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Author(s): Alexander Kaufman

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The Myth of the Patterned Principle: Rawls, Nozick and Entitlements

Alexander Kaufman

University of Georgia

Robert Nozick's claim that the Difference Principle is patterned constitutes the enduring legacy of Anarchy, State and Utopia. Like all patterned principles, Nozick argues, the Difference Principle determines the nature of a just distribution of goods on the basis of unhistorical considerations, and therefore fails to respect rights established through historical entitlement. I argue that the Difference Principle does not satisfy Nozick's criteria for patterning; nor does it raise the philosophical problems that Nozick associates with patterned principles. Since the Difference Principle does not define a specific preferred distribution of goods, the principle cannot require that the distribution of goods vary with the distribution of a particular pattern variable, as Nozick claims. The decisive contrast between Rawls and Nozick, in fact, concerns the status assigned to historical considerations, and not the status of entitlements.

Alexander Kaufman is assistant professor of political science at the University of Georgia's School of Public and International Affairs. He has published articles on German idealism, distributive justice and legal theory, and is the author of *Welfare in the Kantian State* (Oxford University Press, 1999). He can be reached at akaufman@uga.edu.

Is the Difference Principle a patterned principle? Robert Nozick's claim that the principle is patterned constitutes the enduring legacy of *Anarchy, State and Utopia*.¹ While Nozick's entitlement theory of justice has few literal adherents, many readers have been persuaded by his critical assessment of Rawls's principle of distributive justice. Like all patterned principles, Nozick argues, the Difference Principle determines the nature of a just distribution of goods on the basis of unhistorical considerations, and therefore fails to respect rights established through historical entitlement. This indictment has been accepted by many commentators, including Card, Galston, Lomasky and Narveson, as a demonstration that liberal theory cannot coherently unite its concerns regarding liberty and equality.²

1. Robert Nozick, *Anarchy, State and Utopia* (ASU) (New York: Basic Books, 1974). Page references to this book will be placed in the text.

2. Claudia Card, "Individual Entitlements in Justice as Fairness," in *The Idea of a Political Liberalism: Essays on Rawls*, ed. V. Davion and C. Wolf (Boston: Rowman & Littlefield, 2000), 183-189; William Galston, *Liberal Purposes* (Cambridge: Cambridge University Press, 1991), 26; Loren Lomasky, *Persons, Rights*

Rather than dispute Nozick's assessment of the principle's form, many sympathetic to Rawls's approach have preferred to accept the charge, but to deny that patterning is inconsistent with respect for rights. The Difference Principle is patterned, G.A. Cohen concedes, but patterns are necessary to preserve liberty.³ Moreover, Cheyney Ryan argues, Nozick establishes that patterned principles restrict liberty only by presupposing an account of the liberties the person is entitled to enjoy.⁴ Most creatively, Thomas Pogge argues that Rawls relies on patterns only "as a criterion for the assessment . . . of ground rules," not as an element "to be incorporated into the content of those rules."⁵ According to Pogge, Rawls employs patterning only evaluatively: the judgment that social institutions satisfy the Difference Principle simply constitutes evidence that the substantive purposes of Rawls's conception of justice are being realized effectively.⁶

While Rawls's defenders are often persuasive, I will suggest that their arguments concede too much to Nozick's critique. The Difference Principle does not satisfy Nozick's criteria for patterning; nor does it raise the philosophical problems that Nozick associates with patterned principles.

Underlying Nozick's critique of the form of Rawls's proposed principle is a disagreement regarding the status of historical considerations in political justification. Nozick views historically established entitlements as unrevisable facts regarding the distributive requirements of justice. Nozick's approach therefore insulates historically established rights-claims from reevaluation and revision. Rawls's approach, in contrast, critically evaluates elements of the political tradition, including rights-claims deriving from practices within that tradition. Claims of entitlement, like all other claims grounded in the political tradition, must satisfy a stringent standard of justification.

Nozick is suspicious of rationalist philosophical projects such as Rawls's, which attempt to present a precise theory of the moral basis of political values. He describes such ambitiously systematic work as:

[a] form of philosophical activity [that] feels like pushing and shoving things to fit into some fixed perimeter of specified shape. All those things are lying out there, and they must be fit in . . . you push and shove and clip off corners from the things so they'll fit . . . what doesn't gets heaved *far* away (ASU xiii).

and the Moral Community (New York: Oxford University Press, 1987), 135-141; Jan Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press, 1988), 69-73.

3. G. A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995), 19-37.

4. Cheyney C. Ryan, "Yours, Mine and Ours: Property Rights and Individual Liberty," *Ethics* 87 (January 1977): 133.

5. Thomas Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989), 29.

6. Pogge, *Realizing Rawls*, 30.

Nozick's discomfort with systematic philosophy, however, often prevents him from grasping the overall structure of Rawls's theory. One of Nozick's most apparently impressive criticisms of Rawls's logic, for example, fails because of Nozick's inattention to structure. The criticism involves Rawls's argument that "democratic equality" is a more acceptable conception of distributive justice than "liberal equality," because democratic equality compensates more completely for the influence of arbitrary considerations on the distribution of social goods. The argument is defective, Nozick claims, because in Rawls's original position⁷ the choosers are motivated only by rational self-interest. They would not, therefore, choose a conception of justice on the grounds that it minimized arbitrariness.

This criticism seems impressive until one realizes that it involves a confusion. Rawls offers two arguments for his conception of justice. The first argument offers an intuitive justification of Rawls's conception (TJ 57-78).⁸ The second (formal) argument works from the conditions of the original position to the choice of the two principles of justice (TJ 102-170). The original position is relevant only to the second argument; but the argument for democratic equality that Nozick criticizes is part of the first argument. The rational self-interest of the parties in the original position is therefore irrelevant to the argument that democratic equality would be preferred to liberal equality.

Nozick's discomfort with systematic theorizing thus limits his appreciation of the structure of Rawls's argument. As a result, I will argue, Nozick mischaracterizes the Difference Principle's motivation, substantive character and practical applications. In order to justify this claim, I will first examine Nozick's notion of patterning and evaluate his argument that the Difference Principle is patterned. After rejecting this argument, I will evaluate Nozick's claim that the principle suffers from the defects that are typical of patterned principles. Finally, I will argue that Nozick's critique of Rawls's theory is rooted in his foundationalist approach to political justification, and that his critique is persuasive only if his foundationalist assumptions are accepted.

I. Patterned Principles

Nozick defines a *patterned principle* as a principle specifying that the distribution of goods "is to vary along with some natural dimension" (ASU 156). *Natural dimensions* are basic qualities of the person, such as need, desert or talent, that are identified by the principle as exclusively relevant to the determination of just shares in the distribution of goods. To each according to his need; to each according to his desert; to each according to his ambition and effort; to each according to his marginal prod-

7. Rawls's model of a fair decision procedure for the choice of a conception of justice.

8. John Rawls, *A Theory of Justice* (TJ) (Cambridge, MA: Harvard University Press, [1971] 1999). Page references to this book will be placed in the text.

uct—these are all patterned principles. While Nozick concedes that he fails to furnish “a general criterion” (ASU 156) for identifying natural dimensions, he provides numerous examples of the pattern-variables that define such dimensions. In addition to need, desert and effort, Nozick mentions moral merit, I.Q., marginal product, “the weighted sum of the foregoing, and so on” (ASU 156-57). Each pattern-variable represents a general quality of agency, and may therefore be employed to evaluate the status, relative to claims of distributive justice, of (virtually) any person.

Patterned principles of distribution are inconsistent with respect for entitlements, Nozick argues, because maintaining a pattern requires “continuous interference with people’s lives” (ASU 163). Nozick offers the notorious Wilt Chamberlain thought experiment to illustrate this claim (ASU 160-64). In this example, the initial distribution of social goods conforms to D1, a just pattern under our preferred patterned principle. Chamberlain then negotiates a contract guaranteeing him a fixed royalty from tickets sold. At the end of the season, Chamberlain is rich—and D1, the original patterned (and just) distribution, has been upset. In order to preserve D1, Nozick argues, society would have to (i) prevent people from transferring their legitimately acquired resources as they wish or (ii) continually and intrusively redistribute resources.

In his *general* discussion of patterned principles, Nozick has described the defining quality of patterning: patterned principles privilege a particular natural dimension as the sole consideration relevant to distributive justice, so that the justice of a distribution of goods may be determined entirely through attention to this dimension. The Wilt Chamberlain example, however, exhibits a second basic quality of patterning: patterned principles establish a unique schedule of just distributive shares which must be maintained strictly in order to preserve justice (ASU 157). The Wilt Chamberlain example is problematic precisely because the distribution of goods will predictably depart from the strict schedule of distributions established by D1. Patterned principles, therefore, do not merely establish a relation between a pattern-variable and justified claims to goods; they establish a literal and fixed relation. Yet this is not the only, or even the most natural, way to understand the intent of patterned principles.

Nozick has, in fact, been harshly criticized for the unrealistic rigidity of his account of patterning.⁹ As Scanlon remarks with some justice, there is good reason “to doubt whether anyone ever held a ‘patterned’ conception of justice in [this] sense.”¹⁰ Taken literally, then, Nozick’s account of patterning is of little philosophi-

9. T. M. Scanlon, “Nozick on Rights, Liberty and Property,” *Philosophy & Public Affairs* 6 (Autumn 1976): 6. See Alan Goldman, “The Entitlement Theory of Justice,” *The Journal of Philosophy* 73 (December 1976): 834; Ryan, “Yours, Mine and Ours,” 132; Jonathan Wolff, *Robert Nozick: Property, Justice and the Minimal State* (Stanford: Stanford University Press, 1991), 89.

10. T. M. Scanlon, “Nozick on Rights, Liberty and Property,” *Philosophy & Public Affairs* 6 (Autumn 1976): 6.

cal interest, because the set of patterned principles is empty. It is not necessary, however, to hold Nozick to his own rigid standard. The vice of patterning that concerns Nozick is the attempt to organize the distribution of goods to track qualities of persons in a manner that detaches distribution from historically determined entitlement. Many theories of justice can reasonably be described as pursuing such a project. I will therefore define a patterned principle simply as a principle requiring that the distribution of goods must vary along with the distribution of a particular pattern variable in a manner that is sufficiently precise to allow for the specification of a preferred distribution of goods.

II. Patterning and the Difference Principle

In this section, I will evaluate two arguments that the Difference Principle is patterned. First, I will assess the claim that the principle fits Nozick's literal criteria for patterning. After rejecting this claim, I will examine the argument that the Difference Principle is nevertheless patterned because it establishes a direct relation between disadvantage and the right to compensation.

Literal Fit

The Difference Principle requires that superior opportunities allowed to the more fortunate members of society must improve the expectations of the least advantaged members (TJ 65). Inequality in expectations is permissible if and to the extent that the permitted inequality is to the advantage the less fortunate (TJ 68). Under the principle, then, the disadvantaged possess a right to compensation simply by virtue of their status as disadvantaged. Does the relation established between disadvantage and claims to compensation constitute patterning? More specifically, can the principle be characterized accurately as requiring that the distribution of goods must: (i) vary along with the distribution of a particular pattern variable; and (ii) conform to a specific preferred distribution of goods?

First, does the Difference Principle require that the possession of some natural quality automatically entitles persons to a particular share of social goods? To anyone familiar with Rawls's theory, the answer would appear to be obvious. Qualities which the person possesses by nature are natural endowments; and it is fundamental to Rawls's argument that the distribution of social goods should *not* be determined by the distribution of natural endowments.¹¹ In fact, since natural endowments are distributed through a morally arbitrary natural lottery, *any* accept-

11. Since natural qualities, like all natural endowments, are distributed through an arbitrary natural lottery, a person's endowment of natural qualities establishes no basis for a claim to a particular share of goods (see TJ 64).

able theory of justice must seek to minimize the influence of such endowments upon life chances. Rawls is, therefore, explicitly committed to the view that the possession of a natural quality cannot justify a claim to a share of goods.

Second, does the Difference Principle define a specific preferred distribution of goods? Would it be possible, in the abstract, to establish a precise correlation between persons and the shares of goods to which they are entitled under the principle? Again, the answer seems clearly to be *no*. Rawls describes his theory as one of *pure procedural justice* (TJ 118, see 73-78); and the defining characteristic of such a theory is that a unique distribution of goods cannot be specified *ex ante*. Rather, the theory merely sets out principles to govern the basic structure of a social system.¹² Once those rules are in place, a just distribution “is arrived at by honoring the claims determined by what people undertake to do in light of [their] legitimate expectations;” and “the outcome is just *whatever it happens to be*” (TJ 74, emphasis mine).¹³ In fact, the distinctive feature of pure procedural justice is that “the procedure for determining the just result *must actually be carried out*” before a just distribution can be identified (TJ 75, emphasis mine).

In assuming that the Difference Principle simply proposes a “criter[ion] for determining who is to receive holdings” (ASU 168) in a given stock of goods, then, Nozick appears to ignore the distinction that Rawls emphasizes between pure procedural justice, as exemplified in his theory of justice as fairness, and allocative justice. Allocative justice merely focuses upon the case in which “a given collection of goods is to be divided among definite individuals with known desires and needs” (TJ 77). In justice as fairness, unlike allocative theories, “[a] distribution *cannot be judged in isolation* from the system of which it is an outcome or *from what individuals have done in good faith in light of established expectations*” (TJ 76, emphasis mine). Like Nozick, then, Rawls emphasizes that an acceptable conception of justice must be attentive to “what individuals have done” to generate entitlements to goods. Contrary to Nozick’s claims, Rawls’s theory appears to be quite sensitive to historical information regarding justified entitlements. More significantly, Nozick’s claim that the Difference Principle operates as an allocative principle: (i)

12. Rawls emphasizes that the fundamental consideration for his theory is not the resulting distribution, but the fairness of the *scheme of cooperation* that produces that distribution: “the correctness of the distribution is founded upon the scheme of cooperation from which it arises” (TJ 76). As Rawls has emphasized from the start, justice is “the first virtue of social institutions”, not of distributions (TJ 3); the subject of a theory of distributive justice is “the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and distribute the advantages from social cooperation” (TJ 6).

13. “If it is asked in the abstract whether one distribution...is better than another, then there is simply no answer to this question.” “In pure procedural justice, distributions of advantages are not appraised...by confronting a stock of benefits available with the given desires and needs of known individuals. . . ; in this kind of procedural justice, the correctness of the distribution is founded on the scheme of cooperation from which it arises. . . . A distribution cannot be judged in isolation from the system of which it is the outcome or from what citizens have done in good faith in light of established expectations” (TJ 76).

ignores Rawls's clear distinction between his approach and allocative approaches; and (ii) appears to reflect a misunderstanding of the character of Rawls's theory.

Disadvantage as a Natural Dimension

Nozick's critique of the Difference Principle appears to be grounded in a confused understanding of Rawls's theory. Why, then, have so many found Nozick's argument persuasive? The reason is primarily that the Difference Principle establishes a direct relation between disadvantage and the right to compensation. This means that despite Rawls's rejection, in theory, of the idea that shares of goods should vary with qualities which the person possesses by nature, Nozick can plausibly argue that the Difference Principle, in practice, does require that the distribution of goods vary along with a natural dimension—the dimension of disadvantage.

How persuasive is this argument? Since disadvantage does appear to provide a quantitative basis for determining claims to shares of goods under the Difference Principle, it might seem, as Nozick claims, that disadvantage simply constitutes a "criter[ion] for determining who is to receive holdings" (ASU 168) in a given stock of goods. If the Difference Principle merely allocated goods to persons based upon criteria of relative advantage, the principle would appear to provide the basis for generating a precise schedule of just holdings *ex ante*, so that Nozick could plausibly argue that coercive interference would be required to maintain a distribution of goods conforming to the schedule.

This appearance, however, is deceptive. Far from requiring the maintenance of a fixed distribution, the principle fails even to provide the basis for a partial determination of the shares of goods to which members of society are entitled. The Difference Principle does not, in fact, guarantee any particular quantifiable benefit to the least advantaged. While the principle requires that the social and economic opportunities that are permitted to the better situated must be "to the greatest expected benefit of the least advantaged" (TJ 72), this requirement will confer tangible benefits only if and to the extent that the better situated produce social surplus; and the better situated are under no obligation to produce surplus. The underlying commitment of the theory is *not* to the maximization of surplus, but rather to ensuring that "[e]veryone is assured an equal liberty to pursue whatever plan of life he pleases" (TJ 81). In formulating their plans, persons simply pursue "the harmonious satisfaction of [their] interests" (TJ 80).

The amount of surplus which is subject to the requirements of the Difference Principle can therefore be determined only after the better situated have actually pursued their life plans and generated social surplus. In order to determine the distributive requirements of the principle, then, the procedure for determining the nature of a just result (in this case, the pursuit of life plans within existing social arrangements) must be carried out. As a result, the Difference Principle does not provide a basis for answering *ex ante* and abstract questions about the distributive

claims of the least advantaged. Rather, the social system operates autonomously, subject to the regulation of principles of justice, and “the outcome is just whatever it happens to be” (TJ 74). Far from deviating from pure procedural justice, as Nozick suggests, the practical operations of the Difference Principle exemplify pure procedural justice.

But, Nozick might respond, the Difference Principle does, at least, ensure that when surplus *is* produced, the least advantaged are assigned a claim of justice to a share of it, a share that increases proportionately with their degree of disadvantage. This, Nozick would argue, is loose patterning which detaches the distribution of goods from allocation in accordance with just entitlements.

How persuasive is this argument, and does it establish that the Difference Principle is patterned? It is important to emphasize, first, that the effect of the Difference Principle will not determine the shares of goods possessed by the most or least advantaged. Some portion of the benefit to the better situated will be diverted to the least advantaged; and some portion of the income of the least advantaged will derive from surplus that is diverted in this way. The share of goods of both, however, will be determined primarily when members of each group “acquire claims to a share of the social product by doing certain things encouraged by the existing social arrangements” (TJ 275),¹⁴ and the distribution of goods will not be predictable in advance. Shares of goods will, therefore, primarily track the productive employment of entitlements, as Nozick prefers.

But what about the portion of those shares that *does* result from redistribution? Must the Difference Principle be considered patterned because *some portion* of social goods is redistributed in accordance with a principle that assigns a proportionately greater claim to persons who are more disadvantaged? In considering this point, it is important to keep in mind Nozick’s explanation of why *his* entitlement theory is not patterned:

There is no one natural dimension or weighted sum or combination of a small number of natural dimensions that yields the distributions generated. . . . Heavy strands of patterns will run through [the set of holdings that results]; significant portions of the variance in holdings will be accounted for by pattern variables. . . . [But] the set of holdings that results...will not be patterned (ASU 157).

Nozick concedes that heavy strands of patterning will run through even the distribution of goods generated under his own entitlement theory. In particular, Nozick concedes, an entitlement theory that privileges the results of market exchanges will

14. In general, in a just society, persons “acquire claims on one another” to social goods by “tak[ing] part in just arrangements” (TJ 273). “Thus, when just economic arrangements exist, the claims of individuals are properly settled by reference to the rules and precepts . . . which these practices take as relevant” (TJ 275).

reward persons with high levels of marginal productivity:¹⁵ “if marginal productivity theory is reasonably adequate, people will be receiving [in market transactions under an entitlement theory of justice] roughly their marginal product” (ASU 187). Nozick’s entitlement theory thus, in effect, patterns the distribution of social goods according to the principle: “to each according to her marginal product.” Nozick could respond that his theory is not designed to produce this distribution; the distribution simply results when we respect entitlements. But Rawls can, with equal justice, note that his theory does not aim to produce a disadvantaged class with specific holdings; Rawls would in fact prefer that there should be no disadvantaged class. Compensation to the least advantaged is merely required to further the theory’s substantive goal: minimizing the influence of natural endowments on life chances.

The point to emphasize, however, is that the presence of heavy strands of patterning (whether produced by rewards to marginal productivity or by redistribution to the least advantaged) is not sufficient to establish that a theory is patterned, according to Nozick’s *own* criteria. In the passage cited above, Nozick sets out a minimum condition that a patterned theory must satisfy; and that condition requires that “there is . . . one natural dimension or weighted sum or combination of a small number of natural dimensions that yields the distributions generated” (ASU 157). That is, there must be one pattern-variable, or a small number in combination, whose effect determines “the distribution generated” (ASU 157) by the principle. Once we establish the distribution of that pattern-variable over the population, we must be able to determine the precise distribution of goods required under the principle.

Nozick’s entitlement theory is not patterned, not because strands of patterning are not present—he concedes that such strands are present—but because (i) the effects of the strands of patterning that *are* present are washed out by the overall effect of market operations, so that (ii) we cannot predict in advance “the distribution [to be] generated.” This is Nozick’s justification for the claim that his theory is not patterned—and it could literally have been written to describe the operations of the Difference Principle. Strands of patterning will be introduced by the requirement that the higher expectations of the more favored must benefit the least advantaged—but, as noted above, the effect of that patterning will be marginal, and will be completely overwhelmed by the effects of the routine economic transactions through which persons acquire claims to social goods “by doing . . . things encouraged by the existing social arrangements” (TJ 275). Redistribution will not determine the shares of goods of the least advantaged; it will merely supplement their earnings. And we will not be able to come close to predicting in advance “the distribution [to

15. “If most people most of the time choose to transfer some of their entitlements to others only in exchange for something from them, then a large part of what many people hold will vary with what they held that others wanted. More details are provided by the theory of marginal productivity” (157).

be] generated” under the principle. If Nozick’s entitlement theory is not patterned under this standard, then neither is the Difference Principle. Nozick’s criteria for patterning thus exclude the Difference Principle from the class of patterned principles.

Note that if the presence of strands of patterning were sufficient to establish that a theory was patterned, then Nozick’s argument would seem to establish that *all* theories of justice are patterned. Nozick has already argued that virtually all theories of justice are based upon patterned principles;¹⁶ only his entitlement theory is clearly unpatterned. If the presence of strands of patterning established patterning, then Rawls’s and Nozick’s theories would also be patterned, and the set of unpatterned theories would be empty. Nozick avoids this conclusion by conceding that strands of patterning may characterize the distribution produced by an unpatterned principle. But this concession excludes both his own *and* Rawls’s theories from the category of patterned theories.

III. Patterning, Coercion and Respect for Entitlements

The Difference Principle’s form does not, then, meet Nozick’s literal criteria for patterning. But perhaps, nevertheless, the principle manifests the defects associated with patterning that particularly concern Nozick: (i) disregard of relevant historical information regarding entitlements; and (ii) coercive interference with people’s lives. A persuasive argument establishing that the Difference Principle manifests these defects would support Nozick’s claim that Rawls’s unhistorical approach has led him to produce a theory of justice that is insensitive to the fundamental concerns of justice (liberty and entitlements). Principles that are defective in this way, Nozick argues, will generate conclusions which are, at best, approximations of justice; worse, the approach will “produce the wrong sorts of reasons” to justify these conclusions (ASU 202). But does Nozick demonstrate that the Difference Principle manifests either of these defects?

Disregard of Relevant Historical Information

Nozick defines an unhistorical principle as a principle that assigns goods to persons based entirely upon considerations of “how things are distributed (who has what)” (153). Such principles disregard or assign insufficient weight to historical information regarding entitlements. Is the Difference Principle unhistorical in this sense? Nozick’s arguments that the Difference Principle is unhistorical focus primarily on its derivation and justification, and are designed to demonstrate that a theoretical approach which manifested adequate respect for historical information

16. “Almost every suggested principle of distributive justice is patterned: to each according to his moral merit, or needs, or marginal product, or how hard he tries . . . and so on” (156).

would not support such a principle. First, Nozick argues that Rawls's account of fair deliberations regarding justice (deliberations in the original position) disregards the justified claims of the better endowed to greater shares of goods. Second, Nozick argues that Rawls's account of a fair decision procedure is fundamentally flawed: the structure of the original position necessarily leads the choosers to disregard information essential for respect for entitlements.

The Original Position and the Claims of the Better Endowed. Nozick argues that the Difference Principle is not symmetrical in its treatment of the better and worse endowed. The distribution produced by the principle favors the worse endowed, Nozick claims, while slighting the justified claims of the better endowed. And this asymmetry results directly from the character of the deliberations about justice that Rawls characterizes as fair. Rawls, Nozick claims, would have us imagine the worse endowed person offering the following proposal:

Look, better endowed: you gain by cooperating with us. If you want our cooperation, you'll have to accept reasonable terms. We suggest these terms: We'll cooperate with you only if we get *as much as possible* (ASU 195).

This does sound rather unreasonable. In these "fair" negotiations, Nozick suggests, the worse endowed exploit their threat advantage to extort unreasonable terms from the better endowed. But notice the kind of negotiation that Nozick imagines between the better and worse endowed: negotiation among parties with *full information* regarding their economic and social interests. Is Nozick offering an accurate representation of Rawls's account of fair deliberations?

Rawls's account of fair deliberations about justice is simply his account of deliberations in the original position. And in the original position, the veil of ignorance deprives the deliberating parties of all information about their place in society, social status, wealth, and particular interests or abilities (TJ 11). Nozick's hypothetical picture of negotiations among parties who are fully informed regarding their economic and social interests simply misrepresents Rawls's account of fair deliberations regarding questions of justice.

But, Nozick argues, the claim that deliberations that result in the choice of the Difference Principle are conducted behind the veil of ignorance is inconsistent with Rawls's claim that the principles of justice "seem to be a fair agreement on the basis of which those better endowed . . . could expect the willing cooperation of others" (ASU 196-97). If the better endowed are not aware of their position and interests, Nozick asks, then who is doing the expecting? Doesn't this passage demonstrate that Rawls really does contemplate that the Difference Principle must be the product of fully informed deliberation?

The short answer is *no*. Nozick has, once again, confused Rawls's intuitive and formal arguments. Rawls provides an account of fair deliberations about questions of justice in the formal argument of chapter three of *A Theory of Justice*. But the

passage cited by Nozick describes the intuitive argument developed in chapter two, an argument that does *not* discuss the nature of fair deliberations.¹⁷ The passage cited, then, offers no support for Nozick's claim that Rawls justifies the Difference Principle as the product of fair deliberations among fully informed parties, deliberations in which the worse endowed exploit their threat advantage to extort acceptance of the Difference Principle from the better endowed. In fact, as Nozick perceptively observes, if the parties negotiating the terms of the theory of justice *were* able to exploit threat advantage, the *better endowed* would occupy the superior bargaining position; and the principles chosen would favor the interests of the better endowed, while slighting the claims of the worse endowed (ASU 195).

A Flawed Decision Procedure? The failure of principles chosen in the original position to respect entitlements is unsurprising, Nozick claims, because persons choosing distributive principles from behind a veil of ignorance will predictably treat goods to be distributed "as manna from heaven" (ASU 199). To support this claim, Nozick asks us to consider an example. A group of students have studied for a year and taken examinations that were graded by a competent instructor and assigned grades between zero and 100. These grades are suppressed, and the students are asked to choose grades for themselves by unanimous consent, subject to the condition that the sum of their grades must equal the sum of the grades assigned by the competent instructor. Assuming suitable restrictions on their ability to threaten one another, Nozick asserts, they would probably consent to the assignment of the same grade to each person. If this option were, for some reason, unavailable, the principle of maximizing the lowest grade might seem attractive. But they would never, Nozick claims, consent to the set of grades assigned by the instructor. The appropriate distribution of grades depends upon "developed intelligence, how hard people have worked, accident and so on, factors about which people in the original position know almost nothing" (ASU 200-01). A contractarian original position procedure thus leads us to ignore the considerations that should be decisive.

Is Nozick's example relevant to an evaluation of the merits of the original position? In particular, is the choice of grades relevantly similar to the choice of principles of justice? The short answer to both of these questions is *no*. Nozick's example is, in fact, problematic for two reasons. First, Nozick writes as though a procedure for the choice of principles of justice were simply a special case of a choice procedure for the allocation of goods. Principles of justice are not goods, however, and their choice raises issues that are quite distinct from those raised in the case of goods. In particular, *goods* exist in concrete contexts in which accepted norms generally establish entitlements. In Nozick's grading example, the use of an

17. In this passage, Rawls sets out (i) the *normative* claim (defended in chapter two) that the principles provide a "fair basis" (TJ 13) for social cooperation; and not (ii) the *formal* claim (defended in chapter three) that the principles would be chosen by persons employing the maximin principle of choice in the original position.

original position procedure is problematic precisely because we assume that the norm of distributing grades in accordance with merit entitles the students who performed well to the best grades. It is not obvious that preexisting norms or ideas of justice should be similarly privileged in the choice of principles of justice. As Rawls notes, such “everyday ideas of justice . . . [are] strongly colored by custom and current expectations” (TJ 31). It is therefore the *function* of principles of justice to establish criteria for evaluating the acceptability of norms and ideas of justice. While a theory of justice may ultimately incorporate a background norm, the authority of the incorporated norm derives from its incorporation within the theory and not from its status as an element of the background tradition. Even the norms requiring respect for entitlements in Nozick’s theory will be authoritative only if we are persuaded to accept his overall theory (or some similar theory). Nozick’s use of the grading example is therefore misleading because it suggests that fundamental decisions regarding the choice of principles of justice should be determined by background norms.¹⁸

Second, even if the analogy to a choice procedure for the allocation of goods were unproblematic, Nozick has chosen for his example a case in which the norm that entitlements should determine distribution is assigned unusual weight. In western cultures, the norm that excellent performance entitles the student to excellent grades is generally constitutive of educational practices. Such an assumption does not apply with similar force to the distribution of many other goods. The considered judgments of members of western societies generally appear to support the views, for example, that: (i) medical care should be distributed in accordance with need; (ii) citizenship should be distributed on a first-come, first-served basis to immigrants who meet certain threshold criteria; and (iii) the obligation to serve national defense needs should be distributed by lot.¹⁹ Thus, Nozick’s example is misleading in a second sense, since it exaggerates the general significance of a norm whose authority in fact appears to be limited to specific categories of goods.

Nozick’s argument from the grading example is therefore problematic in two respects. First, the example misleadingly suggests that background norms should be assigned the same privileged status in the choice of principles justice as in the choice of goods. Second, Nozick has chosen an example in which the intuition that entitlements should determine distribution applies with unusual force, exaggerating the relevance of this intuition for the general case.

18. As Chandran Kukathas and Philip Pettit persuasively argue, “the parties to the contract do not debate about the distribution of goods already owned, [but]...about how goods yet to be acquired, perhaps yet even to be produced, should be distributed.” *Rawls: A Theory of Justice and its Critics* (Stanford: Stanford University Press, 1990), 86.

19. This passage follows Michael Walzer’s account of the diversity of distributive principles. See *Spheres of Justice* (New York: Basic Books, 1983), 21-26.

Coercive Interference

Nozick's argument therefore fails to establish that the Difference Principle: (i) asymmetrically neglects the just claims of the better endowed; or (ii) improperly disregards information regarding entitlements. Even if the principle avoids these vices, however, Nozick argues that the requirements of the Difference Principle, in practice, are inconsistent with respect for the entitlements of the better endowed. Redistribution of social goods under the Difference Principle will require the taxation of earnings; and, Nozick argues, taxation is unjust—in fact, taxation of earnings “is on a par with forced labor.” Taking the earnings of n hours of labor “is like forcing the person to work n hours for another's purposes” (ASU 169). The person possesses a property right in her earnings, and a property right in X contains “the right to determine what is done with X ” (ASU 171). Since the Difference Principle will require the taxation of income, then, the better endowed have reason to complain that the principle unjustly requires that they have less “in order that another...might have more than he otherwise would” (ASU 197).

Most striking in this argument is Nozick's claim that persons possess absolute rights to property that are prior to all other requirements of justice. Only if the right to property is *prior to any other relevant consideration* could it be justifiable to claim that taxation necessarily violates property rights, regardless of the strength of the considerations justifying the tax. And only if property rights are *absolute* can Nozick claim that any taxation, no matter how trivial, constitutes unjust interference with property rights.

Also striking in Nozick's presentation is his choice not to offer a sustained defense of these controversial claims. As has been generally noted,²⁰ Nozick simply assumes the authority of norms from the Lockean political tradition. This choice is perplexing, however, since Nozick's central claim regarding property rights—that taxation necessarily violates such rights—goes far beyond any mainstream conception of rights recognized in the Lockean tradition. Nozick therefore seems to lapse into inconsistency. While he claims to appeal to mainstream values in the Lockean tradition to justify his entitlement theory, the notion to which he appeals to justify his theory does not appear to be contained within that tradition.

Perhaps recognizing that his understanding of Lockean property rights may seem eccentric, Nozick offers a reconstruction of Lockean theory designed to establish the plausibility of his interpretation. Locke, notoriously, argues that a person generates a property right by “mix[ing] his *Labour*” with an object. In laboring, Locke argues, the person “remove[s] [the object] from the common state . . . [and] excludes the common right of other Men.”²¹ The laborer has then established a

20. Scanlon, “Nozick on Rights, Liberty and Property,” 13; B. J. Diggs, “Liberty Without Fraternity,” *Ethics* 87 (January 1977): 101; Ryan, “Yours, Mine and Ours,” p. 136; Wolff, *Robert Nozick*, 106.

21. John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, [1690] 1988), 288.

property right in the object to which he has joined his labor. Nozick concedes that Locke's argument, taken literally, is problematic. How are we to determine the boundaries of the object with which labor is mixed? Why does mixing one's labor with an object ground a right? And if the answer is that I have mixed what I own with the object, why isn't that a way of losing what I own? The objections to the mixing argument, Nozick acknowledges, are powerful.

But a better interpretation of Locke's idea is available. According to this view, laboring on an object improves it and makes it more valuable; and anyone is entitled to own a thing whose value he has created. You might, Nozick concedes, think that the person should really accrue a right only to the value that has been added to the object; but "no workable or coherent" approach to determining the value added by labor has ever been perfected (ASU 175). The default position, then, must be to assign full property rights in the object to the laborer. Thus, Nozick claims, labor is privileged over all competing considerations as a determinant of property rights; and labor grounds an absolute property right.

This reconstruction of Locke's mixing argument constitutes Nozick's *sole* sustained attempt to defend the claim that persons, by virtue of their labor, possess property rights that are prior to the claims of justice. One can only imagine Nozick's reaction if Rawls had offered so insubstantial an argument regarding an issue of such central importance. Nozick's conclusion is not entirely implausible; but he has offered nothing resembling a persuasive argument for the claim that labor grounds an absolute property right. One could equally plausibly conclude that, since "no workable or coherent" approach to determining the value added by labor has ever been perfected, *no right at all* can be assigned.

Moreover, while Nozick's argument depends upon the premise that labor is the *only* consideration relevant to the generation of property rights, Nozick explicitly acknowledges the relevance of at least one consideration other than labor: "[i]t will be implausible to view improving an object as giving full ownership to it if the stock of unowned objects that might be improved is limited" (ASU 175). The crucial point, Nozick claims, is "whether the appropriation of an unowned object worsens the situation of others." This is a sensible position; but if, as Nozick claims, "anyone is entitled to own a thing whose value he has created" (ASU 175), it is hard to see why Nozick should view such a limitation on appropriation as justified or necessary.

Whether an appropriation worsens the situation of others can be relevant to the determination of property rights only if labor is not the sole consideration relevant to the determination of such a right. But if other considerations are relevant, then Nozick requires some account of the relative priority of rights-claims in order to justify his claims for the priority of those grounded in labor. Since Nozick self-consciously declines to offer such an account,²² his argument leaves open the possibil-

22. "The completely accurate statement of the moral background...is a task for another time. (A lifetime?)" (ASU 9).

ity that considerations other than labor may ground rights-claims with priority over claims grounded in labor. Nozick has therefore failed to establish the priority of labor-grounded rights over other claims of right.

Nozick's argument that the Difference Principle requires unjust interference with just entitlements assumes the priority of claims to property grounded in labor over all other distributive claims. If, as I have argued, Nozick has failed to justify the priority of such claims, his argument that the operations of the Difference Principle *necessarily* constitute unjust interference with entitlements fails.

IV. Fundamental Explanation and Foundationalism

Nozick's failure to provide a sustained defense or justification for his account of entitlements is generally conceded to be the critical shortcoming of his theoretical project.²³ Nozick himself concedes that "the gap left . . . [is] yawning" (ASU 9). Nozick's apparent looseness here, however, reflects his confidence in the argument that all viable alternatives to historical theories are unacceptable. Since only historical theories are plausible, any acceptable theory will take the characteristic form of a historical theory—that is, an acceptable theory will accept as foundational a set of norms from the background political tradition, and will evaluate the justice of social relations in terms of those norms. A theory of this type will predictably respect entitlements as defined by norms within the background tradition. Nozick does not, therefore, feel a pressing need to justify privileging entitlements in his account of justice.

Nozick thus assumes that the attentiveness of his approach to historical considerations constitutes its principal advantage over Rawls's theory. In this section, I will argue that Nozick's theory is distinguished from Rawls's not by a different degree of attentiveness to historical considerations, but by the different status to which each theory assigns this information.

Fundamental Explanation

Beyond manifesting respect for entitlements, Nozick suggests that the most persuasive form of historical theory will have a particular character. Such a theory will explain the political realm "in terms of the nonpolitical" (ASU 6). The more that such a theory picks out basic and important features of the human condition as its starting point, Nozick argues, the more useful the theory. The most "desirable and complete" (ASU 6) theories of this type will provide a particular form of explanation. Such theories will:

23. Scanlon, "Nozick on Rights, Liberty and Property," 13; Diggs, "Liberty Without Fraternity," 101; Ryan, "Yours, Mine and Ours," 136; Wolff, *Robert Nozick*, 106.

[begin] with fundamental general descriptions of morally permissible and impermissible action, and of deeply based reasons why some persons in any society would violate these constraints, and [go] on to describe how a state would arise from that state of nature. (ASU 7)

A theory that provides this kind of explanation for an institution, Nozick argues, *justifies*²⁴ the institution.

Nozick calls a theory with this form a *fundamental explanation*. Suppose, for example, that a political theory assumes that: (i) “the *State of Nature* has a Law of Nature to govern it;”²⁵ (ii) persons who desire to act from the law of nature predictably fail because, in the state of nature, each person is a judge in his own case;²⁶ and (iii) the social institution of the state evolves to solve this collective action problem by “setting up a known Authority, to which every one of that Society may Appeal upon any Injury received.”²⁷ Such a theory provides: (i) a general description of the morally permissible and impermissible; (ii) a deeply based reason why persons in the state of nature would violate the constraints; and (iii) a description of the emergence of the state to resolve the collective action problem. Locke’s account of the state therefore provides a fundamental explanation of the state and, as a result, justifies²⁸ the state.

Fundamental explanation, in this description, might appear to base normative claims upon a merely descriptive analysis of the development of social institutions. Nozick’s approach, however, avoids such an error because the foundation of the analysis—a general description of the morally permissible and impermissible derived from the background tradition—is moral, rather than merely descriptive. As a result, when the state solves the collective action problem created when each person is a judge in his own case, the achievement is a moral accomplishment—the vindication of the moral tradition.

This conclusion is not, however, completely unproblematic. The fact that fundamental explanations accept moral intuitions from the background tradition as constitutive elements of the theory allows Nozick to claim that this form of analysis justifies, rather than merely describes, the institutions it explains. But what is the status of the intuitions that are accepted as constitutive? How are these particular moral intuitions chosen; and what argument justifies their priority? Nozick does not address these questions, simply noting the “minor comfort” that his theory “follow[s] the respectable tradition of Locke” (ASU 9).

24. Thus, for example, in showing that the state “arise[s] by a process involving no impermissible steps” from “the most favored situation of anarchy . . . a nonstate situation in which people generally satisfy moral constraints and generally act as they ought,” Locke’s theory “provide[s] a rationale for the state’s existence [and] justifies it” (ASU 5, my emphasis).

25. John Locke, *Two Treatises of Government*, 271.

26. John Locke, *Two Treatises of Government*, 275-76.

27. John Locke, *Two Treatises of Government*, 326.

28. See footnote 24.

The problem is not that Nozick's approach assigns an important role to moral intuitions from the tradition. In this respect, Nozick's approach to theory construction parallels Rawls's constructivist method. Rawls, in fact, explicitly constructs his theory from considered judgments²⁹ that express our most reliable moral intuitions (TJ 17-18).³⁰ While working his theory up from moral intuitions, however, Rawls stresses the concern that even the most reliable of intuitions are colored by situation, custom and expectations (TJ 31). Therefore, while moral intuitions necessarily play a constitutive role in theory construction, these intuitions should constitute merely "provisional fixed points" which are subject to reassessment and revision.

Norms, Intuitions and Theory Construction.

Unlike Rawls, however, Nozick appears to privilege norms from the background tradition over all other relevant considerations. It is Nozick's insistence on the absolute priority of elements of the background tradition that leads him to privilege entitlements above all other relevant considerations in resolving questions of justice. Thus, the contrast in views regarding the status of entitlements—usually viewed as the fundamental contrast between Rawls and Nozick—merely reflects a deeper disagreement regarding the status of contents of the background tradition in political justification.

Rather than offering a direct argument for the choice to privilege contents of the political tradition, Nozick justifies this position indirectly by criticizing approaches such as Rawls's that attempt to provide "unified explanations" (ASU 220). Nozick's skepticism regarding such a project is evident in his impatience with Rawls's assumption that "[d]ifferences in treatment of persons need to be justified" (ASU 223). The claim, Nozick suggests, is trivially false. If I frequent one movie theater rather than another, I have no obligation to justify my different treatment of the two theater owners. "Isn't it enough," Nozick asks, "that I felt like going to one of them?" (ASU 223).³¹

Yet Nozick fails to characterize Rawls's position accurately. Rawls does not argue generally that all differences in treatment must be justified. Rather, he argues that differences in the treatment of members of society by *basic social institutions* must be justifiable if those institutions are to be considered just. Thus, the requirement applies *only* to differences in the treatment of members of society by basic institutions. Since

29. Defined as judgments in which we have particular confidence, because we have examined the issue with care and have reached an impartial judgment.

30. Rawls's most basic assumptions are considered judgments embodying reliable moral intuitions. These include the claims that: (i) principles of justice should be chosen by those subject to the principles; (ii) acceptable arguments for the principles may not appeal to the situated/partial interests of the choosers; and (iii) a just distribution of goods should not be determined by arbitrary considerations.

31. Nozick concedes that the principle of justifying differences in treatment should be applied to governments, since, in that case, there is "a centralized process treating all, with no entitlement to bestow treatment according to whim" (ASU 223). In a free society, however, distribution is not achieved primarily through the action of governments. Under such conditions, it is not clear why the principle of justifying differences in treatment "should be thought to have extensive application" (223).

it is an individual, in Nozick's example, who subjects theater owners to differential treatment, Rawls would not view the difference in treatment as requiring a justification. Nozick's example therefore fails to ground a plausible objection to Rawls's approach.

Rawls's argument that differential treatment of citizens by basic institutions must be justifiable, which simply develops the practical implications of the considered judgment that a just distribution of goods must not be arbitrary, reflects his basic method of theory construction. In constructing an acceptable moral or political theory, Rawls asserts, one should work from a set of judgments "rendered under conditions favorable to the exercise of the sense of justice" (TJ 42), treated as "provisional fixed points" (TJ 18), to a set of principles. This set of principles is then evaluated in light of the initial set of considered judgments. If the principles are initially inconsistent with that set, the analysis must "work from both ends," reassessing both the judgments and the principles (TJ 20). In the process of deliberating, we are to carefully take into account "all possible descriptions to which we could conform our judgments" (TJ 49). The task of deliberation is complete when "our principles and our judgments coincide" and we have achieved reflective equilibrium (TJ 20).

The deliberator is instructed to consider the widest range of possible positions before concluding deliberation. If this effort is successful, the deliberation will take into account all relevant considerations—including all relevant historical considerations relating to entitlements. Rawls, in attempting to implement this approach to deliberation, does in fact give careful consideration to issues of historical entitlement (TJ 273-77). Like Nozick, Rawls concludes that persons "acquire claims to a share of the social product" through their labor and effort (TJ 275). Unlike Nozick, however, Rawls does not conclude that those claims are privileged above all other relevant considerations. It would, Rawls argues, be unfair to allow level of effort to determine completely the distribution of goods. The level of effort that a person is willing to make is to a great extent influenced by her abilities and the available opportunities; and no person can reasonably claim to merit completely the abilities and opportunities she enjoys. In addition, Rawls notes, "[n]o one supposes that when someone's abilities are less in demand...his moral deservingness undergoes a similar shift" (TJ 274). For these reasons, Rawls concludes that claims based upon historical entitlement should not, as Nozick urges, be privileged absolutely over all other claims.

To respond to Rawls, Nozick cannot plausibly claim that Rawls has been inattentive to the issue of historical entitlements. Rather, Nozick requires a positive argument justifying the claim that entitlements grounded in the background tradition should be privileged over all other claims. But this is precisely the argument that Nozick refuses to provide. The contrast between Rawls's and Nozick's approaches does not, therefore, reflect a contrast between one approach that takes historical considerations seriously and another that does not. In fact, both approaches take historical considerations extremely seriously. Thus, even if we accept Nozick's argument that only historical theories of justice are acceptable, this conclusion will neither discredit Rawls's theory nor establish that only entitlement theories of justice are plausible.

The decisive contrast between the theories involves the status assigned to historical considerations. Rawls's method incorporates these considerations in an overall deliberative process that attempts to take all relevant information into account and to assign to each set of concerns their proper weight. Nozick privileges historical considerations over all other relevant concerns. The contrast, therefore, does not reflect lack of attention to entitlements on Rawls's part; rather, it reflects Nozick's foundationalism.

Conclusion

The decisive distinction between Rawls and Nozick, then, concerns method of justification, and not the status of entitlements. While Rawls argues that an account of justice must assess and evaluate historically generated claims of entitlement, Nozick places historically generated entitlements beyond the reach of critical evaluation. In privileging the background tradition in this way, Nozick makes explicit the limits of an approach to theory construction that insists upon the absolute priority of historical considerations. Nozick's approach provides the resources to evaluate fidelity to historical entitlements, but not to evaluate or justify the norms grounding those entitlements. The limitations of his approach limit his appreciation of the work done by systematic theory, and lead him to mischaracterize the motivation and practical operation of the Difference Principle. Thus, in spite of his skeptical orientation, the distinguishing feature of Nozick's theory is his foundationalism; and his criticisms of Rawls's approach and theory are plausible only if his foundationalist assumptions are accepted.