

**Entry by Birth Alone?:  
Rawlsian Egalitarianism and the Basic Right to Invite**

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Rawls imposes a key assumption on the original position. Call it “the Closedness Assumption.” In *A Theory of Justice*<sup>1</sup> he characterizes it as follows:

“Let us assume, to fix ideas, that a society is a more or less self-sufficient association of persons who in their relations to one another recognize certain rules of conduct as binding and who for the most part act in accordance with them.”

(*TJ*, p. 4)

“I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies.” (*Ibid.*, p. 7)

In his later works, Rawls retains this working assumption,<sup>2</sup> and characterizes these closed societies as political states that persons “enter...only by birth and leave...only by death.”<sup>3</sup>

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<sup>1</sup> John Rawls, *A Theory of Justice* (Cambridge MA: Harvard University Press, 1971/rev. 1999). “*TJ*” hereafter. All citations herein refer to the revised edition.

<sup>2</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), “*PL*” hereafter, and John Rawls, *Justice as Fairness: A Restatement* (Cambridge MA: Harvard University Press, 2001), “*JAFR*” hereafter.

The purpose of imposing the assumption is to “fix ideas,” which means roughly two things here: (i) restricting the subject matter to issues of domestic justice and, relatedly, (ii) restricting the agreement to one that is between (representatives of) members of society. Closedness in the setup of the original position therefore can be thought of in two ways:

Physical Closedness: All persons are born in and die in the same society, and have no contact with or relations to persons in other societies.

Normative Closedness: All and only members of society are represented in the agreement on the public conception of justice.

Rawls uses Physical Closedness to secure Normative Closedness, spelled out in terms of (ii) which pertains to the setup of the original position. These two notions of closedness, however, come apart and should be viewed separately. For our purposes, the important point is that we can achieve Normative Closedness without Physical Closedness. We can restrict our subject matter to domestic justice concerns – concerns that involve only the interests and treatment of members – without having to assume Physical Closedness. All and only representatives of members of the society whose public conception of justice is the output of the agreement in the original position are parties to the agreement.

The second important point is that we should jettison the assumption of Physical Closedness if we want a lasting agreement on a public conception of justice for a liberal

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<sup>3</sup> *PL*, p. 12.

democracy. The clearest reason why this is the case is that some members of a liberal democracy have important attachments to people who are not members of that society, including their parents, children, and spouses. Representatives in the original position should be able to take this fact into account when choosing a public conception of justice. Their ability to do so, I argue, will have the implication that a new basic right, a “right to invite,” must be regarded as a commitment of Rawlsian domestic justice.

For the purposes of this paper, I will not question Rawls’ commitment to Normative Closedness. I thus leave aside the debate over whether he should have extended the original position to cover interactions between persons on a global scale. Prominent critics working in both the ethics of immigration<sup>4</sup> and political philosophy more broadly<sup>5</sup> have argued for this conclusion. Rawls famously rejected this move in his later work on international justice, *The Law of Peoples*.<sup>6</sup> This debate raises important questions about global political institutions and international distributive justice, among others. One important upshot of my argument here is that we don’t have to address such questions to see that Rawls’ egalitarian theory of domestic justice (henceforth “Rawlsian egalitarianism”) has important implications for how societies should treat at least some people seeking to immigrate.

A second important upshot of this paper is that Rawlsian egalitarianism can vindicate some of our deepest commitments about immigration justice. Immigration has

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<sup>4</sup> Joseph H. Carens, “Aliens and Citizens: The Case for Open Borders,” *Review of Politics*, 49 (1987), pp. 251-273.

<sup>5</sup> Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1973); Thomas Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989).

<sup>6</sup> John Rawls, *The Law of Peoples* (Cambridge MA: Harvard University Press, 1999). “LP” hereafter.

become a central topic in political philosophy in recent years. Political philosophers have largely rejected Rawls' view that immigration doesn't hold much in the way of independent theoretical interest. He famously thought that issues of immigration would fall away if most societies became reasonably just.<sup>7</sup> Most of us think that this is false – people have interests in being able to migrate that have little to do with suffering injustices at home. Further, even if Rawls' conditional claim were true, the antecedent – all societies being reasonably just – is so far-off that it wouldn't lead many of us to think that we shouldn't devote considerable attention to the moral issues raised by immigration. However, insofar as one thinks there is value in the Rawlsian project, my argument shows that Rawls' own framework commits him to giving an important place to matters of immigration, in particular the issue of family reunification. Those of us who take immigration seriously as an area of philosophical investigation may therefore have more reason to think that Rawlsian egalitarianism is a compelling framework for thinking about justice than if we took Rawls' own views on immigration at face value.

Additionally, while immigration is regularly discussed in political philosophy, it is often treated in isolation from other issues of justice. More work must be done to think about how our moral commitments involving immigration should fit into a broader theory of liberal egalitarianism and be balanced with our other moral commitments. Rawlsian egalitarianism is one of the major liberal egalitarian frameworks, and has been used to develop important arguments for open borders<sup>8</sup> and equal treatment of heterosexual and

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<sup>7</sup> *LP*, pp. 8-9.

<sup>8</sup> Carens, "Aliens and Citizens: The Case for Open Borders."

homosexual couples by a society's immigration policy regime.<sup>9</sup> I am arguing that a right to reunification is as basic a right for liberal citizens as other recognized basic rights, such as freedom of speech, on the basis of Rawlsian liberal commitments. Establishing this conclusion is part of the broader project of examining liberal commitments regarding immigration, and how different approaches to thinking about liberal justice can be used to address moral issues concerning migration.

### **1. JAF, JAF\*, and the Basic Right to Invite**

As I argued above, justice as fairness (hereafter “JAF”) is incomplete as a public conception of justice insofar as it ignores the importance of relationships that members of a society stand in with non-members. We have to remove the assumption of Physical Closedness to account for the fact that members are in important relationships with non-members and the demands of domestic justice that these relationships give rise to. Once we do so and consider what the representatives of members would secure for them in the original position, we will see that these representatives would guarantee a basic “right to invite” for members of society within Rawls’ first principle of justice. They would reject JAF, in other words, for JAF\*, which is an extended version of JAF that includes a basic right to invite certain non-members – the ones with whom members they represent may be in important relationships, like parent-child relationships and marital relationships – into the society with the security that co-membership makes possible.

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<sup>9</sup> Matthew J. Lister, “A Rawlsian Argument for Extending Family-Based Immigration Benefits to Same-Sex Couples,” *The University of Memphis Law Review*, Vol. 37 (Summer 2007), pp. 745-780.

Why would these representatives be so adamant about including a basic right to invite parents, children, and spouses for their clients? Consider the difference it would make in their lives if these members of society weren't able to bring in these persons to live with them on the secure basis that co-membership in a society affords. This will not only be highly desirable but urgent in many cases, such as when widowed elderly parents need care or two people are married and prepared to start a life together. The representatives are behind the veil of ignorance in the original position and so do not know which members of society they represent, including whether the member bears ties to non-members whom it is important to be able to bring into the society. With the choice between JAF and JAF\* as alternative public conceptions of justice, representatives of members in the modified original position<sup>10</sup> would choose JAF\* for their clients, which includes a basic right to invite within the first principle of justice.

Of course, I've presented the argument somewhat schematically so far. To be sure that representatives would choose JAF\* over JAF, I'll need to say more about the content of the basic right to invite. I'll also have to show that the inclusion of the basic right to invite in the first principle will not affect the security and fulfillment of either of the two principles of justice such that the representatives would choose JAF over JAF\*. With regard to the first principle, it must not be the case that the addition of the basic right to invite will endanger the prospect of a fully adequate scheme of basic rights and liberties that the principle guarantees for all citizens. The first principle is also lexically prior to the second principle of justice in Rawls' view, which includes fair equality of opportunity and the difference principle. I am not suggesting that we modify the second

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<sup>10</sup> Going forward I refer to the original position as already having the assumption of Physical Closedness removed for ease of exposition, unless explicitly stated otherwise.

principle or the lexical priority relation between the principles. Hence, establishing that the basic right to invite would not negatively impact the fulfillment of the second principle to the extent that representatives would choose JAF over JAF\* is also important to my argument. The representatives must not be willing to allow for tradeoffs between fulfilling the revised first principle and the second principle that the lexical priority relation takes off the table. It is worth noting here that Rawls held that his first principle “may easily be preceded by a lexically prior principle requiring that citizens’ basic needs be met.”<sup>11</sup> This principle requires society to insure that the basic needs of citizens are met insofar as their being met is required for citizens to understand their basic rights and liberties and be able to fruitfully exercise them. According to Rawls, such a principle must be assumed in applying the first principle<sup>12</sup> and is a constitutional essential.<sup>13</sup> I will not question this amendment that Rawls made to his theory, and will draw upon it in supporting my claim that representatives in the original position would choose JAF\* over JAF. I will proceed by discussing the nature of the basic right to invite and how extensive it should be, and then use this material to address the issues just mentioned.

## **2. The Nature and Extent of the Basic Right to Invite**

The right to invite, like the other rights and liberties in Rawls’ first principle, is a right against the state and not individual persons. The correlative duty of the state is not to prevent the exercise of this right by individual citizens and to set up the appropriate

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<sup>11</sup> *PL*, p. 7.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, p. 166.

institutions through which the right may be exercised. While other individual members of society may play a role in restricting or violating a fellow member's right to invite, as with the right to free speech or the right to vote in political elections, it is the state's duty to rectify such violations.

How extensive is the right to invite? In other work, I argue that societies should take on a legal obligation to allow non-members who are in certain types of morally significant relationships with members in. They are legally obligatory "unification admissions," non-members seeking admission for the purpose of living with a member of society on the secure basis that membership provides. While on a case-by-case basis relationships of different types may vary in their relative moral importance, a feasible immigration policy regime cannot treat all equally significant relationships as requiring societies to commit to allowing persons in.<sup>14</sup> I don't have the space here to fully argue for this point, but my own view is that societies should treat parents, non-adult unmarried children, and spouses of members, properly specified,<sup>15</sup> as legally obligatory unification admissions and commit to insuring that these persons can immigrate. This category includes non-biological parents and children of members. These non-members must be taken in unless very pressing reasons can be given for keeping them out. Limiting the category of legally obligatory unification admissions for purposes of unification to these persons, I've argued, will be feasible and compatible with the other responsibilities and moral constraints that societies are subject to in immigration. In order not to be

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<sup>14</sup> For a contrasting view, see Luara Ferracioli, "Family Migration Schemes and Liberal Neutrality: A Dilemma," *Journal of Moral Philosophy*, Vol. 13, No. 5 (2016), pp. 553-575.

<sup>15</sup> See my "In Defense of a Category-Based System for Unification Admissions," unpublished ms.



disadvantaged in the global economy, societies must leave room for some skilled workers to be admitted. They may also have asylum seekers arriving who claim refugee status that they have moral and international legal obligations to take in and determine the status of. By restricting the category of legally obligatory unification admissions to parents, non-adult unmarried children, and spouses of members, societies can insure that immigration flows are not entirely exhausted by unification admissions and retain the ability to take in these other persons. Of course, the point here is that the right to invite can be restricted when doing so is required by the demands of feasibility and the other responsibilities that a society must uphold. If these demands and responsibilities can be upheld while putting a broader right to invite in place, it is fully compatible with my view that this broader right should be implemented.

### **3. The Basic Right to Invite as Part of the Revised First Principle**

Rawls' framework also provides support for the decision to restrict the basic right to invite to the set of persons that the society can feasibly commit to treating as legally obligatory unification admissions. Rawls' first principle holds that each person has an equal claim to a fully adequate scheme of equal basic rights and liberties where that scheme is compatible with the same scheme for all.<sup>16</sup> What counts as a fully adequate

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<sup>16</sup> *PL*, p. 5. The equal political liberties are also to be guaranteed their fair value, and only these liberties. In *Justice As Fairness: A Restatement*, Rawls states the first principle solely in terms of basic liberties (see *JAFR*, p. 42). However, he clearly still includes equal basic rights within the principle, such as the right to vote or hold public office, and so this doesn't mark a substantive change in his view.

scheme can depend on facts about the society where it is implemented.<sup>17</sup> The ability of members to bring in their parents, non-adult unmarried children, and spouses will be feasible to maintain in the modern democratic societies that Rawls has in mind existing under “the circumstances of justice,”<sup>18</sup> in particular where there is only moderate scarcity of natural and other resources. On Rawls’ understanding of what it means for a scheme of basic rights and liberties to be fully adequate, it must be the case that the rights and liberties set out in the scheme do not conflict with one another in ways that are difficult to resolve. The parties to the original position and the real citizens that they represent will want to prevent later conflicts, and so mutual adjustments may have to be made when giving further content to these rights and liberties in a society’s actual institutions. Such mutual adjustments still must leave the most significant aspects of each right and liberty intact and, if needed, only restrict aspects their less significant aspects.

Rawls distinguishes between the more and less significant aspects of a given basic right or liberty in terms of whether they are tied to the first two fundamental interests that he stipulates that citizens possess.<sup>19</sup> These are the interests in developing and exercising the capacity for a sense of justice and the capacity for a conception of the good, which he

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<sup>17</sup> The following discussion benefited from Thomas Pogge, *John Rawls: His Life and Theory of Justice* (Oxford: Oxford University Press, 2007), pp. 82-91.

<sup>18</sup> *TJ*, pp. 109-112. Rawls states that his account of the circumstances of justice largely follows that of Hume (*TJ*, p. 109, note 3). See David Hume, *A Treatise of Human Nature*, eds. David Fate Norton and Mary J. Norton (Oxford: Oxford University Press, 2000), at bk. III, sec. ii, and David Hume, *An Enquiry Concerning the Principles of Morals*, ed. Tom L. Beauchamp (Oxford: Oxford University Press, 1998), sec. III, pt. 1.

<sup>19</sup> *JAFR*, pp. 112-4. Rawls leaves aside the third fundamental interest, which is the interest in being successful in terms of the particular conception of the good that one has. For a discussion of this point, see Pogge, *John Rawls: His Life and Theory of Justice*, pp. 86-91.

refers to as the two “moral powers.”<sup>20</sup> Within a given citizen’s conception of the good are an ordering of attachments to persons and associations and a view of the world in light of which these attachments are understood.<sup>21</sup> The most significant attachments of persons within this ordering are often to their parents, non-adult unmarried children, and spouses, although other persons may be ranked as equal to or higher than these for some citizens. It then makes sense from a Rawlsian perspective for the basic right to invite to be restricted so as to grant members the ability to bring in parents, non-adult unmarried children, and spouses and not necessarily other non-members. The development and exercise of a citizen’s capacity for a conception of the good will often involve the ability to live near or care for these persons. For citizens whose parents, non-adult unmarried children, or spouses are not also citizens, the option to bring them in on the stable basis that co-citizenship affords protects this ability. Attachments to other persons will tend, in general, to be somewhat less significant and not require unification. We may be very close to a sibling or friend, but it will generally be less important to safeguard the ability to live in the same society as them, even if we would prefer for this to be the case. Given that these other attachments tend to be less significant, their inclusion within the basic right to invite would be a less significant aspect of this right and subject to adjustment in order to maintain a fully adequate scheme of basic rights and liberties.

A Rawlsian rationale, then, can be given for a restricted basic right to invite that places a society under an obligation to allow in parents, non-adult unmarried children, and spouses of members. If this circumscribed basic right would be accepted by representatives in the original position, we may then ask what else may be due to

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<sup>20</sup> *PL*, pp. 59-60.

<sup>21</sup> *Ibid.*, pp. 333-334.

members of society as a matter of justice in terms of the ability to bring in non-members. The Rawlsian reasoning for restricting the extent of the basic right to invite derives from the need to balance the importance for citizens of being able to bring particular persons in with the need to fit this right into a practically implementable set of basic rights and liberties. It is implausible that the right would endanger the ability to maintain a fully adequate scheme of basic rights and liberties as guaranteed by the first principle or other particular basic rights and liberties, such as freedom of speech or liberty of conscience and thought, when limited in this way. Whether a broader right to invite would conflict with such a scheme is a topic for further inquiry.

#### **4. The Right to Invite and the Second Principle**

I just argued that a restricted basic right to invite can fit into a fully adequate scheme of basic rights and liberties as guaranteed by the first principle of justice. A further issue concerns whether the addition of the basic right to invite to the first principle of justice is implausible in light of the relation between the two principles of justice. The first principle covers the basic rights and liberties of citizens while the second principle covers social and economic inequalities. The first principle is lexically prior to the second principle of justice in Rawls' framework, which prevents tradeoffs from being made when infringements of the basic rights and liberties would be justified or compensated for by raising the socioeconomic position of the worst off. The second principle includes two lexically ordered principles within it which hold that social and economic inequalities (i) must be attached to offices and positions open to all under

conditions of fair equality of opportunity and (ii) must be to the greatest benefit of the least advantaged members of society (the “difference principle”). Whether the right to invite should be included in the first principle depends in part on whether it is plausible that representatives would safeguard the right to invite against tradeoffs that would increase the fulfillment of the second principle.

It is true that some of the other rights and liberties that Rawls lists in his original first principle generate cases where many will quickly and strongly judge that we should not sacrifice their security for a higher socioeconomic position for the worst off. It seems especially clear that representatives would not choose to allow freedom from psychological oppression and physical assault and dismemberment, which Rawls subsumes together under “integrity of the person,” to be less secure for the sake of raising the socioeconomic position of the worst off. We may also agree with Rawls that representatives would hold that restrictions to freedom of speech cannot generally be justified or compensated for by such improvements. It may seem that the fact that it is unlikely to be the case that everyone in citizen will have non-citizen parents, children, or spouses that they wish to bring in speaks against securing and protecting the basic right to invite in the same way. Should the representatives of citizens in the original position tolerate a less secure right to invite for the sake of a higher socioeconomic position for the worst off?

Let me first point to the fact that other rights and liberties that Rawls mentions may be subject to similar concerns, in contrast with integrity of the person and perhaps other basic rights and liberties within the first principle. If voter turnout and democratic participation in liberal democracies is any indication, it is unlikely that all citizens are

especially concerned with the security of their right to vote. This is even more plausibly true of the right to hold public office. Rawls refers to these two rights as components of “political liberty” on his list of the basic rights and liberties included in the first principle. It would be inconsistent from a Rawlsian perspective to argue that because some citizens are unlikely to value or exercise a given right or liberty that it should then not be included among the basic rights and liberties and secured against tradeoffs. One might respond by noting that it is in every citizen’s interest to live in a society in which all can vote and hold public office. Yet any citizen can wind up in the situation of having to bring their parents, children, or spouse into their society. It is also quite important for them to live in a society where all citizens can do so.

The basic right to invite will be especially important for citizens with parents, children, and spouses that they wish to bring in and cannot simply go and live with in other societies. They may have elderly parents who require care living in the societies that they cannot immigrate to, children whom they cannot live with except in their own society, or spouses that they cannot share a life with except through unification. Increasing the fulfillment of the second principle by restricting the right of other citizens to bring in their parents, children, and spouses would ignore the importance of this right for the citizens who need to exercise it to unify with these persons. The representatives of citizens should not allow for such tradeoffs as the ability to bring in parents, children, or a spouse may be especially important for the citizen that they represent.

Additional support for this point is provided by the fact that the principle requiring that citizens’ basic needs will be met in Rawls’ later statement of his public conception of domestic justice is lexically prior to the first principle of justice. JAF\*

shares this feature and only differs from JAF in virtue of adding the basic right to invite to the first principle of justice. Given this fact, it will not be the case that representatives must consider instances where the worst off members of society would only have their basic needs met by restricting the right to invite, or other basic rights and liberties. This additional point helps to show that it is plausible that the representatives, thinking about restrictions to the right to invite for the sake of greater fulfillment of the second principle, would not allow such tradeoffs to be made.

I have so far argued that it is not implausible to treat the revised first principle of justice, which includes a basic right to invite, as lexically prior to the second principle of justice. Even if this is true, representatives of citizens in the original position are especially concerned with the worst position in society that the client citizen they represent might occupy. The representatives employ the maximin rule in choosing among alternative public conceptions of justice, which selects the conception that maximizes the position of the worst off.<sup>22</sup> They might therefore choose JAF over JAF\* if they could expect the worst off position under JAF to be better than the worst off position under JAF\*. Alternatively, they might be pushed towards the opposite choice, in favor of JAF\*, for an additional reason if they could make the opposite prediction. The representatives are here concerned with the worst off position that setting up and implementing the basic structure of society in line with the requirements of different conceptions of justice will produce. Could they predict that JAF or JAF\* would produce a better position for the worst off? It is not plausible, again, that the addition of the basic right to invite would endanger the other basic rights and liberties, which the worst off and

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<sup>22</sup> *TJ*, pp. 131-136.

all other citizens are guaranteed by the first principle. We are then asking whether fair equality of opportunity or the difference principle, as covered by the second principle, will be negatively affected by the basic right to invite such that the worst off will be better off under JAF than under JAF\*.

Beginning with fair equality of opportunity, the right to invite may affect the fulfillment of this principle, but not in such a way that the worst off position under JAF\* will be lower than under JAF. Fair equality of opportunity requires that those who are at the same level of talent and ability with the same willingness to use them should have the same prospects of success in attaining offices and positions regardless of any differences in their initial places in society.<sup>23</sup> The most plausible shortfalls from fair equality of opportunity that could be produced by allowing citizens to bring in their parents, children, and spouses would be experienced by the new citizens who would enter. Some of these new arrivals would not have had the advantages that many other citizens had in being raised in the society. Educational opportunities, for instance, may have been much worse in their home countries in some cases. Despite having parents, children, or spouses who are citizens, they may also not have access to the social networks that aid other citizens in their pursuit of opportunities within the society. Given these kinds of differences that sometimes obtain between newly arrived citizens and citizens that have been present in a society longer, the former may not be equally able to acquire positions and offices as compared with the latter even when they possess the same levels of talent, ability, and motivation. At the level of the individual, it may be tempting to say that they chose to come to the society and by letting them be invited in, our society is not thereby

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<sup>23</sup> *Ibid.*, p. 63.



responsible for addressing their lack of access to opportunities. I think that this is a mistake, both because we have obligations to secure fair equality of opportunity for them once they become citizens and because we are committed as a society to fulfilling this principle. Yet this is beside the point, because the comparison we are interested in is between the worst off positions under JAF and JAF\*. Even if fair equality of opportunity might be fulfilled to a lesser extent under JAF\*, this doesn't imply that the worst off position would thereby be lowered when we compare across two groups, citizens living in a society whose basic structure is set up in accordance with JAF and citizens living in another society whose basic structure is set up in accordance with JAF\*. These are independent societies, and showing that there is less satisfaction of the fair equality of opportunity principle in one of two societies does not give us any reason by itself to think that the worst off position in the other society is better. I grant the possibility that a society guided by JAF\* could have lesser fulfillment of fair equality of opportunity in the way that I've described, where these new citizens experience most of its effects, as compared with a society guided by JAF. But the society guided by JAF\* would also fulfill the interests of members for whom it is very important to bring in their parents, children, and spouses and the interests of these new citizens in unifying with them. The burden is on the proponent of JAF to show that this or some other cost in terms of fair equality of opportunity created by JAF\* would affect the worst off, whereas the foreseeable effects land primarily on the immigrants themselves, who receive the benefit of being able to come in and live with the citizens who invited them and receiving citizenship. Additionally, there is little reason to think that the parents, children, and spouse of members of liberal democracies who are brought in will be among the worst

off members of society, even if they experience some inequalities in their access to opportunities compared to some other citizens as they arrive and integrate into the new society. They often can rely on their family members or spouses who brought them in to help them integrate into the society and access the training and social networks that will assist them in achieving equal chances at positions and occupations with other citizens of similar talent, ability, and motivation. There is little reason to think that fair equality of opportunity would be impacted by the arrival of parents, children, and spouses invited under the right to invite so as to make it the case that the worst off citizens under JAF would be better off than the worst off citizens under JAF\*. My argument here only relies on this point, rather than establishing that JAF\* would improve the fulfillment of the fair equality of opportunity principle in such a way that the worst off would be benefited relative to the worst off under JAF. The appeal of JAF\* over JAF, as mentioned earlier, is clear in virtue of allowing citizens to invite and unify with their parents, children, and spouses. To stay with JAF rather than JAF\*, there must be some important cost or problem brought about under JAF\*, and it will not plausibly take the form of a lower position for the worst off caused by lesser fulfillment of the fair equality of opportunity principle.

Turning to the difference principle, one might worry that the worst off position will be impacted by immigration through the basic right to invite. Stephen Macedo<sup>24</sup> has argued that unification admissions harm the worst off in modern democratic societies by bringing in largely unskilled immigrants who compete with them for jobs and use

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<sup>24</sup> Stephen Macedo, "The Moral Dilemma of U.S. Immigration Policy: Open Borders versus Social Justice?," in *Debating Immigration*, ed. Carol M. Swain (Cambridge: Cambridge University Press, 2007).

resources that would otherwise be available for them. To fulfill the difference principle, such resources will be required that can be transferred to the least advantaged, such as through welfare payments, or put in programs that help them, such as housing assistance. Rawls holds that taxation is required to generate these resources. The implementation of an immigration policy regime that includes the basic right to invite will require the use of economic resources, which could otherwise be used to raise the position of the least advantaged. The new citizens will also use some of the public resources that would otherwise be available for the worst off, such as when invited elderly parents and spouses require medical care that the society funds and children enroll in public schools. These are potential examples where the right to invite could divert some resources away from those that would be used to fulfill the difference principle.

However, the empirical data on immigration in modern democratic societies suggests that immigration tends to bring many compensating benefits that far exceed these costs. Immigrants are often important job creators. In the United States, first-generation immigrants and their children played founding roles in more than 40% of the Fortune 500 companies.<sup>25</sup> Immigrants have been found to be nearly twice as likely as native-born citizens to found a company,<sup>26</sup> and immigrant-owned companies employ one out of every ten American workers that are employed at privately-owned companies.<sup>27</sup> In

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<sup>25</sup> “The “New American” Fortune 500,” Partnership for a New American Economy, June 2011, [http://www.nyc.gov/html/om/pdf/2011/partnership\\_for\\_a\\_new\\_american\\_economy\\_fortune\\_500.pdf](http://www.nyc.gov/html/om/pdf/2011/partnership_for_a_new_american_economy_fortune_500.pdf), accessed September 18, 2015.

<sup>26</sup> Robert W. Fairlie, “Kauffman Index of Entrepreneurial Activity,” Kansas City, MO: Ewing Marion Kauffman Foundation, 2014, [http://www.kauffman.org/~media/kauffman\\_org/research%20reports%20and%20covers/2014/04/kea\\_2014\\_report.pdf](http://www.kauffman.org/~media/kauffman_org/research%20reports%20and%20covers/2014/04/kea_2014_report.pdf), accessed September 18, 2015.

<sup>27</sup> “Open for Business: How Immigrants are Driving Small Business Creation in the United States,” Partnership for a New American Economy, August 2012,

terms of economic resources that could be used to help the worst off, it has been estimated that tax payments by immigrants in the U.S. exceed the amount of government services they use by \$20-30 billion.<sup>28</sup> The net economic benefit of immigration to the U.S. each year is nearly \$10 billion. Insofar as some occupations and tax resources go to newly arrived citizens, the gains that they produce by creating jobs and generating revenue are generally thought to outstrip these costs. There is then little reason to expect that the worst off position under JAF is better than the worst off position under JAF\*, as it is implausible that adding the basic right to invite will lead to conditions that make it more difficult to fulfill the difference principle. If anything, the data cited above suggests that JAF\* may be advantageous to the worst off as compared with JAF in this respect, although my argument does not rest on this point. JAF\* would not predictably produce a lower socioeconomic position for the worst off than JAF by negatively affecting the fulfillment of the difference principle, and so another reason for the representatives to potentially choose JAF over JAF\* is ruled out.

## **5. The Right to Exit and the Right to Invite**

One potential objection is that there need not be a basic right to invite in liberal societies because these societies always grant their citizens the right to exit. This objection falsely presupposes that citizens can always immigrate to another society where

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<http://www.renewoureconomy.org/wp-content/uploads/2013/07/openforbusiness.pdf>, accessed September 18, 2015.

<sup>28</sup> "Questioning Immigration Policy - Can We Afford to Open Our Arms?," Federation of American Scientists, Friends Committee on National Legislation, Document #G-606-DOM, January 25, 1996.

the persons they wish to invite live. It will not always be the case, for instance, that a homosexual married couple can rely on the other spouse's society as a safe alternative to live in together. The society where the other party to a marital or parent-child relationship lives may be unsafe for any number of reasons. That region may be torn by conflict or war, there may be discrimination against persons bearing other qualities that one of the parties to relationship has, and so on. It also cannot be assumed that a third country can be found that both parties could immigrate to. The fact that there may not be a safe option to immigrate to the prospective invitee's society, that the only path to unification may be through invitation into the society in question, and that there may not be a third society to unify with a given non-member in undercuts the objection that the basic right to invite is unnecessary due to the ability of members to emigrate.

In considering this objection, it is helpful to examine the decision that would have to be made by the representative of a citizen in the domestic original position. Suppose that they are considering JAF, which does not include a basic right to invite, and JAF\*, which does. Should the possibility that the citizen whom they represent would potentially be able to move to other societies where the persons whom they want to invite make the representative indifferent between JAF and JAF\*? It should not, and the considerations just mentioned explain why. Their citizen might be a member of a minority group that has a lot of trouble finding societies where they can live freely, as individuals or in their relationships with persons whom they will want to bring in.<sup>29</sup>

There may be multiple persons that they wish to bring in from different countries, where

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<sup>29</sup> These conditions typically go hand in hand for homosexuals, but are distinct and could be separate or of differing levels of severity in certain places. For instance, there could and may in fact be societies where there isn't a strong social norm against being gay but where homosexual partners cannot safely display affection towards one another publicly.

no other option would allow them all to live together as citizens of the same country. And there may not be a third society that will let them in along with the immediate family members whom they intend to unify with. Additionally, the citizen may really value their own society's political culture, social institutions, and their other friends and family members who live in the society, and so not wish to leave. All of these points would push the representative of a citizen in the original position towards JAF\* rather than JAF. In other words, they would prefer a public conception of justice that included a basic right to invite at least some persons over one that did not so long as, as I have argued, there are no important downsides to the including this right that outweigh its benefits for citizens.

## **6. The Role of Physical Closedness**

One might also question my reliance on the assumption that Physical Closedness is genuinely meant to guarantee Normative Closedness. The burden, however, is on the hypothetical objector to point out a distinct role for Physical Closedness that (i) shows that this role is non-arbitrary or, better, important to Rawls' project and (ii) would justify keeping the assumption in place when, as I argue, removing it has important consequences for the public conception of justice that representatives in the original position would choose.

Of course, Rawls acknowledges that the closed society that he envisions when constructing JAF is a "considerable abstraction." Onora O'Neill objects to this description and points out that, strictly speaking, abstractions omit or bracket facts that

are true of the matter from which they abstract.<sup>30</sup> The idea of a closed society, she argues, assumes predicates that are false of all existing human societies, and is thus better described as an idealization. O'Neill makes this point for a very different purpose, which is to critically assess the implication of this idealization for Rawls' account of public reason in comparison to that of Kant, but it is also useful here. Rather than leaving out facts about real societies, Physical Closedness treats false predicates about the kind of society that Rawls wants his public conception of justice to order as if they were true, in particular that all of the citizens of that society are born and die there and have no contact with or relations to people outside of the society. The reasoning that leads to the first principle of justice should not be based on false assumptions about the society whose basic structure will be organized around it. By constraining the reasoning of the parties in the original position in this way, Rawls leads them to adopt a public conception of justice that they wouldn't adopt if they were informed of a simple fact about the world, namely that the citizens that they represent may have important ties to non-citizens. The fact that citizens may be in these external relationships is not merely left out of Rawls' domestic justice theory, but placed out of the bounds of consideration by the assumption of Physical Closedness.

Rawls could respond that the idealization can be appropriate to a theoretical exercise if it produces some benefits, and is a common feature in philosophy and other fields of inquiry. In physics, the universe is represented as frictionless for the sake of constructing certain theories of mechanics, and in economics *homo economicus* represents an idealized rational actor with properties that human beings do not possess.

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<sup>30</sup> Onora O'Neill, "Political Liberalism and Public Reason: A Critical Notice of John Rawls, *Political Liberalism*," *Philosophical Review*, Vol. 106, No. 3 (1997).

Each of the idealizations just mentioned advance the goals of theorists making those idealizations when they are indeed appropriate. Newtonian mechanics flourishes within its realm of importance in physics despite the assumption of zero friction. It is more controversial that economics can derive descriptively adequate pictures of economic behaviors using the assumption of *homo economicus*, but that is at least the claim of proponents of that assumption's use. Rawls might by analogy think that we are able to get a first approximation of a public conception of justice that we adjust later to take into account the ways in which societies are not closed off to one another.

As I argued earlier, the purported benefits of the assumption of Physical Closedness whereby we maintain Normative Closedness, which keeps agreement on the public conception of justice between representatives of citizens of the society only, can be achieved without that assumption in place. Not only is the assumption of Physical Closedness unimportant for securing Normative Closedness and not required for this other beneficial restriction, however, but it also gets us on the wrong track in thinking about the place of immigration in a public conception of domestic justice. The assumption of Physical Closedness makes it the case in Rawls' framework that the issue of whether or not citizens have a right to invite cannot even be considered for inclusion within the public conception of justice of a society. But as I have argued, this is a right that we should at least consider, and once we do it will inform the choice of the public conception of justice and its package of basic rights and liberties that representatives in the original position accept. By assuming that the right to invite cannot be a part of the public conception of justice, the ability to bring in parents, children, and spouses is unjustifiably kept apart from a core question in domestic justice theory as Rawls



understands it, namely what public conception of justice we should choose to guide the creation and reform of our society's basic structure. One could just assert that the right to invite matter enough to be added in here, but this simply begs the question against my argument. The assumption of Physical Closedness not only is unnecessary to maintain Normative Closedness, but gets the public conception of justice off on the wrong track, assuming that the right to invite cannot be an important component of this conception. Once we lift the Physical Closedness assumption, we arrive at just the opposite view about the centrality of the right to invite to a plausible conception of justice.

It is worth emphasizing that issues that are not covered in the public conception of justice, under Rawls' framework, can never has as central a place in the creation and reform of the basic structure as those that are a part of it. They can be brought in only at later stages where the public conception of justice is drawn upon in creating a constitution, specific laws and policies are agreed to that realizes its principles, and judges and administrators apply these laws and policies to particular cases.<sup>31</sup> Part of the reasoning for including the basic rights and liberties within the first principle of justice is to take them off the table for negotiation in these later stages. We inherently regard the right to bring in parties, children, and spouses as less important than the other rights in the first principle if we relegate it to later stages where it is uncertain whether or not it will be implemented. For immigrant families that have been torn apart by circumstances, and couples that cannot live as spouses in societies where their sexual orientation or other aspects of themselves are not welcome, liberal societies are committed to providing an answer – you have a basic guarantee that you can bring in your parents, children, or

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<sup>31</sup> For Rawls' discussion of the four-stage sequence, see *TJ*, pp. 171-6.

spouses. On the basis of Rawlsian reasoning, I hope to have shown that a just democratic order should recognize as a basic part of domestic justice that this guarantee is given to citizens. The assumption of Physical Closedness gets our theorizing about domestic justice off on the wrong foot with respect to the centrality of unification to domestic justice in modern democratic societies, in which many citizens do in fact have parents, children, and spouses who are non-citizens that they wish to bring in.

## **7. Situating the Argument for a Rawlsian Basic Right to Invite in Relation to Other Responses to Rawls**

My critique differs from those that have been offered by theorists responding to Rawls' conception of the divide between domestic and international or global justice and his views on immigration. On the former, Charles Beitz<sup>32</sup> and Thomas Pogge<sup>33</sup> have argued that Rawls' original position should be extended to global interactions between persons. Rawls himself, by contrast, presents the global original position in his later *The Law of Peoples* as a contract between representatives of peoples, or political societies, rather than individual persons as he did in constructing his theory of domestic justice, justice as fairness. Pogge<sup>34</sup> has also criticized Rawls' lack of emphasis on the effects of politics outside the state on domestic justice and the coherence of *LP* with Rawls' domestic justice theory. By contrast with these other theorists, I argue that even within

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<sup>32</sup> Beitz, *Political Theory and International Relations*.

<sup>33</sup> Pogge, *Realizing Rawls*.

<sup>34</sup> Thomas W. Pogge, "Assisting the Global Poor," in *The Ethics of Assistance: Morality and the Distant Needy*, ed. Dean K. Chatterjee, (Cambridge: Cambridge University Press, 2004), pp. 260-288; Thomas W. Pogge, "The Incoherence Between Rawls' Theories of Justice," *Fordham Law Review*, Vol. 72, No. 5 (2004), pp. 1739-1759.

the domestic original position, issues concerning the treatment of non-citizens emerge, given the ties that citizens bear to them.

In the ethics of immigration literature, Carens<sup>35</sup> prominently offered a Rawls-inspired argument for open borders that remains an important contribution. Using a global version of the original position, representing people from all over the world, Carens argued that representatives behind the veil of ignorance would agree to an open borders policy. Rawls himself, however, did not believe that justice as fairness was committed to open borders. In *The Law of Peoples*, Rawls states that his views on the role of borders and the responsibilities of peoples to manage their territory, its environmental integrity, and their population imply that they have a qualified right to limit immigration.<sup>36</sup> Unlike Carens, I do not hold that Rawls' theory commits him to open borders. This is, in part, because my view does not require adding non-members into the original position itself, as Carens' does. I argue for the Rawlsian basic right to invite by considering what representatives in the original position would secure for their client citizens.

Here a further difference between my approach and these others is brought out. Whereas some theorists have argued for extending the Rawlsian original position thought experiment to include non-members of society, or non-citizens, I am committed to no such extension. But in theorizing about domestic justice, using Rawls' framework, I remove the assumption of Physical Closedness, and so the existence of non-members is brought to salience even when thinking about what societies owe to their own members alone. Carens does offer a libertarian line of reasoning for open borders (as well as one

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<sup>35</sup> Carens, "Aliens and Citizens: The Case for Open Borders."

<sup>36</sup> *LP*, pp. 8-9, pp. 38-9.

grounded in utilitarianism), and suggests that anything but open borders limits the freedom of members of society to enter into consensual contracts with adult non-members. But Carens himself is not a libertarian, and is merely showing that the open borders position should be endorsed from a range of political perspectives. Many will also reject this line of reasoning, given its libertarian bearings, and hence Carens makes sure to emphasize the appeal of open borders for liberal theorists who share many of the commitments regarding social and political justice that Rawls defends.

Lister<sup>37</sup> has also adopted a Rawlsian view of immigration and, in particular, the view that it is a requirement of domestic justice to give equal access to family reunification to married same-sex couples. In a sense, Lister's approach is closest to mine, in that he does not require the original position itself to take on new parties – citizens are still the only people represented. Lister notes that Rawls does not mention family-based immigration among the causes of immigration, and holds that this oversight explains Rawls' view that if most societies were just, immigration would nearly cease.<sup>38</sup> However, Lister does not require the removal of the assumption of Physical Closedness in the original position. He believes that the motivation for keeping it in place is to make sure that the parties do not pick principles of justice that they might want to skip out on if they end up as one of the less fortunate members of society.<sup>39</sup> It seems to me that this is the wrong motivation to cite, both textually and theoretically. For the reasons given earlier in distinguishing between Physical and Normative Closedness, it is more likely that Rawls' main motivation was to retain a focus on issues of domestic justice and keep

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<sup>37</sup> Lister, "A Rawlsian Argument for Extending Family-Based Immigration Benefits to Same-Sex Couples."

<sup>38</sup> *Ibid.*, p. 759.

<sup>39</sup> *Ibid.*, p. 764.

the contract only between parties who represent citizens. There is little reason to think that the possibility of emigration connects with what Rawls has in mind when he mentions the need to “fix ideas” by stipulating that the society in question is closed. Additionally, because liberal theorists are clearly committed to the freedom to emigrate, I cannot see why the fact that emigration is not on the table should lead them to be more haphazard in choosing principles of justice. Why should they assume that there will be anywhere else to go where they will wind up in a better position? This move, however, has further consequences, in that Lister cannot argue for the requirement to honor same-sex couples in family reunification in terms of a basic right to invite for all citizens. He instead holds that the representatives of citizens would bring rights to family reunification in at the later constitutional and legislative stages. The requirements implemented at the original position stage, however, are more firmly entrenched in the theory. Rather than later additions that may or may not follow on in the later stages where the public conception of justice is applied, securing rights to family reunification for all citizens, regardless of sexual orientation, should be more deeply enmeshed in the Rawlsian framework. As I argued in the previous section, this position matches the seriousness of the right to invite and its importance for the higher-order interest fulfillment of citizens. It is not a matter for later deliberation, but a fundamental part of Rawlsian domestic justice, to insure that citizens are permitted to bring in their parents, children, and spouses.

## 8. The Basic Right to Invite and *The Law of Peoples*

Insofar as the argument offered in this paper is meant to remain as consistent as possible with Rawlsian commitments, we should also check to see whether there are potential conflicts with values or principles that Rawls argues for at the international level. Whereas in the domestic case we were interested in how the basic right to invite would fit into a fully adequate scheme of basic rights and liberties for all liberal citizens, here we ask whether granting this right would conflict with the interests that Rawls regards peoples as possessing.

In terms of the equality of Rawlsian peoples with other well-ordered peoples, a few points should be made. First, the notion of equality that Rawls has in mind pertains to their standing in the international original position, the Law of Peoples that they select through this procedure, and actual international agreements, such as treaties and trade agreements.<sup>40</sup> Keeping this in mind, it is clear that the interest in equality that representatives of peoples are meant to advance, for Rawls, does not rub up against the basic right to invite.

Second, another separate concern for equality, issued in this spirit of the interest in equality perhaps, is worth taking up. One might be concerned that a Rawlsian people will be disadvantaged with respect to other nations in virtue of implementing this right when many others do not. Knowing that Rawlsian societies recognize a basic right to invite, people may tend to want to live in these societies rather than others. Rawlsian societies could then bear disproportionate burdens in virtue of being more desirable

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<sup>40</sup> *LP*, pp. 37-41.

places to settle in than others. Yet the basic right to invite only secures the ability of existing citizens to bring in their parents, non-adult unmarried children, and spouses. By restricting the basic right to invite in this way, the burdens that it creates will be minimal and securing this right, which Rawlsian societies are committed to as a matter of justice, will be made feasible.

Additional support for this point comes from the fact that there is good reason to think that liberal societies more generally are required to secure the ability to bring in parents, children, and spouses for their members. The Rawlsian basic right to invite is one way of articulating the requirement to treat parents, children, and spouses as legally obligatory admissions. I want to remain pluralistic about how this requirement is understood and conceptualized across different liberal societies. As long as the requirement to let in unification admissions that the Rawlsian basic right to invite upholds is plausible on more general liberal commitments, as I argue, concerns for the equality of Rawlsian peoples should be mitigated.<sup>41</sup> Any burdens associated with implementing the basic right to invite for Rawlsian peoples will be borne by liberal peoples more generally.

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<sup>41</sup> For other liberal arguments in support of family reunification schemes, see Joseph H. Carens, *The Ethics of Immigration* (New York: Oxford University Press, 2013), Ferracioli, “Family Migration Schemes and Liberal Neutrality: A Dilemma,” and Caleb Yong, “Caring Relationships and Family Migration Schemes,” in *The Ethics of Immigration*, ed. Alex Sager (Lanham, MD: Rowman and Littlefield, 2016).

## 9. Concluding Remarks

In this paper I argued that Rawls is committed to revising his first principle of justice to include a basic right to invite. This argument also has the implication that Rawls' methodology of theorizing about domestic justice and international or global justice in isolation from one another is flawed. By seeking to achieve Normative Closedness through the use of the assumption of Physical Closedness, Rawls cannot address the important interests that citizens have in their society's policies that are incompatible with Physical Closedness, and I have focused on immigration policies. Even when we seek an agreement on principles of justice that only citizens are represented in, representatives of citizens would insist on their ability to bring certain non-citizens into the society as new citizens. In the domestic original position, they would secure a basic right to invite parents, children, and spouses within the first principle of justice, and hence select a modified version of justice as fairness that includes this right (JAF\*) over Rawls' stated version (JAF). They would not treat immigration as a secondary issue of domestic justice, to be addressed only once a public conception of justice for their society was agreed upon, but would include this basic right to invite within that conception. I defended the addition of this basic right to invite within the first principle of justice against a number of objections, and also considered how this right would fit with Rawls' commitments at the international or global level. The argumentative strategy employed in this paper therefore also demonstrates the methodological point that we cannot distinguish between domestic justice and international or global justice issues as, respectively, the issues that directly concern only



the treatment of citizens and of non-citizens. Given the existence of relationships between citizens and non-citizens, societal policies and actions concerning the treatment of non-citizens may raise issues of domestic justice. One could also investigate topics such as humanitarian giving, disaster relief, trade policies, and others in light of the interests that citizens have in their society's treatment of non-citizens, but this would go beyond the scope of the present paper. While immigration and the right to invite serve as an important case study here, political philosophers must think through these issues more broadly in further research, as the increasingly interconnected domains of domestic and international or global justice become more difficult to theorize in isolation from one another.