial portion of the work on this project.}

Received: March 2012
Revised: November 2012