

# Against Impartiality

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People often identify justice with impartiality. This reflects reality: many who experience injustice complain of biased treatment. But whether bias is objectionable depends on a prior commitment to an ideal of nondomination. I advance this claim by reference to impartiality arguments defended by Brian Barry and Amartya Sen. Then I sketch a historical account of impartialist ventures that shows why they once appealed but are such a tough sell today. Instead of hunting for the right defense of impartiality, political theorists would do better to focus on ways to identify and mitigate domination. Barry's earlier work on majority rule buttresses my contention that would-be impartialists are wrong-headed to argue for independent institutions, typically courts, that are geared to shielding the dictates of justice from politics. In politics, as in life, there are no guarantees, but majoritarian democracy is a better bet for minimizing domination than any of the going alternatives.

Justitia, the goddess of justice, holds a sword in her right hand and a set of scales in her left. The sword represents the power to punish, while the scales, held slightly above it, signal that fair weighing of the merits comes first. But it is the blindfold, common in depictions of her since the sixteenth century, that proclaims her impartiality. Lady Justice is blind.<sup>1</sup> She screens out any risk of favoritism, special pleading, or irrelevant distraction so as to render decisions that embody unbiased reason. It is this image of justice as, above all, impartial that many in our generation of political philosophers have found alluring. In my view they are misguided. Lady Justice is indeed blind; she cannot help us see what justice is or what it requires.

My goal is to establish that arguments about the justice of political arrangements do not turn in any important way on the idea of impartiality. To the extent that impartiality does play a role, this is either in the application of ideas about justice that have been defended on some other grounds, or impartiality turns out on inspection to be a stalking horse for those other grounds. Put differently, disagreements about the justice of political arrangements cannot be settled by appeal to impartiality. Rather, hostility to domination, or something close to it, usually does the heavy lifting. If I am right, people would do better to recognize that debates about impartiality are confusing red herrings and focus instead on the sources of domination and the means of preventing it.

Why bother? Partly because impartiality is an attractive nuisance. People who become seduced by the prospect of defending accounts of justice that are rooted in impartiality waste their time on quixotic ventures. Worse than wasting time, however, chasing impartiality over the horizon pulls its advocates in unfortunate political directions. A big part of impartiality's allure is the expectation it fosters that we can come up with principles that are beyond the rough and tumble of politics. This, in turn, leads partisans of impartiality to embrace insulated agencies, typically courts, as their institutional instruments of choice. The connection is, to be sure, not necessary; but there is an elective affinity between commitments to impartiality and embracing institutions that are thought to shield its requirements from politics. Courts are not what they are cracked up to be, however. The upshot is that bad philosophy motivates bad politics. Or so I will argue.

Some clarification of terms is in order. Resisting domination does the heavy lifting, I am arguing, but what is domination? To some extent different people mean different things by it. Especially when they invoke it implicitly as they often do, they are unlikely to define it exhaustively or even clearly. Domination is, in any case, what Wittgenstein (1953, 27\*–28\*) described as a family resemblance concept. There is plenty of recognizable overlap among its various meanings, but no single definition captures every

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1. The earliest known representation of justice as blind appears to be Hans Gieng's 1543 statue of the Gerechtigkeitsbrunnen (fountain of justice) in Berne, Switzerland.

intelligible use. So we should not expect too much of definitions.

That said, by domination I will mean the illicit use of power to control people or their choices. This control can be direct or indirect and more or less conscious, although there is usually a presumption that it is alterable: domination can be stopped or mitigated if those responsible for it alter their conduct. Domination can be trivial, but political philosophers who write about justice are usually concerned with serious domination. This might not always rise quite to the level of Locke's ([1681] 2003, 30) admonition that one "can no more justly make use of another's necessity, to force him to become his vassal" than a stronger person "can seize upon a weaker, master him to his obedience, and with a dagger at his throat offer him death or slavery." But people are usually assumed to have basic interests, including the wherewithal to survive and thrive, at stake.<sup>2</sup> Common reasons for regarding the use of power as illicit are that it compromises those basic interests, that it is arbitrary, or that it is unauthorized.

Denying that impartiality will resolve disagreements about justice does not make it irrelevant to those disagreements. Implementing laws and policies requires institutions that depend on impartial administration. People who violate that kind of impartiality, by engaging in self-dealing, bribery, and other kinds of corruption, perpetrate injustice. But that is not what political philosophers usually have in mind, and not what I have in mind, when rejecting impartiality as the basis for justice. Exceptions arise when the rules are themselves compromised. This was well illustrated in Robert Cover's (1984) exploration of the quandaries faced by nineteenth-century American judges who had to adjudicate litigation over the fugitive slave laws. But at issue were the unjust laws they were charged with enforcing, not the idea that judges should generally be impartial. Their dilemmas would be material to our concerns here only if recognizing the injustice of the fugitive slave laws depended on embracing impartiality. That is what I mean to deny.

I begin by considering the most formidable case for justice as impartiality I know of, set out in Brian Barry's 1995 book by that name. His argument relies on a distinction between first-order impartiality, which he agrees is hopelessly vulnerable to well-known objections, and second-order impartiality, which he endorses as immune from them. I show that, despite its apparent appeal, Barry's distinction is untenable, so that his attempt to rescue impartiality as the bedrock of justice fails. The best reconstruction of his argument shows

him to be committed to nondomination instead. In the second section I consider, and find wanting, Amartya Sen's distinction between "closed impartiality," which he rejects, and "open" impartiality, which he adapts from Adam Smith and endorses. I also consider Sen's unsuccessful appeal to "plural reasons," a de-idealized variant of John Rawls's "political, not metaphysical" turn. As with Barry, Sen's best arguments trade on an unacknowledged appeal to the idea that domination is the source of injustice.

In the third section, I propose an interpretation of impartialist ventures that makes a degree of historical sense of them, but which also makes it easier to see why they are such a tough sell today. The social democratic welfare states that Barry's generation saw as achievements for impartial justice were in fact time-bound products of the postwar era that would erode as the conditions that gave rise to them dissipated. I end by arguing that, rather than pursue the mirage of impartiality, Barry would have done better to recognize that there are no impartial principles of justice and stick with his earlier defense of majority rule democracy. Doing so offers the best available bet to vindicate the view of justice geared to diminishing domination that he has embraced, implicitly or explicitly, all along. By the same token, others who think that giving courts the authority to limit democratic politics in the name of what justice is alleged to require are playing with fire. Courts are unlikely to promote the causes their proponents seek over time, and they are all too easily hijacked by people with agendas other than, and sometimes antithetical to, preventing domination.

### **FIRST- AND SECOND-ORDER IMPARTIALITY**

At least since William Godwin ([1793] 1976, 168–74) noted that impartiality might mean allowing one's mother to be killed in a fire in order to save a great benefactor of mankind, people have worried about bedrock commitments to impartiality.<sup>3</sup> Godwin was a radical (utilitarian) partisan of impartiality, but most people treat his example as a *reductio ad absurdum* that illustrates the infirmity of buying into impartiality hook, line, and sinker. Ignoring impartiality is also problematic, however. It opens the door to the dangers of nepotism and related practices that are no less grating to widely shared sensibilities. This means that distinctions have to be drawn to make sense of the expectation that in some contexts people think that justice requires impartiality, while in others, it seems permissible—perhaps even

2. For elaboration of the idea of basic interests, see Shapiro (1999, 85–90).

3. Godwin became sufficiently uncomfortable with his example that in later editions he replaced his mother with his father, brother, or another benefactor.

mandatory—to prefer kith and kin over strangers (MacCormick 1996, 305–6).

Barry (1995, 11) distinguished two kinds of impartiality to avoid these and related difficulties. First-order impartiality concerns the decisions that people make about what to do: where to eat and live, whom to associate with, and so on. Barry defined this first-order impartiality as “a requirement of impartial behavior incorporated into a precept.” Second-order impartiality, by contrast, supplies the justification for basic legal, moral, and political principles. It does not depend on or require first-order impartiality of people in their daily lives. Second-order impartiality “calls for principles and rules that are capable of forming the basis of free agreement among people seeking agreement on reasonable terms.” I am skeptical of the “seeking” part of this, which limits the class of acceptable principles to those that people can be motivated to agree on, but I will not pursue that matter now (see Krause 2001). Here my focus is on second-order impartiality itself and, in particular, Barry’s insistence that what sets it apart from unacceptable theories is that it is impartial among particular conceptions of the good life. In this he shares Rawls’s ([1971] 1999a) impulse to discover principles of justice that are not biased in favor of particular conceptions of the good, though Barry pursues his agenda by reference to T. M. Scanlon’s (1998, 105–6) “reasonableness” test, which obliges us to embrace principles if we cannot supply reasonable grounds to reject them.

In making his case, Barry (1995, 168–69) distinguished those who insist that their particular conceptions of the good pass this reasonableness test, whose claims he thought he could refute, from those who resist the test itself. Barry did not deny that there are people who reject his account of reasonableness or that “they have to be taken seriously” as a political matter. But he insisted that “the only response worth making is to try to defeat them politically and, if necessary, seek to repress them by force.” Barry thus portrayed himself as a Leninist on behalf of reasonableness but not on behalf of a particular conception of the good life. If, however, it turns out that his account of reasonableness conceals a particular conception of the good life on which it depends, then this becomes a distinction without a difference.

Unfortunately for Barry’s argument, that is the case. Moreover, it would be true of any version of impartiality that does the kind of work Barry needs it to do. If such an account remains genuinely second-order in his sense, then concrete political principles cannot be derived from it; if concrete principles can be derived from it, then it embodies a particular conception of the good. My view is that in the end, the only political arrangements on whose behalf we should be Leninists are democratic arrangements. The

reason is not that they are impartial but that they hold out a better chance of mitigating domination than do the going alternatives.

Let’s start with the view of the good life that lurks in Barry’s Scanlonian exercise. As illustrations of why impartiality should be affirmed, Barry (1995, 84–85) maintained that no one could reasonably reject guarantees of full religious liberty and the right to practice any sexual orientation. If you recognize that the importance of freedom of worship “in the way you think right” is integral to “your own ability to live what you regard as the good life,” you will be bound to concede that it is important to others as well. Likewise, “if the expression of your sexual nature is important to your living a good life, as you see it, then again you are asked to accept that it is equally important to those with a different sexual orientation from yours.” For Barry (1995, 94), this legitimates an absolute constitutional ban on all discrimination based on religious belief or sexual orientation.<sup>4</sup> By contrast, Barry (1995, 91–92) maintained that the right to abortion does not merit constitutional protection because there is enduring disagreement about its permissibility. Accordingly, he concluded, “there is no way round the point that there are different evaluations of the gravity” of allowing a fetus to be aborted “when put in the balance against the ability of women to control their own fertility.”

Note that what is at stake here for Barry does not turn on the harm done to the fetus but rather the irresolvable disagreement about the justifiability of abortion.<sup>5</sup> He might well have been right that this disagreement is irresolvable, but that scarcely distinguishes abortion from the cases that he treats differently. There has often been, and in some quarters continues to be, no less enduring or intense disagreement about the gravity of permitting religious disestablishment or homosexual conduct. What is alleged to differentiate them from abortion, for Barry, is their relevance to a person’s “ability to live what you regard as the good life.” But that is

4. Barry (1995, 84–85) concedes that religious and sexual tolerance “can, of course, be derived from some conceptions of the good,” but he insists that his own defense of them depends only on the appeal to fairness built into the Scanlonian test. For reasons set out later, this is not plausible.

5. Barry (1995, 91) says that the permissibility of abortion cannot turn on harm to the fetus “because the issue at stake is precisely whether the foetus is a human being.” Though not material to the point under discussion, Barry is mistaken that the abortion question turns on whether a fetus is a person. On the one hand, Judy Thompson (1971, 47–66) pointed out long ago that conceding that someone is a person does not oblige you to keep him or her alive. On the other hand, someone committed to minimizing suffering might be unconvinced that a fetus is a person, yet still oppose abortion once the fetus can experience significant pain.

unconvincing. Many women would reasonably insist that not having to bear an unwanted child is no less vital to the ability to live what they regard as the good life than is freedom of religion or unhampered sexual practice. If Barry had a reason to distinguish among these cases, he did not supply it. It is hard to imagine what a compelling reason could be.

Barry's biases about the good life shaped his application of his reasonableness test elsewhere. Consider his contention that courts should not generally make policy in democracies but that they should require legislatures to implement their policies in equitable ways. "The key to this approach," he argued, is to distinguish "what gets done and how it gets done." Such principles as "non-discrimination, equal educational opportunity, and equal access to health-care speak to the question of 'how' and are appropriate subjects for judicial review." Questions about "what," on the other hand, "speak to the overall level of expenditure and the general organization of the service," suiting them better "to the government and legislature, even when they too involve questions of justice" (Barry 1995, 98–99).

Barry's position sounds appealingly impartial at first blush. Many who would agree, for instance, that courts should not require governments to support the arts might nonetheless think it legitimate for them to intervene if a government decided to do so but then declared blacks or Jews ineligible to apply for grants. Yet while reasoning of this kind led Barry to endorse the US Supreme Court's 1983 decision in *Bob Jones University v. United States*, which denied tax-exempt status to universities that prohibit interracial dating, he rejected my suggestion that the *Bob Jones* logic should be extended to religious institutions that deny women access to the priesthood.<sup>6</sup> Catholic women who aspire to become priests should not be protected from this inequitable treatment, he said, because this would interfere with essential matters of church doctrine. "If you believe that the sacraments have efficacy only if administered by a man, you can scarcely regard the sex of the person administering them as irrelevant." This must be beyond dispute, according to Barry (2001, 174), because "being a Catholic entails acceptance of papal authority." Notice the mission creep that Barry engaged in to make this seem plausible. The suggestion was not, after all, that the Church be ordered to admit women to the priesthood but simply to proscribe as inequitable tax subsidies for religions that decline to do so. This is in line with Barry's admonition that government benefits must be given impartially or not at all.

6. This might qualify me for what many will see as the dubious distinction of being the only person on earth who is less sympathetic to multicultural accommodation than was Barry. See Barry (2001, 168–74).

What is really going on here, I think, is that denying the tax-exempt status does not seem worth it to Barry because he does not judge the Catholic proscription of women priests important enough to compromise the free exercise of religion. But that reflects Barry's judgment about which things are most important for living a good life. Others will take a different view. Barry did not say what he thought should be done if a church were to exclude blacks from the priesthood, as Mormons did until 1978, though it seems he would have no difficulty with that either. For Barry (2001, 174–75), the question allegedly turns on whether the belief in question is essential to practicing the religion. But what then about *Bob Jones*? It would be child's play for those who promulgated their exclusionary racial policy to reframe their objections as essential to the practice of their religion; indeed, for many of them no reframing would be needed. I suspect that the real reason Barry could not bring himself to say that *Bob Jones* was wrongly decided has nothing to do with impartiality. Rather, it is that proscription of miscegenation has been so closely linked to the domination of American blacks for so long that this distinguishes it from what strikes Barry as the comparatively benign matter of excluding women from the Catholic priesthood.<sup>7</sup> Just as Michael Walzer (1983, 3–30) has pointed out with regard to appeals to equality, once we dig into invocations of impartiality, we find assumptions about resisting domination doing the real work.

Comparable considerations apply to Barry's discussion of rights and economic guarantees. Though he rejected Mill's harm principle (which he dubbed the "negative" harm principle) on the grounds that preventing harm is not the only justification for government action, Barry (1995, 86–88) embraced a "positive" harm principle, which, he claimed, passes the Scanlonian test. "We all have a legitimate complaint based on justice," he says, "if our society fails to provide us with what is needed to avoid harm." The reason: "What is harmful is deleterious to the furtherance of virtually any conception of the good." Accordingly, we do not have to invoke "any particular conception of the good to arrive at the conclusion that rules of justice must prohibit the doing of harm" (Barry 1995, 142–43). His list of what the positive harm

7. This is suggested by Barry's (1995, 165) discussion of the related subject of religious establishment: "We must, of course, keep a sense of proportion. . . . Strict adherence to justice as impartiality would, no doubt, be incompatible with the existence of an established church at all. But departures from it are venial so long as nobody is put at a significant disadvantage, either by having barriers put in the way of worshiping according to the tenets of his faith or by having his rights and opportunities in other matters (politics, education, or occupation, for example) materially limited on the basis of his religious beliefs."

principle requires includes “security against the deliberate infliction of injury and death by other people, and the provision of sanitation, portable water, shelter, and heat (as required by the climate) and medical care.” It also requires “a supply of food adequate to provide for normal growth, work at full capacity, enjoyment of leisure, pregnancy, and child rearing.” Satisfying these “vital interests” has “absolute priority,” he insisted, “over any other use of society’s resources” (Barry 1996, 332).

Barry’s defense of his positive harm principle put him squarely in what, since Rawls, has been known as the resourcist camp in arguments about justice. Rawls’s motivation had been to avoid questions about the sources of human welfare, focusing instead on the resources people need regardless of their particular conceptions of the good. He acknowledged that his view rested on a “thin” theory of the good, but he insisted that this depended only on “general facts” about society and “the laws of sociology and economics.” It was not biased in favor of particular conceptions of the good life. But just as critics like Roemer (1986, 751–84) Scanlon (1986, 111–18), and Shapiro (1986, 213–14, 283–84) pointed out that Rawls’s thin theory was thicker than he acknowledged, the same is true of Barry.

Barry’s resourcism privileges some conceptions of the good life over others in several ways. One, as Andrew Reeve (1996, 314–18) noted, is that Barry’s use of “virtually” excludes conceptions that do not include being protected from harm. Barry (1996, 332–33) heaped scorn on this in a reply to his critics, insisting that he meant only to exclude wildly idiosyncratic conceptions of the good such as the suffering that Mother Teresa considered a gift from God, the beckoning afterlife that made Hamlet unhappy with the proscription of suicide, or the Munchausen patient for whom being diagnosed with an illness turns out to be an asset.

But we can agree with Barry that avoiding harm is integral to most reasonable conceptions of the good life yet still balk at his notably heftier contention that insisting on rights to protection from harm by the state does not require contestable assumptions about the good life. Particularly on Barry’s capacious view, which, as we have just seen, includes harms due to bad luck as well as the malevolent actions of others—not to mention rights to cradle-to-grave state guarantees of the necessities for commodious living—*harm* is manifestly a placeholder for a contestable set of views of the good life. Most obviously, Barry’s account excludes rugged bootstrapping views that assign an important role to triumphing over adversity and providing for one’s own security from harm, at least in significant part—to say nothing of providing the wherewithal for leisure. Barry’s

account also excludes views at the opposite end of the ideological spectrum. His declaration that people are entitled only to enough food to work “at full capacity” loads the dice against views, like Philippe Van Parijs’s (1995), that detach people’s just claims on social resources (in Van Parijs’s case, to an equal share of the highest sustainable social wage) from any expectation that they be required to work.

And this is the tip of the iceberg. Barry’s “absolute priority” requirement stands in need of both substance and mechanisms of enforcement. His remarks about equity and institutions understate how demanding these requirements would be—both philosophically and politically. Barry’s advertised stance appears strongly conditioned by democratic considerations: that there should be constitutional requirements for his list of social and economic rights, but that it should be left to legislatures to institute them subject to his constraints about equitable allocation already discussed. But this is problematic in ways that reveal the impossibility of hiving off second-order impartiality as a domain that can yield concrete judgments yet avoid the difficulties of first-order impartiality with which Barry was all too familiar.

The example of medical care establishes the point. Assuming for now that a just overall social budget for medical care could be agreed on, there would still be no way to divide it up that would not seem, and indeed be, inequitable from some reasonable point of view. Some ethnic and racial groups are more susceptible to particular diseases than others. Should we invest extra in research on and treatment of diseases that afflict particular groups? If so, which groups should count, and who should bear the opportunity costs? Women live longer than men. Should that entitle them to less lifetime medical care or more? Arguments can be made on both sides. Should we treat illnesses that result from bad genetic luck differently from those that include a behavioral component—and if so, how much should behavior be factored in? Must nonsmokers get lung transplants before smokers, and should addicted smokers be preferred to recreational ones? As I have noted elsewhere with respect to the debates Rawls ignited about moral arbitrariness, there is no impartial way to stipulate the extent to which people should be held accountable for differences in weakness of the will.<sup>8</sup> How then are courts meant to decide whether and to what degree any contested allocation of the medical care pie passes Barry’s equitableness test?

8. Rawls held that differences in capacity, whether due to nature or nurture, are morally arbitrary but not differences that result from how we use capacities. This is unconvincing: the capacity to deploy capacities is itself distributed in morally arbitrary ways (see Shapiro 1996, 67–75).

These difficulties spill over into questions about the size of the medical care budget itself, subverting Barry's attempt to distinguish the amount of provision from how it is divided up.<sup>9</sup> One need not reflect for long on the opportunity-cost dilemmas opened up by dialysis machines, artificial hearts, or the research on cures to cancer, AIDS, Ebola, and other fatal diseases to see that the possibility of investing in lifesaving medical technologies is elastic, if not limitless. Interpreting Barry's absolute priority requirement literally would therefore mean that medical care has the potential to consume the entire government's budget, raising problems for the other social and economic guarantees that are also accorded absolute priority over "any other use of society's resources." As the South African Constitutional Court discovered when it sought to delineate the limits of a constitutional right to medical treatment for someone dying of renal failure in 1997, there is no theoretically compelling solution to these trade-offs.<sup>10</sup> Certainly Barry's theory offers no help. If everyone who needs kidney dialysis is covered but those in need of artificial hearts are not, cardiac patients will reasonably feel aggrieved. And their distress will only intensify if the state is also underwriting the wherewithal for people's leisure. As this example illustrates, drawing the budget line for an inherently scarce good inescapably involves equitable considerations. It is thus self-contradictory to declare that courts should police equity in public provision impartially while keeping out of decisions about what the level of public spending should be.

The difficulties are compounded once we turn to issues about taxation and the distribution of income and wealth. Barry's full analysis of this subject was promised in a volume he never completed (see Barry 1995, 95–98). However, he did say that his distinction between the "what" and the "how" of justice did not apply here—at least not in the same way.<sup>11</sup> Instead, he took the obverse (and in some ways

more Rawlsian) view that there should be a constitutional requirement of the main contours of a just distributive regime, but that judges should keep out of the technicalities of its implementation (1995, 96–97).

As we have seen, hiving off the areas that are immune from judicial review is easier said than done once costly resources are included within the ambit of what courts should protect from politics.<sup>12</sup> In any case, Barry never filled out his account of the just distributive regime that should be constitutionally protected, much less derived it from second-order impartiality via his Scanlonian test. However, in subsequent writing he made no secret of his view that justice requires much less inequality and notably more steeply progressive taxation than that which prevails in advanced capitalist democracies.

But how much less, and how much steeper? Most of what Barry had to say that bears on these questions was set out in his last book, *Why Social Justice Matters*, published in 2005. His goal there was to help combat the sharp increases in inequality and declines in progressivity that had occurred in Britain and the United States over the preceding decades. Accordingly, most of the book is spent documenting the extent of the changes and exposing specious arguments that had been put forward to justify them. He makes short work, for instance, of the 1994 report on inequality and taxation commissioned by then Labour Party leader John Smith that laid the groundwork for Tony Blair's "New Labour."

Barry points out that the report offers no justification for its bald assertion that no one should pay more than half of their income in taxes. He also notes that the New Labour credo was a major departure from the standard views of progressivity embraced by social democratic parties (including the British Labour Party) for decades, and that a 50% limit could not have been expected to make a dent in the inequality that had been growing since the 1970s—as, indeed, it did not. All this is true, but it is also true that Barry never offers a defense of the traditional social democratic stance on progressivity embraced by "old-fashioned adherents of social justice" from the standpoint of justice as

9. Barry (1995, 98) qualifies the claim discussed in the text by saying that it should be up to the legislature to set the overall level of provision "within certain limits." Unfortunately, he does not say what these limits are, who should determine them, or how. I suspect that, as with my earlier discussion of race and gender in connection with the *Bob Jones* case, if pressed, Barry would have ended up insisting that medical care should at least be provided in circumstances where refusal to do so would render people vulnerable to domination by others. That is, nondomination would have displaced impartiality as the principle doing the real work.

10. The Constitutional Court refused to order the dialysis that was being sought, throwing its hands up in the face of scarcity. See *Soobramoney v. Minister of Health* (27 November 1997), 13. [http://www.esrc-net.org/usr\\_doc/Soobramoney\\_Decision.pdf](http://www.esrc-net.org/usr_doc/Soobramoney_Decision.pdf) (accessed September 26, 2015).

11. With respect to public services, citizens should decide through democratic politics what the level of provision should be, and justice bears "primarily on the way in which the money is raised and the way in which

the services are distributed among the claimants." But Barry (1995, 98) insists that "there is no similarly conventionalist element in justice as it concerns the distribution of income and wealth."

12. This arises in the US context when theorists like John Hart Ely and Ronald Dworkin try to vacuum up much of the New Deal and Great Society social policy into the ambit of judicial review by imperatives that are comparable to Barry's positive harm principle (in Ely's case it is footnote four of Justice Stone's opinion in *Carolene Products* mandating protection of "discrete and insular minorities," and in Dworkin's case it is his principle of equal concern and respect). See Shapiro (1996, 16–52).

impartiality. He simply points out that effective tax rates on the wealthy had been 70% as recently as the 1970s, and that even with a top marginal rate of 99%, “the more pre-tax income people have the more they would have after paying their tax” (2005, 7–9).

#### INTERLUDE: OPEN VERSUS CLOSED IMPARTIALITY

One path forward might be to invoke Amartya Sen’s claim that we do not need a complete theory of justice to tackle serious injustice in an impartially defensible way. Like Barry, Sen identifies justice with impartiality and for the same reason: to come up with principles of justice that any reasonable person will affirm. But the substance of Sen’s view differs. He is skeptical of the path taken by Barry, Scanlon, and the other social contract theorists who follow Rawls in trying to derive impartial theories by appeal to what members of a political community can, in principle, be brought to affirm or at least not to reject. Sen doubts that their thought experiments can yield universally valid principles and, perhaps echoing Rousseau’s ([1754] 1964, 129) critique of Hobbes, worries that the principles they affirm fetishize local values.

Instead of these “closed” views of impartiality, Sen proposes an “open” conception derived from Adam Smith’s counsel that we should view our sentiments from the standpoint of an “impartial spectator.” The goal is “to avoid local parochialism of values” by taking account of arguments from outside our culture and traditions so that we scrutinize “not only the influence of vested interest, but also the impact of entrenched tradition and custom.” We must try to look at our values and motives, as Smith ([1759] 1853, 161) put it, “with the eyes of other people, or as other people are likely to view them.” Open impartiality, for Sen (2009a, 124–52), is the benevolent disinterestedness that results from critical distance. He thinks this is best achieved by opening ourselves to practices that have prevailed in other times and places and in non-Western philosophical systems; that is a large part of his agenda in *The Idea of Justice*.

How might Sen’s critical distance help with the issues we have been discussing in connection with Barry? One possible way is that critical distance fosters the propensity to focus on major questions. Sen’s impartial spectator is less apt to get caught up in issues three points to the right of the decimal when matters to its left of it are at stake. This aspiration dovetails with the sense of urgency that permeates *Why Social Justice Matters*. It is important to Sen because he thinks that the Rawlsians get bogged down in minutiae that do not need to be resolved in order to address the major questions of justice. He once captured this vividly with the pithy image of a man locked in an unbearably hot sauna who calls urgently to a friend outside to lower the temperature but

elicits the response that he must be told the ideal temperature before acting on the request (2009b).

A neophyte might wonder whether Sen was making a point about poor judgment in choosing friends, but anyone who has been raised on the contrived examples that make up much political philosophy will resonate with his frustration. More specific analogies Sen invokes to make the same point are that people who disagree on the relative merits of a Picasso and a Van Gogh can agree that the Mona Lisa is the greatest painting of all time, and that people who might argue about whether Kilimanjaro is higher than Mount McKinley know that Everest is the highest mountain on earth. The Mona Lisa stands out over the centuries, while debates about lesser works come and go. From a distance Everest obviously towers over the rest. By the same token, Sen’s open impartiality of critical distance might get us to focus on the questions that matter most.

Sen’s analogies are meant to establish that viable theories of justice need not be complete. As he puts it, we can work with partial orderings (2009a, 101–8, 398–400). Perhaps the open impartiality that comes with critical distance might enable him to say, with Barry, that the growth in inequality and decline in progressivity have been so dramatic in Britain and the United States since the 1970s as to make it obvious that there have been substantial increases in injustice. Other comments that Sen makes suggest as much. At one point he remarks, for instance, that perhaps we cannot discriminate between a 39% and 40% marginal tax rate from the standpoint of justice, but that this need not prevent our embracing the conclusions that slavery and the subjugation of women are unjust (Sen 2009a, 395–96).

That has an appealing ring, but there is less to it than meets the eye. One difficulty is that looking at either slavery or the subjugation of women from the perspectives of other times and places will do little to establish them as the justice equivalents of the Mona Lisa and Mount Everest. Slavery has been practiced all over the world for millennia (Davis 1966). The third century Roman jurist Ulpian took issue with an earlier variant of Sen’s claim when declaring that slavery contravened natural law even though it was recognized in the laws of nations across the ancient world.<sup>13</sup> This set in train centuries of debate about whether natural law provides a benchmark to evaluate positive legal systems that we need not pursue here. But Ulpian’s move reveals

13. Ulpian regarded this as proof that natural law could not be conceived of as what positive legal systems share in common. The relevant passages in Justinian’s *Digest* are Ulpianus 50.17.32 and Ulpianus 1.1.1.4. See Justinian ([529–34] 1932).

that people have long understood that comparative scanning of the world's practices is unlikely to be enough.

The most effective arguments for abolishing slavery, at least as a historical matter, came from within the metropolitan West (Davis 1975). They were imposed elsewhere by force.<sup>14</sup> Fighting the subjugation of women has also been, and continues to be, indigenous to the West and something of an export as the fulsome debates about headscarves, female genital mutilation, and foot binding underscore. Mary Wollstonecraft and the suffragists did not look to non-Western values and traditions any more than the antislavery societies did.<sup>15</sup> This is not to deny that there are interpretations of non-Western philosophical traditions that proscribe slavery and the subjugation of women; surely there are. But most of those who fought these practices in and from the West did not know about those interpretations and did not need to know about them.

These are scarcely isolated instances. If Steven Pinker (2011) is even half right in his account of the worldwide decline of violence and cruelty over the past millennium, perusing human history and the rest of the globe for less unjust societies than today's Western democracies would be something of a wild goose chase. Sen focuses mainly on non-Western theories of justice rather than social and political practices; even so, I have noted elsewhere that he never deploys the theories culled from elsewhere to settle any contested matter of justice, not even the ones, like slavery and the subjugation of women, that he himself raises (see Shapiro 2011a, 1255–63). It is hard to escape the conclusion that, as with Barry's objection to racial discrimination, Sen's real objection to these practices has nothing to do with impartiality but rather with the obvious reality that they are forms of domination.

What of the issues concerning inequality and progressive taxation that concerned Barry? Sen has another argument that might seem more serviceable for generating impartial claims about them, though it stems from a rather different reading of impartiality—something more like neutrality with respect to people's reason-giving than a feature of reason itself. This is Sen's appeal to "plural reasons" (2009a, 12–15, 56–57, 200–201, 353–54). Here the idea is that an outcome might be preferred from many points of view, and we need not choose among them if our principal

interest is in vindicating that outcome. Examples that Sen gives include the long list of reasons Edmund Burke adduced in his effort to persuade Parliament to impeach Warren Hastings in 1789 and the various reasons that were supplied for opposing the US-led invasion of Iraq in 2003, any of which, Sen thinks, would have been decisive (2009a, 1–3).

Sen's "plural reasons" has affinities with the mature Rawls's "political, not metaphysical" turn (1999b, 388–414). Rawls's claim was that agreement on the principles of justice that should govern a society does not require agreement on metaphysical doctrines and worldviews. All we need is an "overlapping consensus" on the desirability of the principles in question.<sup>16</sup> People might have wildly different and even incompatible philosophical convictions, but if they can converge on what is needed to sustain a just political order, we can build on that. The overlapping consensus, Rawls says, "seeks common ground—or if one prefers, neutral ground—given the fact of pluralism" (1999c, 459; see also [1971] 1999a, 354–55). By emulating Rawls in this way, and as Sen's examples of Burke's reasons for impeaching Warren Hastings and the Iraq war underscore, he is forsaking his "external" impartial observer for an "internal" common denominator view.

But Sen's view differs from Rawls's in one vital respect. Rawls's "political, not metaphysical" search for overlapping consensus is not an appeal to actual beliefs but rather to those he deems necessary to sustain a just democratic order. I have noted elsewhere that this inevitably hobbles Rawls in circularity: we cannot define overlapping consensus as what justice requires and then expect to discover what that is by appealing to overlapping consensus (see Shapiro 2003, 118–21, 149–50). Sen's account of plural reasons avoids that trap; he draws on the reasons that actual people give for their views. But taking that tack means shouldering the burden of showing that there is in fact an overlapping consensus in support of the principles of justice that we want to sustain. In the present context that means asking whether there is an overlapping consensus on the basic elements of distributive fairness and progressive taxation whose erosion in the advanced capitalist democracies since the 1970s so troubled Barry. The answer is not encouraging.

Consider progressive taxation. Defenders of a single tax rate (the so-called flat tax) insist that it is fair because it treats everyone alike. By contrast, proponents of various progres-

14. It took the Royal Navy six decades to stamp out the Atlantic slave trade in the nineteenth century (Kaufman and Pape 1999).

15. Indeed, she and John Stuart Mill, arguably the two most trenchant advocates of women's rights in pre-twentieth century Britain, point to the treatment of women in non-Western societies as ballast for Western enlightenment models of women's advancement (see Botting 2016, chap. 4).

16. Cass Sunstein (1995, 1733–72) defends a variant of this as "incompletely theorized agreement," observing that legislatures can agree to pass a bill or even though they could never agree on why.



sive rates think fairness means that those with a greater ability to pay should bear correspondingly higher rates. Their critics respond that the rich inevitably pay more because they have more income. If their taxes must be judged as a percentage of something, they think, taxes collected is the right denominator. Partisans of this view are outraged by a system in which the top 10% of taxpayers provide over 70% of federal revenues.<sup>17</sup> Disagreements of this kind partly reflect different views of the purposes of taxation: whether to reduce inequality (as Barry supposes), to supply public goods or to serve other collective purposes. But the differences also reflect divergent conceptions of what equitable treatment means.

The 2012 controversy over multimillionaire presidential contender Mitt Romney's taxes is instructive in this regard. Romney did not release his tax returns during the early Republican primaries, hoping, no doubt, to secure his party's nomination before they became objects of public scrutiny. But he let slip in an interview that his income had been taxed at about 15% over the preceding few years because it consisted mostly of deferred compensation and investment income, which are taxed at lower rates. This prompted a firestorm of criticism because it was less than half the rate to which earned income above \$357,700 was subject, not to mention being notably less than the 25% rate paid by a family of four earning the median income of \$72,000.<sup>18</sup> The 15% number that Romney released made the unfairness of his low rate the focus of withering criticism from all quarters. Perhaps this, at least, revealed some overlapping consensus as a progressive tax analogue of a sauna that is "too hot!"

But no. Rather than an overlapping consensus about marginal tax rates, the response reflected what Tversky and Kahneman (1974, 1124–31) describe as an availability heuristic or framing effect: people focused on the available data. Realizing this, no doubt, the campaign soon released Romney's recent tax returns to defuse the attacks. They showed that he had "earned" in excess of \$20 million in each of 2009 and 2010 but also that he had paid \$6.2 million in taxes and donated \$7 million to charity (Holland and Dixon 2012). The story line predictably became mud-

died as commentators began debating the merits of these various implicit benchmarks, and the controversy dissipated for the rest of the primaries (Benoit 2012). Efforts by Democrats to revive the issue in the general election met with little success.<sup>19</sup> Moreover, while Romney continued to take some flak for bucking tradition by refusing to disclose taxes from prior years, neither the content of what he did release nor his decision not to release more had much effect on voters (Sides 2012). Sen might be right that to ask a theory of justice to discriminate between 39% and 40% marginal tax rates is to ask too much, but he gives no indication of how his plural reasons would help adjudicate among the distributive visions that drove this debate.

It is worth noting that plural reasons would not even have helped with slavery and the subjugation of women when it most mattered, as Sen at times (2009a, 391–92, 398–99) seems to suppose that it would. After all, the United States had to fight a civil war to rid itself of slavery (see Shapiro 2016, sect. 5.5.1). As for women's subjugation, as recently as the 1950s the United States lacked an overlapping consensus about the injustice of marital rape or the other legal immunities that allowed husbands to assault and otherwise harm their wives with impunity (see Russell 1990; Ryan 1995). To the extent that there is an overlapping consensus about this in America today, this is the result of a four decade-long battle to get legislators and other public officials to accept that rape dominates women inside marriage just as much as outside of it and to legislate against it.

Why would anyone expect an actual overlapping consensus to yield serviceable judgments about just social arrangements? Indeed, in an unjust world, there are good reasons to suppose that it will not. Barry (1995, 54, 183–84) was unsympathetic to Rawls's "political, not metaphysical" move, which he saw as subversive of the Kantian project of generating political principles that can be universally affirmed. He would have been no friendlier to Sen's plural reasons, which would have struck him as bereft of the wherewithal to attack the injustices that concerned him. He would have been right about that.

17. "Who Pays Income Taxes?" National Taxpayers' Union. <http://ntu.org/tax-basics/who-pays-income-taxes.html> (accessed January 24, 2015).

18. "2011 Median Income for a Family of Four," HUD Median Income Percentages (Portland Housing Bureau, June, 2, 2011). [http://www.apicia.org/files/median\\_family\)income.pdf](http://www.apicia.org/files/median_family)income.pdf) (accessed February 3, 2011] and "Marginal and Average Tax Rate," Maxi-pedia 2011 Federal Tax Rate Tables. <http://www.maxi-pedia.com/marginal+average+tax+rate+difference> (accessed January 24, 2015).

19. In a February 2012 *Washington Post/ABC* poll, 30% of voters had said that Romney was paying his fair share of taxes, while 66% said he was not. See *Washington Post/ABC* poll conducted February 4, 2012. [http://www.washingtonpost.com/wp-srv/politics/polls/postabcpoll\\_020412.html](http://www.washingtonpost.com/wp-srv/politics/polls/postabcpoll_020412.html) (accessed January 24, 2015). Yet in the same poll conducted seven months later, 46% said that he was paying his fair share, while only 48% said he was not. See *Washington Post/ABC* poll conducted September 26, 2012 to September 29, 2012. [http://www.washingtonpost.com/politics/polling/romney-among-registered-percent/2012/10/30/c05dc238-0bb6-11e2-97a7-45c05ef136b2\\_page.html](http://www.washingtonpost.com/politics/polling/romney-among-registered-percent/2012/10/30/c05dc238-0bb6-11e2-97a7-45c05ef136b2_page.html) (accessed January 24, 2015).

**IMPARTIALITY OR DEMOCRACY?**

At this point it is worth stepping back to ask why Barry, Rawls, Scanlon, and the other Kantian-inspired contractualists have poured so much energy for so long into deriving accounts of justice from ruminations about impartial human reason. There is a pull-the-rabbit-out-of-the-hat quality to the whole enterprise that calls to mind Aesop's quip that after all is said and done, more has been said than done. Obviously you can't derive something from nothing. It is scarcely surprising that these expeditions from reason to justice become laden, along the way, with contestable assumptions about what is good for people, how they can know and secure it, at what cost, and to whom. No one should be surprised that the contestable assumptions carry more freight than the advocates of these ventures admit, or that people who are skeptical of the assumptions have trouble staying along for the ride.

Barry's work is unusual in this genre in that his writing about justice was embedded in, and addressed to, actual distributive conflicts. Yet his confidence that the moral positions he took reflected the dictates of impartial reason was never shaken. To some extent, he was a creature of his era. Western intellectuals who were born, as he was, in the 1930s, came of age during the heyday of the social-democratic welfare states that were built after the war. They saw themselves, as Tony Judt has noted, as defusing old political animosities and, more importantly, as "detached from any doctrinal project." These thinkers had grown up in the aftermath of the Depression and experienced firsthand the horrors of war driven by ideological extremism and the shortages that followed. But they found themselves, in the 1950s, in an era of unprecedented prosperity and peace, "where politics was giving way to government, and government was increasingly confined to administration" (Judt 2006, 384). It could all too easily seem to them that, after a protracted struggle, the Enlightenment dream of basing collective life on reason's dictates was finally coming true. This helps explain why they embraced the social democratic welfare state as a benchmark for normalcy, with the implication that departures from it would stand in need of justification. As we have seen, this is the basis of Barry's stand in *Why Social Justice Matters*.

But, as Judt also points out, this new normal was in fact a precarious and time-bound achievement. It rested on the unusual confluence of military exhaustion, unprecedented postwar growth helped along by the Marshall Plan, favorable demographic trends, and the protected pocket of geopolitical stability created by the early Cold War. Starting in the mid-1960s, it came under increasing stress as popula-

tions aged, growth slowed, and offshore competition forced latent tensions between high wages and full employment to surface. Ronald Reagan, Margaret Thatcher, and the New Right might have seemed like a radical departure from normalcy, but their ascendancy really reflected trade-offs and conflicts of interest that became manifest once the tide that had lifted all boats began receding in the 1970s. The costs of welfare states were escalating, with no obvious respite in view. The "social rights" that T. H. Marshall had famously portrayed as the culmination of three centuries of evolution had worn thin, much to the chagrin of Barry's generation.<sup>20</sup> Many of them reacted with rage to the advent of the New Right and with incandescent fury to the subsequent adoption of its neoliberal promarket, antiwelfare agenda by New Labour in Britain and comparable backtracking on traditional social democratic agendas in Western Europe. They saw this as a retrograde selling out of the post-political achievements of European social democracy. Thus it was, as Judt (2006, 385) says, "that the very generation which came of age in the Social Democratic paradise of its parents' longings was most irritated and resentful of its shortcomings."

These considerations help explain why liberals of Barry's generation thought they could find an impartial rationale for the postwar welfare states, one that brackets disagreements about interests and values yet assumes that there are ways to serve them that all reasonable people must, on reflection, affirm as fair. But we live in a different world today, one in which all vanguardist political solutions are suspect. This is no less true of vanguardist solutions that rest on appeals to armchair speculation about reason than earlier ones that invoked the historic mission of the proletariat. In our world, direct focus on resisting domination makes more sense than defending impartialist ventures. And combatting domination is best served by betting on democracy, the worst system, as Churchill said, except for the others that have been tried.<sup>21</sup>

This is true for reasons both theoretical and practical. On the theoretical front, Robert Dahl ([1956] 2006, 12–26) noted more than half a century ago that the trouble with claiming that certain rights should be protected as anterior

20. Marshall (1964, chap. 4) described a progression from civil rights in the eighteenth century to political rights in the nineteenth to social (welfare) rights in the twentieth.

21. "Democracy is the worst form of Government except all those other forms that have been tried from time to time." Winston Churchill, speech on the parliament bill, House of Commons, November 11, 1947. <http://hansard.millbanksystems.com/commons/1947/nov/11/parliament-bill> (accessed January 19, 2015).

to democratic politics is that there is endemic disagreement about which rights these are. Dahl was thinking of natural rights theorists, but the resourcists following Rawls confront the same difficulty. There is a garbage-in, garbage-out quality to their ventures: assumptions are made about what people are and what they need, and those assumptions are then deployed to generate the desired results, as we have seen. It is not surprising, therefore, that there are as many resourcist theories as there are resourcist theorists.<sup>22</sup> This is not to deny the value of resourcist arguments. But their proponents should not pretend that they embody, or are products of, the dictates of impartiality. In my view, for instance, people have an interest in access to the wherewithal to avoid domination, but those who reject this commitment to nondomination will be unpersuaded. I think that when push comes to shove they are few and far between, but they exist and my disagreements with them cannot be resolved by appealing to impartial principles.

On the practical front, some worry that democracy, based as it is on majority rule, does nothing to guarantee protection of people's basic interests. That is true, but there are no guarantees in politics. The real question is: majority rule compared to what? Fondness for judicial review has been a distinctively American preoccupation, but it is worth nothing that, like Tony Judt's disappointed European social democrats, the main champions of judicial review in the United States were born between the wars and hit their intellectual strides during the Warren Court era (Dwight Eisenhower appointed Earl Warren Chief Justice in 1953 and he served until 1969).<sup>23</sup> People like Ronald Dworkin, John Hart Ely, and Laurence Tribe championed that Court, and the mounting distress expressed by many in their generation as much of its work was undone by the Burger (1969–86), Rehnquist (1986–2005), and Roberts (2005–) Courts calls to mind Brian Barry's irate response to the assault on the British welfare state that began in the late 1970s. They saw the Warren Court's achievements as vital for protecting individual rights and for the health of American democracy; its eclipse, they thought, seriously jeopardized both. Also reminiscent of Barry, much of their commentary portrayed the situation

as a departure aberrational from sound practice that would return once sanity was restored and the Court could once again do its proper job.<sup>24</sup>

Just as Judt's 1960s European intellectuals were blind to the reality that their social democracies were not the new normal, many of their American counterparts missed the degree to which the Warren Court was a massive historical outlier. More attention to the longer sweep of American history, and the Taney (1836–64), Waite (1874–88), Fuller (1888–1910), White (1910–21), and Taft (1921–30) Courts, might have alerted them to this reality. Given decisions like *Dred Scott* or *Plessy v. Ferguson*, the Court's complicity in undermining Reconstruction and limiting the Civil War Amendments in the *Slaughterhouse* and *Civil Rights Cases*, or its evisceration of much New Deal and other reform legislation during the *Lochner* era, there was plenty of evidence at the time that the Warren Court was unusual.<sup>25</sup> Certainly Eisenhower got more than he bargained for in appointing Warren ("the biggest damn fool mistake I ever made"), a former California Attorney General and then its Republican Governor, who had been the moving force behind the internment of US citizens of Japanese descent during the war, who was confirmed 96–0 by the US Senate, and whose subsequent trajectory was predicted by no one (Urofsky 2001, 264).

Most judges are not like that. They are conventional establishment figures, and if they do stray, it is more likely to be in the direction of public opinion as expressed through elected branches than away from it (see Friedman 2010; Giles et al. 2008; McGuire and Stimson 2004). Lord Devlin (1965, 15) might have overstated things in declaring that judges reflect the views of the man on the Clapham omnibus but not by much. When the US Supreme Court refused to strike down Georgia's proscription of homosexual conduct in 1986, homosexuality was still illegal in half of the states. By the time the Justices reversed themselves 17 years later, 36 states had

22. For a review of the various resourcist theories on offer, see Dworkin (2002, 65–119).

23. John Hart Ely (born in 1938), Ronald Dworkin (born 1931), and Bruce Ackerman (born 1943) all published accounts of justice that affirmed values close to those of the Warren Court as the impartial dictates of justice. See Ely (1980), Dworkin (1986), and Ackerman (1981). The Warren Court turned out to be no more of a new normal than European Social Democracy.

24. For the flavor, see Dworkin's many contributions to the *New York Review of Books* <http://www.nybooks.com/contributors/ronald-dworkin-2/> (accessed January 7, 2014).

25. *Dred Scott v. Sandford*, 60 US 393 (1857), held that blacks, whether free or slave, were not citizens and therefore lacked standing to sue in federal court. *Plessy v. Ferguson* 163 US 537 (1896) coined the euphemism "separate but equal" to sanctify racial segregation in schools and public facilities. *The Slaughterhouse Cases*, 83 US 36 (1873) crafted a narrow reading of the Fourteenth Amendment, immunizing the states' police powers, and the *The Civil Rights Cases*, 109 US 3 (1883) held that its enforcement provisions did not empower Congress to outlaw racial discrimination by private individuals and organizations—only state and local governments.

repealed the ban.<sup>26</sup> When public opinion is seriously divided, the Court tends to duck. *Roe v. Wade* is the exception that proves that rule. The Court aggressively rewrote the law of abortion in the face of a divided public, acting in an imperialistic way that failed to settle the question and eroded the Court's legitimacy—even in the estimation of many who favored the outcome.<sup>27</sup> More typical is the story of school desegregation. Despite the extravagant claims often made for the Court's 1954 decision in *Brown v. Board of Education* reversing *Plessy v. Ferguson* and declaring "separate but equal" unconstitutional, it seems clear that the advances that have occurred in desegregating schools were achieved through legislative action, not courts (Rosenberg 2008).

It is in fact not possible to show that judicial review matters for the prevention of domination. Authoritarian governments routinely flout courts when they are intent on oppression, as anyone who lived through fascism, communism, the era of Latin American "disappearances," or South African Apartheid will attest. Democracies do vastly better from the perspective of nondomination, but there is no compelling evidence that judicial review has much—if anything—to do with this. Rather, it seems clear that democracy does the heavy lifting. Countries like Britain, Sweden, Norway, and until recently the Netherlands, which have shown little appetite for judicial review, have not done demonstrably less well at protecting basic rights than has the United States.

As early as 1956, Dahl registered skepticism that democracies with constitutional courts could be shown to have a positive effect on the degree to which individual freedoms are respected when compared to democracies without them, a view he developed more fully in a seminal article the following year (see Dahl [1956] 2006, 105–12, and 1957, 279–95). Subsequent scholarship has shown that Dahl's skepticism was well founded (see Hirschl 2007; Tushnet 1999). Indeed, it is plausible to wonder whether the popularity of independent courts in democracies has more in common with the recent popularity of independent banks than with the protection of individual freedoms. These "independent" institutions signal to foreign investors and gatekeepers at international economic institutions that the capacity of elected officials to engage in redistributive policies or interfere with property rights will be limited. That is, they might be devices by which governments can signal their willingness to limit domestic political op-

position to unpopular policies by taking them off the political table (Hirschl 2000, 91–147).

It is worth noting here that the growth of inequality since the 1970s that so troubled Barry has been more extreme in the United States, with its Bill of Rights and judicial review, than in any of the other advanced democracies (Piketty and Saez 2006). No doubt there are many reasons for this, but one nonnegligible contributor has been the role of money in politics, which makes both parties disproportionately dependent on large financial contributors. This in turn has been aided and abetted by the Supreme Court, which since 1976, has struck down successive attempts by Congress to limit money's role in politics and has recently expanded its prohibition to regulation of corporate political expenditures as well.<sup>28</sup> Instead of arguing that courts should be empowered to protect people's basic interests from the paper tiger of majority tyranny, those who are concerned about domination would be better advised to invest their energy in protecting competitive democratic politics from courts that undermine its integrity and effectiveness.

A full defense of this view here would take us too far afield (see Shapiro 2016). Instead, I will conclude by noting that in earlier work Barry defended majority rule against theorists like James Buchanan and Gordon Tullock (1962), who had advocated shielding various entrenched constitutional provisions from democratic politics by means of supermajority and even unanimity requirements. This is the best way, they had argued, to limit the likelihood that we will have solutions imposed on us that we do not want. Barry was the first in a long line of theorists to point out, in his 1965 book *Political Argument*, that Buchanan and Tullock were wrong because unanimity rule privileges the status quo. If we assume as much uncertainty about whether our interests are served by the status quo as by possible departures from it, he showed that the best default presumption is to embrace majority rule (see Barry [1965] 1990, 242–85, 312–16; see also Rae [1969] 1975 and Taylor 1969). Barry's earlier view in *Political Argument* is more appealing than his subsequent excursus into the blind alley of justice as impartiality.

If this overstates the change in Barry's views, it is because, as I showed regarding his treatment of blacks and women in the first section, hostility to domination also turns out on inspection to do much of the subliminal work beneath Barry's subsequent concern with rising inequality. For instance, a good bit of his outrage at what he follows R. H.

26. *Bowers v. Hardwick*, 478 US 186 (1986) upheld as Georgia's proscription of homosexual conduct between consenting adults. It was reversed by *Lawrence v. Texas*, 539 US 558 (2003), which granted constitutional protection to same-sex sexual activity legal in all US jurisdictions.

27. Most famously, Ruth Bader Ginsberg; see Shapiro (2011b, 238–41).

28. See *Buckley v. Valeo* 424 US 1 (1976) and *Citizens United v. Federal Election Commission* 558 US 310 (2010).

Tawney in describing as the “repulsive consequences” of inequality is that, beyond some threshold, it “makes even policies aimed at ending poverty harder to enact.” Barry (2005, 180–83) also endorsed my (2002) argument that the poor become disempowered in highly unequal democracies due to wide empathy gaps (the possibility of upward mobility eludes them and the rich become so insulated that they can ignore them), while middle class resentment is diverted into stigmatizing them as undeserving. But these are arguments about the vulnerability of the poor to domination, not about inherent evils of inequality.

Barry (2005, 235–37) also had much to say about the changing role of the media in democratic politics. He took particular issue with the 1987 decision by the Federal Communications Commissions (FCC) in the United States to abandon the fairness doctrine that had required balanced presentation of controversial public issues, usually by including several points of view. The advent of cable and satellite television meant that the original rationale that had led to its adoption in 1947, the scarcity of channels, no longer obtained. Barry correctly pointed out, however, that the new status quo did not produce a competitive marketplace of ideas because the FCC did nothing to prevent already concentrated media markets from becoming even more so. Again, his compelling objection here is to the way in which a few wealthy individuals and their media conglomerates undermine competitive democratic politics. This is an argument about the illicit uses of power, not the intrinsic desirability of impartiality or, indeed, equality.

## CONCLUSION

This emphasis on power is, in the end, what separates my commitment to nondomination from Barry’s justice as impartiality. Like other resourcists following Rawls, Barry thought of his view along the lines of Aristotle’s instrumental goods: they consist of the wherewithal to pursue final goods, or things that Aristotle ([c350 BC] 1984, 1,733) described as “good in themselves.” But whereas Aristotle thought of final goods as universal and invariant, Barry ties himself up in philosophical knots to try and show that the instrumental goods that he defends by reference to his positive harm principle do not presuppose a particular conception of the good.

This forlorn endeavor is beside the point. My power-based account is indeed biased in favor of some conceptions of the good: to wit, those that are compatible with mitigating domination when it cannot be escaped. It rests on skepticism of any sharp distinction between means and ends, partly because we are so often unsure of our ends and recast them as our environments evolve and the means we deploy to pursue

them play out. Means/ends dichotomies also warrant skepticism because of their elective affinities with vanguardism—to which a commitment to nondomination is constitutionally hostile. This means tolerating, even welcoming and institutionalizing, a degree of uncertainty into our thinking about what justice requires that is out of kilter with much of the philosophical literature, and betting instead on democratic politics. Those who fear this course and want it checked by impartial requirements of justice have a cure that is worse than the disease. Philosophically, their ventures are bound to fail, as we have seen. Politically, the institutions they depend on do more harm than good.

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