

Apreda, Rodolfo

Working Paper

Underlying counterfactual conditionals in Rawls' "Justice as fairness": How the overlapping consensus becomes functional to the original position

Serie Documentos de Trabajo, No. 238

Provided in Cooperation with:

University of CEMA, Buenos Aires

Suggested Citation: Apreda, Rodolfo (2003) : Underlying counterfactual conditionals in Rawls' "Justice as fairness": How the overlapping consensus becomes functional to the original position, Serie Documentos de Trabajo, No. 238, Universidad del Centro de Estudios Macroeconómicos de Argentina (UCEMA), Buenos Aires

This Version is available at:

<https://hdl.handle.net/10419/84277>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.

UNIVERSITY OF CEMA

Working Paper Series, number 238
June 2003

UNDERLYING COUNTERFACTUAL CONDITIONALS

IN RAWLS' "JUSTICE AS FAIRNESS"

How the Overlapping Consensus

becomes functional to the Original Position

Rodolfo Apreda
ra@cema.edu.ar

Professor Apreda (Ph D Economics), Full-Time professor and researcher at Ucema, Room 612. The author acknowledges encouragement to write this paper from Professor Andrés Rossler (Ucema). As usual, all likely mistakes remain my own eventually.

"Justice as fairness is intended as a political conception of justice for a democratic society, it tries to draw solely upon basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretation." John Rawls. Justice as Fairness: Political not Metaphysical (1985)

Introduction

Since *A Theory of Justice* came up in 1971, the metaphor of the Original Position has brought up not only a nurturing debate but also enduring criticism. Rawls himself contended that the Original Position was merely an hypothetical expository device to build up a foundational environment where a fair agreement could be settled for the best principles of justice to obtain. He even took great pains to improve upon his basic arguments. However, as he humbly acknowledged many times, there remained unwieldy issues at the core of *A Theory of Justice* in need of further diligence.

We are going to claim in this monograph that Rawls laid a worthy groundwork for the Original Position by means of two major contributions:

- a) firstly, the rendering of "*Justice as Fairness*" as a political and not a metaphysical issue, carried out in his 1985 outstanding paper;
- b) secondly, the idea of Overlapping Consensus which, although he had already worked out in the 1985 paper, became fully developed in his influential book on *Political Liberalism* (1993).

Besides, our line of research will show that there are at least three underlying counterfactual conditionals in Rawls' conception that shape up the Original Position when we take advantage of his later notion of Overlapping Consensus. We feel that this has been a neglected issue so far. The analytical approach will evolve in stages.

The problem of justification and the considered judgments make the starting point, to be followed by the Original Position in section 2 where due attention is also paid to the dynamics of the reflective equilibrium.

Next, we expand on the Veil of Ignorance. Then, section 4 gives a brief outline of counterfactuals. It is for section 5 to cope with two hidden counterfactuals in the Original Position. Section 6 deals with the Overlapping Consensus, leaving for the following section the issue of how the Overlapping Consensus becomes functional to the Original Position by furnishing it with a third and complementary counterfactual.

Last of all, in section 8, an assessment of our proposal will proceed so that two well-known objections to the Original Position, namely those advanced by Nozick (1974) and Nagel (1973), could be discussed in a new light against the background provided by the three counterfactuals.

1. The problem of justification and the considered judgments

The problem of justification arises when we have to look for a theory of justice that qualifies as the best among a set of alternative ones. The criterion of justification consists in assessing the extent to which such theory matches our considered judgments.

Considered judgments come defined as "*Those judgments in which our moral capacities are most likely to be displayed without distortion. [...] Those (judgments) rendered under conditions favorable to the exercise of the sense of justice. [...] The person making the judgment is presumed, then, to have the ability, the opportunity, and the desire to reach a correct decision.*" (A Theory of Justice, page 42)

Taking another standpoint, by considered judgments is understood a set of *provisional* moral evaluations conveying three features

- a) that they seem sound judgments
- b) and turn out to be fixed and basic facts
- c) to which the qualifying theory fits into.

We have underlined "provisional" since this issue will have a further enlargement in section 2.1, devoted to the so-called reflective equilibrium.

2. The Original Position

Since the concept of *Justice as Fairness* stems from the contractual tradition, it is likely to expect a fundamental agreement into which parties must enter so as to find out the principles of justice intended to rule and manage the evolvement of the basic structure of society. But in order for such an agreement to be fair, parties should be prevented from bargaining power to their advantage, or from building up procedures that might further their own agenda on behalf of opportunistic behavior or rent-seeking.

Rawls introduces both the original position of equality and the problem of justification because he is in search of a fair procedure of agreement on principles of justice:

"I have said that the original position is the appropriate initial status quo which insures that the fundamental agreements reached in it are fair. This fact yields the name "justice as fairness". It is clear, then, that I want to say that one conception of justice is more reasonable than another, or justifiable with respect to it, if rational persons in the initial situation would choose its principles over those of the other for the role of justice. [...] Understood in this way the question of justification is settled by working out a problem of deliberation: we have to ascertain which principles it would be rational to adopt given the contractual situation. This connects the theory of justice with the theory of rational choice." (A Theory of Justice, 1990 edition, pp. 15-16).

Therefore, Rawls is not only interested in principles but he also proposes a methodology for deciding upon principles. Only after the principles are agreed on, parties make for a constitution and a legislature, and when this stage is reached we can say that they have contracted a general system of rules that defines a just society.

The choice problem involves the search of reasonable restrictions on the arguments that will lead to the principles of justice. As it is usual practice in rational choice, general actors are invested with distinctive features of behavior. Therefore, it is assumed that rational and free persons would manage their decision-making facing three sets of restrictions:

a) On the players:

- No person should be advantaged or disadvantaged by natural fortune or social circumstances in the choice of principles.
- It should be impossible to tailor principles to the circumstances of one's own case.
- Principles adopted should not be affected by particular inclinations and aspirations, and persons' conceptions of their good.
- By person, Rawls means a fully cooperating actor in society over a complete life. In other words a fully-fledged citizen.

b) On the players' freedom:

- all have the same rights in the procedure for choosing principles;
- each can make proposals, and submit reasons for their acceptance.

c) On the motivation of the players:

- *primary goods*: it is asserted that people are better whenever their lives are endowed with more primary goods rather than less. In this context, by primary goods are meant things that rational men want. They are of two kinds:
 - i) social primary goods: rights, liberties, opportunities, income, wealth, self-respect;
 - ii) natural primary goods: health, intelligence, natural talents;

however, the Original Position stresses only the primary goods:

- *a capacity for the good*: that means a capacity to form, revise and pursue one's natural good in social cooperation;
- *a capacity for a sense of justice*: that means a capacity to understand, apply and act from the Public Conception of Justice.

It rises to surface that Rawls pursues a special and impartial point of view from which to build foundations to the principles of justice. Remarkably, ten years before his paper on *Justice as Fairness: Political not Metaphysical*, was published, Professor Snares suggested the need to go beyond the Original Position and towards a common ground for the deliberations and final agreement involved in the model. In due course, Rawls' answer came to be known as the Overlapping Consensus.

In conclusion, I would like to point out that there is yet another way of looking at the appeal to the original position even if it is not clear that Rawls looks at it in this way. If men are to argue, give reasons, and make claims against each other (where this is not just an appeal to self-interest), there must be some common point of view which they take in their discussion. Merely to appeal to one's self-interest is not to take a viewpoint which others share. Of course it might be doubted whether such a common point of view is possible for rational men, but if one is, certainly Rawls' appeal to choice from the original position is the most compelling proposal to date. (Snares: John Rawls and the Methods of Ethics, page 111)

While dealing with the Original Position, we cannot forget that *Justice as Fairness* takes a firm stand on predicating that agreements will be feasible only if we give heed to:

- i. the background institutions of the basic structure of society by which we must understand the main political, social and economic institutions;
- ii. the framework provided by a modern constitutional democracy;
- iii. the cooperative nature of social commitments

2.1. The Reflective Equilibrium

It would be misleading to assume that the Original Position is a fixed and permanent part of the agreement while deliberations are still going on. Quite the opposite: the principles of justice must be chosen in a competitive process that keeps the considered convictions as a countervailing standard. In other words, although the purpose of this expository device is to produce consented principles of justice, they should match considered convictions eventually. Let us outline this competitive practice.

a) The starting point is the setting of a choice context with restrictions by means of which it might follow a distinctive set of principles of justice to be regarded as the best available. Otherwise, we should be able to look for further conditions.

b) By the same token, when defining such restrictions we have to bear in mind a set of considered convictions that are provisionally fixed and qualified to match those principles of justice that will come out of the initial deliberative process.

c) However, discrepancies may arise between the principles and the considered convictions. This calls for a dynamics of decision-making updating:

- either the intended original position qualifies for a change,
- or the existing judgments have to be revised.

d) Therefore, there is a dynamical approximation of considered convictions to the principles to be chosen, and this feedback process ends up when there is a balance between the former and the latter. Rawls calls this final state "reflective equilibrium":

- *reflective*, because it refers to the principles that our considered convictions fit, and how they were derived;
- *equilibrium*, because, in the end, the principles and the judgments coincide.

e) Only when the reflective equilibrium has been reached, we can regard the Initial Position as a fully-fledged agreement.

Remark

Behind the reflective equilibrium we can find the same sort of adjustment of expectations that is current in competitive markets, or in usual arbitrage procedures widely used in Financial Economics.

3. The Veil of Ignorance

The Original Position is an hypothetical and non-historic contractual setting that gives heed to the background institutions of the basic structure of society. This being so, we need an *objective point of view* by which the position comes up as an agreement devoid of particular features lying on that institutional background. It goes without saying that bargaining power and contingencies from the past should not hinder an agreement on principles whose final task will be to regulate the institutions of the basic structure. It is for the Veil of Ignorance to correct for the arbitrariness of the world.

The Veil of Ignorance deprives the contracting parties of all those features that could prevent the basic agreement from holding outright:

- a) the parties do not know their place in society, neither his class position nor social status;
- b) they do not know their fortune, intelligence and strength;
- c) they do not know his conception of the good, their distinctive plans of life, aversion to risk or liability to pessimism or optimism;
- d) even they ignore the particular features of their society, or the generation to which they belong;
- e) but they certainly know not only that their society is subject to the circumstances of justice, but also the general facts about human society; they even know political affairs and principles of Economics, the basis of social organization and the laws of human psychology.

Taking the viewpoint of an economist or a decision-making theorist, one would say that the Veil of Ignorance consists in designing a very peculiar information set to hold for every party in the hypothetical deliberation process whose main characteristics are:

- It is included in the common knowledge set of society

- Information is fully symmetrical and shared by everybody
- It is divested of the private information contained in the particular information set of each individual

4. Counterfactuals

The truth table for an implication (or the so called material implication connective) is usually formatted in Symbolic Logic as in the third column of the table in Exhibit 1.

Exhibit 1 TRUTH VALUES FOR AN IMPLICATION

| <i>p (antecedent)</i> | <i>q (consequent)</i> | <i>$p \Rightarrow q$</i> |
|------------------------------|------------------------------|--|
| true | true | true |
| true | false | false |
| false | true | true |
| false | false | true |

In ordinary applications the first and the second line are straightforward: if both sentences were true, it follows a true implication, whereas from a false consequent it must follow a false implication. However, lines three and four are rather puzzling. In fact, the falsity of the antecedent grants the truth of the conditional, regardless of the consequent being true or false.

Lines three and four are usually illustrated by means of counterfactual conditionals. Let us take a clear-cut example analyzed by Kearns (2000) discussing the subject and the role of possible worlds on Semantics' grounds.

- a) If kangaroos had no tails they would topple over.
- b) If kangaroos had no tails they would not topple over.

As kangaroos have tails, the antecedent in a) and b) is false, but if we see the table above, both a) and b) are true conditionals, in spite of being each consequent contradictory with the other. Still, there seems to be that only a) could pass the test of experience. The counterfactuals in examples a) and b) set forth a statement on hypothetical situations and never they intend to spell out how things take place in actual fact.

That is to say, counterfactuals claims about events that did not actually take place. In social sciences, counterfactuals are widely used for assessing causal hypothesis in non- experimental research settings. On the other hand, in the realm of the hard sciences, counterfactual are widely

used as well. For instance, Galileo built up his dynamics upon the conception of a body moving without the influence of any external force, an event by all means implausible in real life.

From a political science standpoint, Fearon (1991) argued that when it is hypothesized that C was a cause of event E, and experimental testing and replication are not available, we have two strategies for empirically assessing this hypothesis:

- either we can imagine that C had been absent and ask whether E would have or might have occurred in that counterfactual case;
- or we can search for other actual cases that match the case under study except that C can be absent.

How to deal with counterfactuals? Still better, how can we isolate counterfactuals hidden in complex models? This has been a longstanding issue in Logic and Epistemology for many years hitherto. We have to bear in mind that almost everything concerned with conditionals is still at issue (Edgington, 1995). Hence, to be on the safe side we follow one well-known approach suggested by Goodman (1947) in a widely referred paper where he brings forward that any counterfactual statement holds true if fulfills the following conditions:

- i) **the counterfactual antecedent, when joined with appropriate theories and facts, implies the consequent;**
- ii) **the counterfactual antecedent is "cotenable" with the facts or "initial conditions" used to draw the inference. This means that**

if the antecedent had actually occurred, the initial conditions could also have occurred

Counterfactuals predicate a sort of connection between the antecedent and the consequent, holding true if the above mentioned connection obtains. But the consequent would usually not come up by logic alone unless we required joint statements to grant the connection.

In making this issue more precise, let S denote the set of statements linked with the relevant conditions. Then i) means:

$$(\text{Antecedent}) \wedge (S) \Rightarrow (\text{Consequent})$$

Another feature of this approach is that S must not only be compatible with (Antecedent) but also jointly tenable (or cotenable) with (Antecedent). This latter feature is predicated by ii) and it could be summarized by

$$\{ (\text{Antecedent}) \wedge (S) \}$$

where it is not the case that S would not be true is A were.

Therefore, the framework that make meaningful any counterfactual conditional can be split down into two components:

- a) **certain circumstances exist, are used or accepted (what amounts to saying that those circumstances obtain)**
- b) **the connective joins the consequent with a pair that consists of**
 - **the (Antecedent),**
 - **and the set S of relevant conditions drawn from the former circumstances so that S is cotenable with (Antecedent).**

Both pairs of statements, i) and ii) on the one hand, a) and b) on the other hand, were stressed in bold because they will be conclusive below when the counterfactuals hidden in the Original Position will be brought to light.

5. Counterfactuals in the Original Position

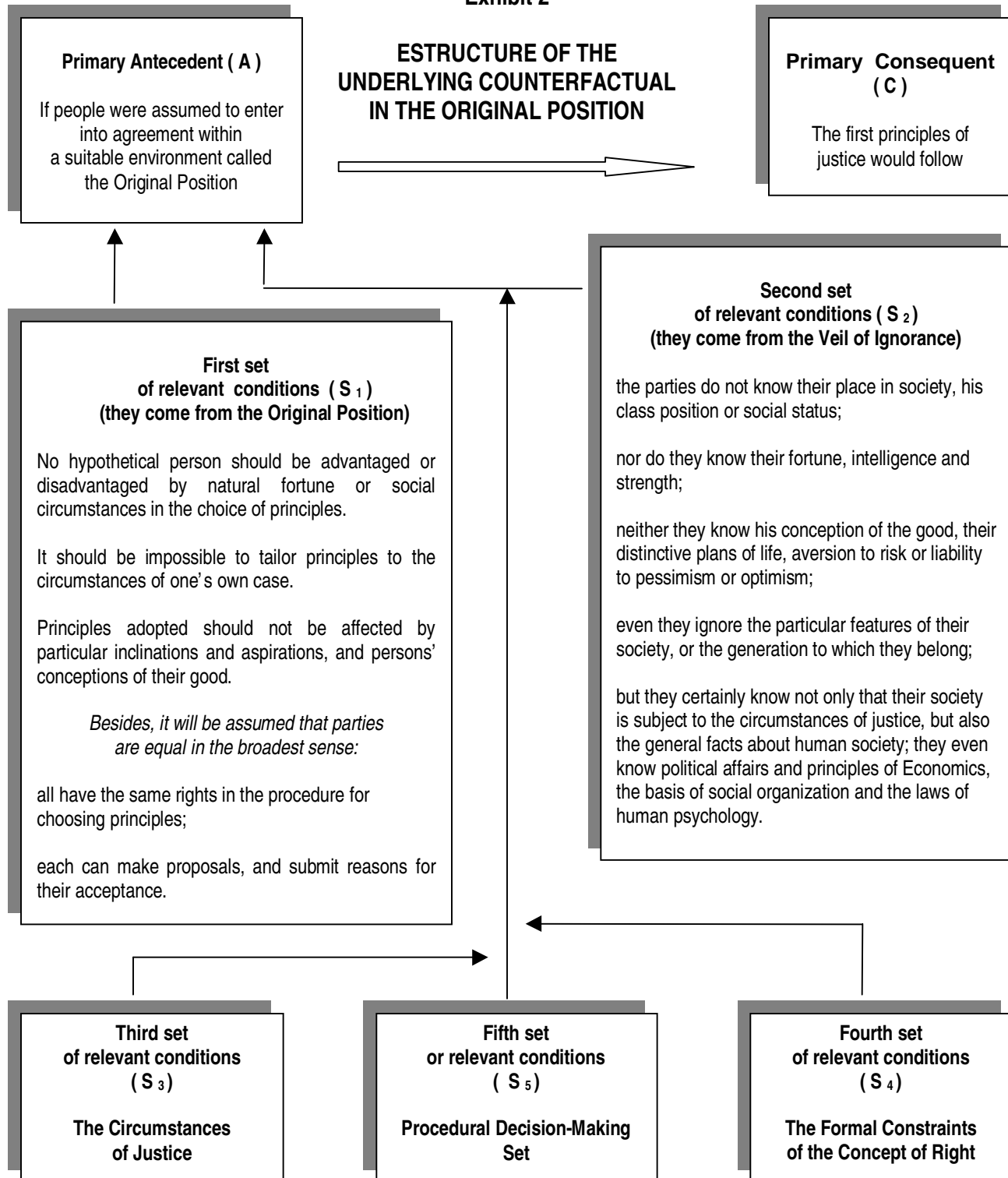
Although Rawls did not make any counterfactual statement explicit, he was fully aware of the hypothetical reasoning behind the complex framework advanced in the Original Position. In his own words:

It is clear, then, that the original position is a purely hypothetical situation. Nothing resembling it need ever take place, although we can by deliberately following the constraints it expresses simulate the reflections of the parties. (A Theory of Justice, page 104)

In order to apply what we have said about counterfactuals we need to search not only for the constraints that parties entering into the original agreement must face, but also for the sets of statements linked with relevant conditions. They are of two kinds: core conditions and background conditions, and are detailed in Exhibit 2:

- a) Firstly, the core conditions are those that define the Original Position and were dealt with in section 2 and 3. For the sake of analysis, we are going to denote them this way:
 - First set of relevant conditions (**S₁**): the defining features of the **Original Position**.
 - Second set of relevant conditions (**S₂**): the constraints brought about on information by the **Veil of Ignorance**.
- b) Secondly, the background conditions are those that Rawls explicitly expands on when putting forth a justification of the Original position.
 - Third set of relevant conditions (**S₃**): those disclosed by **the Circumstances of Justice**; that is to say, the normal conditions under which human cooperation is both possible and necessary.

Exhibit 2



They can either be objective circumstances (like geography, scarcity and collective hazards) or subjective circumstances (bounded rationality, asymmetric information and conflict of interests).

- Fourth set of relevant conditions (S_4): intended as **the Formal Constraints of the Right**; that is to say, those conditions that hold when people choose ethical principles including those for justice, either on the alternatives open to them or in their knowledge of their environment.

i) *Constraints on the alternatives*: the principles should be general, universal, publicly known, showing finality (as if they were a sort of final court of appeal in practical reason), and able to order conflicting claims.

ii) *Constraints on the knowledge*: those already set up in the Veil of Ignorance.

- Fifth set of relevant conditions (S_5): we are going to call this set the **Procedural Decision-Making Set** which consists of two main components widely used in the choice environment:

i) Considered Judgments

ii) Reflective Equilibrium

We dealt with Considered Judgments in section 1, and the Reflective Equilibrium was outlined in section 2.1. They work jointly together to grant a competitive partnership among participants.

Now we can proceed to make explicit two counterfactuals that underlie the Original Position.

PRIMARY COUNTERFACTUAL

$$\left\{ \begin{array}{l} \text{(Primary Antecedent)} \\ \text{cotenable with} \\ S = S_1 \cup S_2 \cup S_3 \cup S_4 \cup S_5 \cup S_6 \end{array} \right\} \Rightarrow \text{(Primary Consequent)}$$

where

(**Primary Antecedent**): If people were assumed to enter into agreement within a suitable choice environment called the Original Position

(**Primary Consequent**): The First Principles of Justice would follow.

SECONDARY COUNTERFACTUAL

$$\left\{ \begin{array}{l} \text{(Secondary Antecedent)} \\ \text{cotenable with} \\ \mathbf{S_2 \cup S_4 \cup S_6} \end{array} \right\} \Rightarrow \text{(Secondary Consequent)}$$

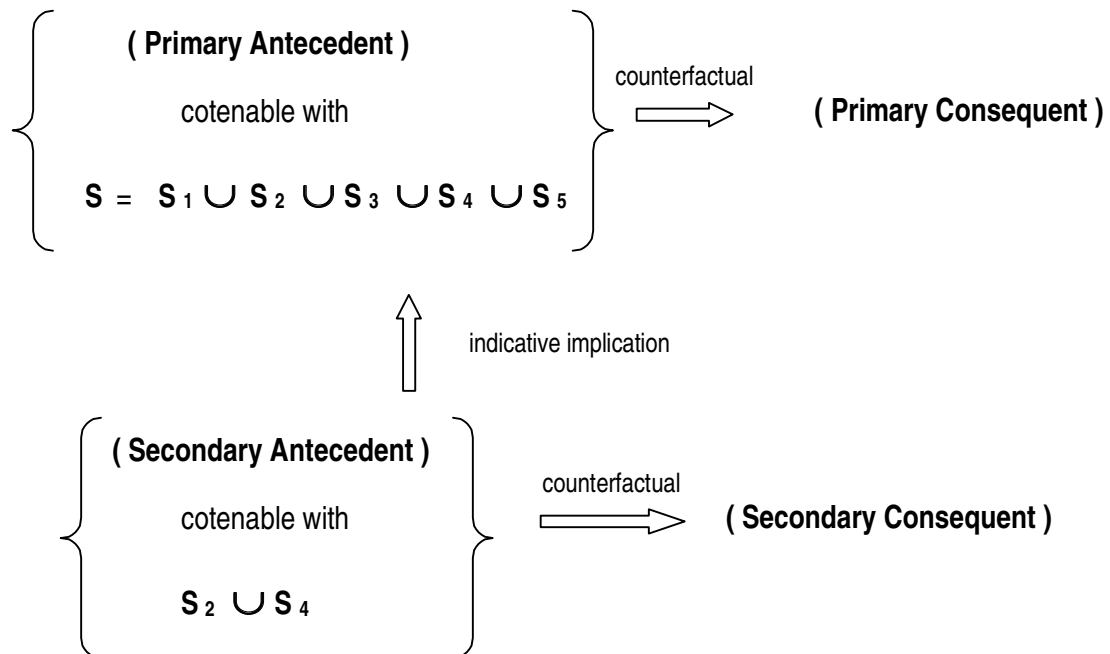
where

(**Secondary Antecedent**) : If people were endowed with a Veil of Ignorance

(**Secondary Consequent**) : They would be able to enter into agreement within a suitable choice environment called the Original Position.

Finally, the primary and secondary counterfactuals are related by an indicative implication, as portrayed in Exhibit 3.

Exhibit 3 UNDERLYING COUNTERFACTUALS IN THE ORIGINAL POSITION



6. The Overlapping Consensus

The overlapping consensus is "*one in which different and even conflicting doctrines affirm the publicly shared basis for underwriting political arrangements*". Hence, justice as fairness stems from the basic intuitive ideas that belong to the public culture of a constitutional democracy.

Rawls developed the notion of Overlapping Consensus in his paper *Justice as Fairness: Political not Metaphysical*, and fully expanded it in *Political Liberalism* (1993). But the first time he resorted to such expression was in *A Theory of Justice*, when dealing with the role of Civil Disobedience:

In these remarks I have assumed that in a nearly just society there is a public acceptance of the same principles of justice. Fortunately this assumption is stronger than necessary. There can, in fact, be considerable differences in citizens' conceptions of justice provided that these conceptions lead to similar political judgments. And this is possible, since different premises can yield the same conclusion. In this case there exists what we may refer to as overlapping rather than strict consensus. (A Theory of Justice, 1990 edition, page 340)

For the overlapping consensus to become functional within the reasonable pluralism fostered by the democratic tradition, a reciprocity condition must be fulfilled:

- a) *"both sides must believe that however much their conceptions of justice differ, their views support the same judgment in the situation at hand;*
- b) *both sides would do so even should their respective positions be interchanged."*

7. Functionality of the Overlapping Consensus

In Rawls' words,

"A political conception of justice, to be acceptable, must be in accordance with our considered convictions, at all levels of generality, on due reflection [or in what I have called reflective equilibrium]." (Justice as Fairness: Political not Metaphysical, 1985, page 228)

Such a conception must encompass familiar intuitive ideas and principles if we take advantage of a more basic albeit intuitive idea:

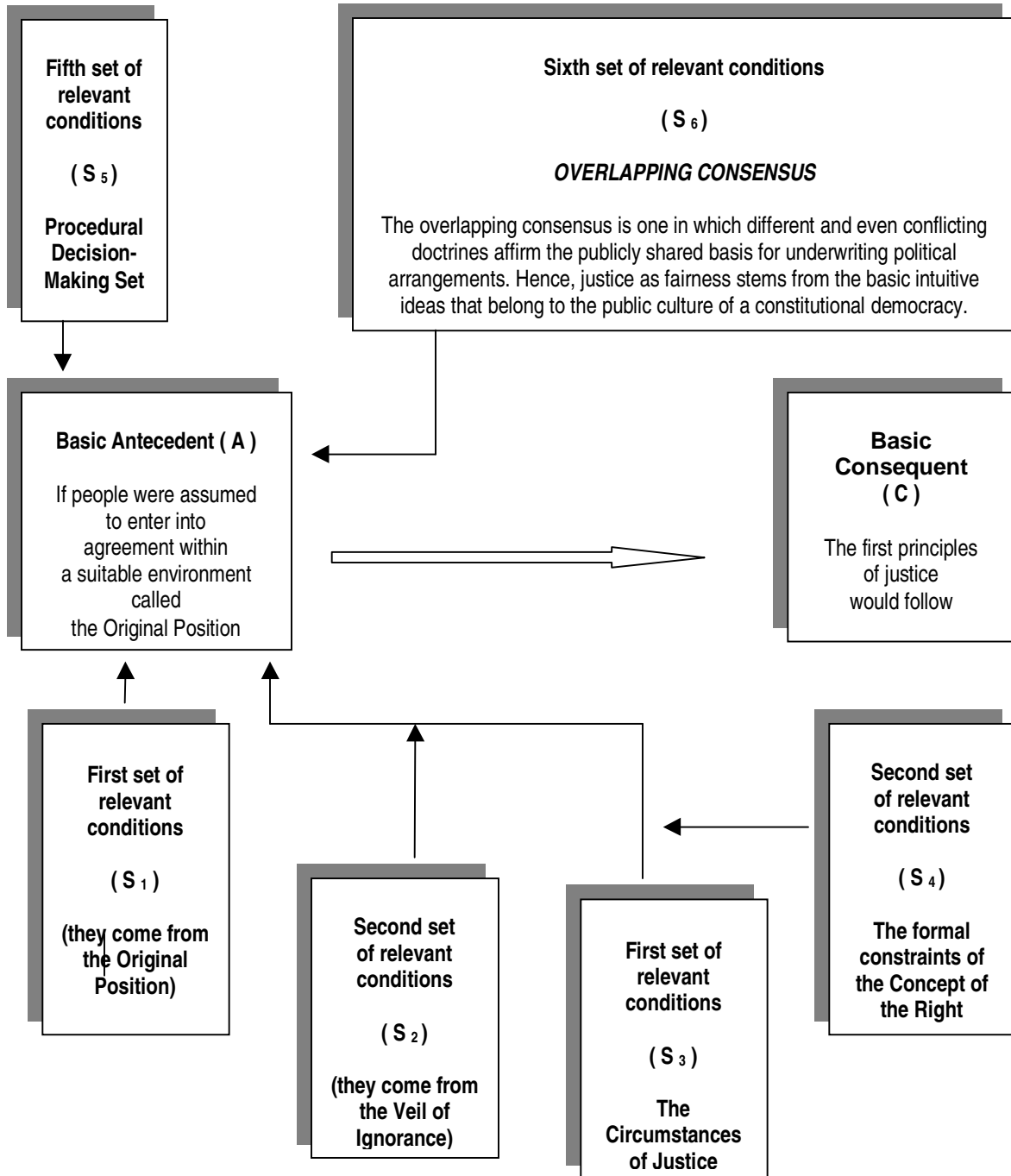
society is a system of fair cooperation between free and equal persons.

That is to say, the basic ideas of justice are common ground in the public culture of a democratic society.

In order to be acceptable, the political conception of *Justice as Fairness* meets the following constraints:

- it is practical, not metaphysical or epistemological;

Exhibit 4 THE UNDERLYING COUNTERFACTUAL IN THE ORIGINAL POSITION WHEN THE OVERLAPPING CONSENSUS IS INCLUDED



- it traces the sources of agreement to the public culture of a constitutional regime;
- the agreement must be informed and uncoerced;
- the agreement must be reached by citizens viewed as free and equal persons.

In framing this political approach, it is our viewpoint that Rawls links political liberalism with the tradition of American Pragmatism, as this paragraph brings to light:

Philosophy as the search for truth about an independent metaphysical and moral order cannot, I believe, provide a workable and shared basis for a political conception of justice in a democratic society. (Justice as Fairness: Political not Metaphysical, 1985, page 230)

It should not come as a surprise that Rawls had turned out to be a bone of contention either for those who are for, or are against the latest branch of the Liberal tradition, labeled Pragmatic Liberalism [background on this new development in Anderson (1990)].

Moreover, it is also worthy of being remarked that leaving aside moral and philosophical controversies, as well as longstanding problems, Rawls reveals an Agnostic viewpoint that is consistent with classical liberal tenets inherited from the Enlightenment tradition. In his own words:

This form of constructivism neither asserts nor denies these doctrines. Rather, it recasts ideas from the tradition of the social contract to achieve a practicable conception of objectivity and justification founded on public agreement in judgment on due reflection. (Justice as Fairness: Political not Metaphysical, 1985, page 230)

From these statements, we can say that parties who enter into the original position perform such thing as partners in the overlapping consensus venture. Besides, parties are rational, free, equal, and the overlapping consensus nurtures and makes meaningful the Veil of Ignorance that can be regarded like a common knowledge set with restrictions on particulars, history and contingencies.

Now we can make explicit the third counterfactual implied in Rawls approximation to the Theory of Justice as Fairness.

TERTIARY COUNTERFACTUAL

$$\left\{ \begin{array}{c} \text{(Tertiary Antecedent)} \\ \\ \text{cotenable with} \\ \\ S_5 \cup S_6 \end{array} \right\} \Rightarrow \text{(Tertiary Consequent)}$$

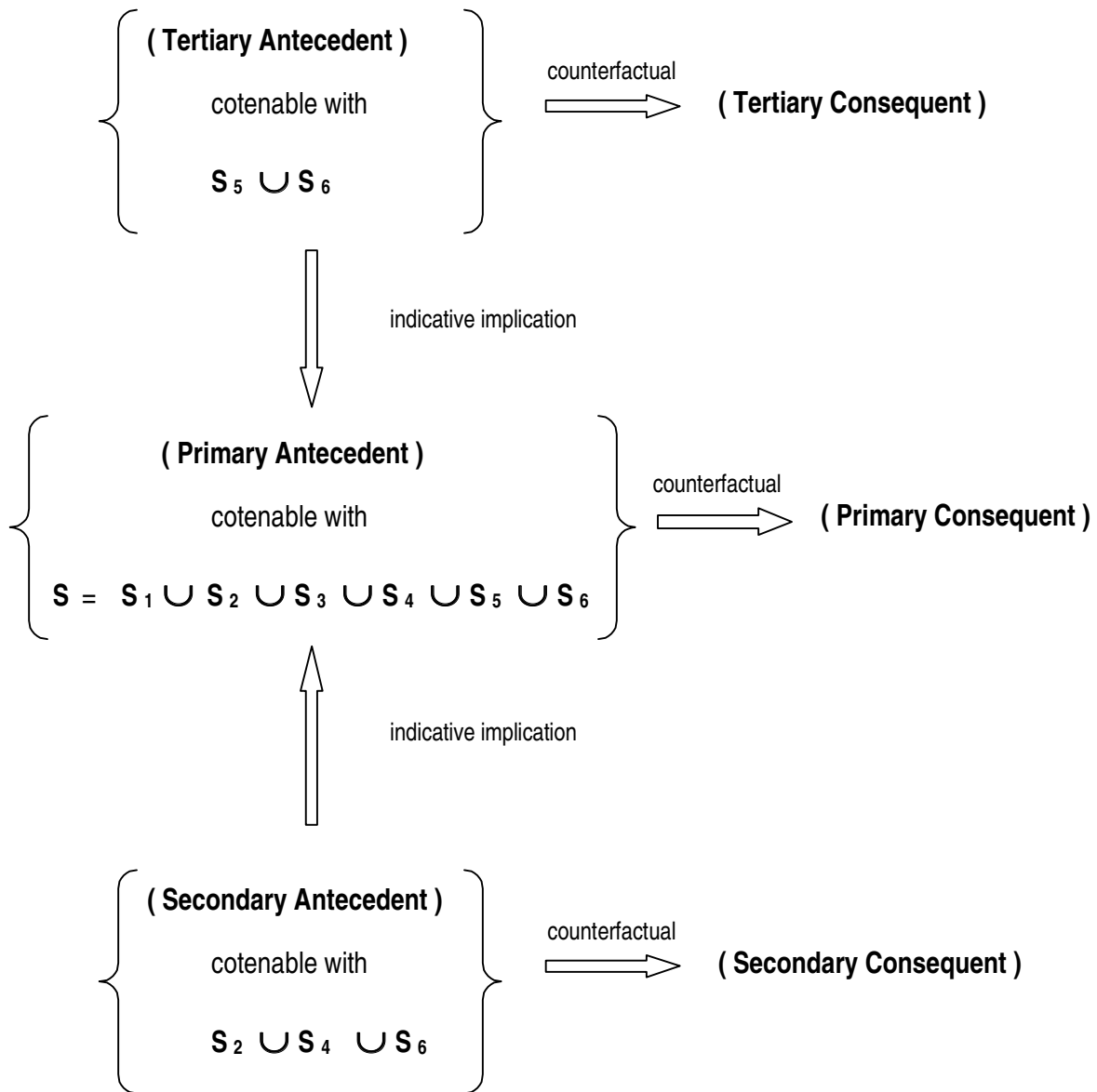
where

(Tertiary Antecedent) : If it were not the case that people were endowed with Overlapping Consensus.

(**Tertiary Consequent**) : They would not be able to enter into agreement within a suitable choice environment called the Original Position.

The relationship among the three counterfactuals is depicted in Exhibit 5.

**Exhibit 5 UNDERLYING COUNTERFACTUALS IN THE ORIGINAL POSITION
WITH OVERLAPPING CONSENSUS**



8. The assessing of the Counterfactuals in contrast with two main Critical Viewpoints

It is our contention that counterfactuals allow us to gain knowledge and intuition of the basic structure on which the device of the Original Position has been founded.

Shortly after the first edition of *A Theory of Justice* two outstanding scholars, Nozick and Nagel among many others, raised their concerns about the inner consistency of the Original Position. We want to take stock on their remarks not only due to their relevance but also because they could be met with the underlying counterfactuals. In this way, we hope that criticism will focus on some neglected but distinctive matters, helping to an enduring debate that should not be avoided as long as Rawls' work, far from definite or even being complete, it is widely acknowledged to have been a breakthrough in Political Science, nurturing research and better understanding of big issues that should sharpen up our own lives.

Let us handle, in turn, these strong objections, trying to give some further comment with the help of the counterfactuals and later Rawls' contributions to the debate.

a) Nozick (1974) made his point of view crystal clear:

But not historical principle, it seems, could be agreed to in the first instance by the participants in Rawls's original position. For people meeting together behind a veil of ignorance to decide who gets what, knowing nothing about special entitlements people may have, will treat anything to be distributed as manna from heaven. (Anarchy, State, and Utopia, 1974, page 205).

First of all, the context of the Original Position is one of counterfactuals, and this adds to non-historical environments. The truth or falsity of the Primary Counterfactual (see Exhibits 2 and 3) it does not depend on history, but on sets of relevant conditions in the wider background of possible worlds like those analyzed in Semantics (Kearns, 2000) and Logic (Nolt, 1986).

Secondly, Nozick makes his point when hinting at the lack of initial entitlement, and the foregone conclusion: in that way some unfair situations could not be prevented. But the Tertiary Counterfactual (see Exhibit 4 and 5) conveys the Overlapping Consensus which could refrain participants entering the hypothetical agreement from claiming for their particular special entitlements, as long as the agreement upon principles of justice evolves. It would be as if entitlements were "put into brackets", like frictions in Newtonian Mechanics, or transaction costs in perfectly competitive markets. As soon as the principles are chosen, entitlements could be resumed in the context of justice as fairness (so cleverly criticized by Nozick) while the distributive approach to justice could obtain eventually, and even contest with Nozick's approach which is not free from criticism, by far.

b) Nagel (1973) put forth the weakness in the epistemology of the Original Position under this format:

- *Any hypothetical choice situation which requires agreement among the parties will have to impose strong restrictions on the grounds of choice, and these restrictions can be justified only in terms of a conception of the good. It is one of those cases in which there is no neutrality to be had, because neutrality needs as much justification as any other position. (Rawls on Justice, page 227)*

Although Nagel's perspicacious comment is straightforward, Rawls shifted gears as from his paper *Justice as Fairness: Political not metaphysical* was published, claiming that he only attempted to work on the surface, leaving aside comprehensive conceptions of justice, metaphysical concerns and moral or religious debates. Moreover, the Overlapping Consensus acknowledged the irresolvable conflict of non-neutrality and submitted a pragmatic criterion to cope with that conflict.

If we take into account how the tertiary counterfactual interplays with the primary and secondary ones, this new perspective brings more light over the framework that is embedded into the Original Position. It seems that the former mindset, however worthwhile it had been, prevented the analysis from sound lateral thinking.

CONCLUSIONS

The considered judgments and the reflective equilibrium provide with a procedural knowledge set that allows for competitive partnerships among all participants in the Initial Position. It seems advisable to regard this procedural set as one with background conditions to fulfill counterfactuals eventually.

The Original Position discloses a complex methodological structure and admits of the following features:

- there is a primary counterfactual whose antecedent is cotenable with two sets of relevant conditions, namely S_1 that shapes the minimal constraints for the Initial Position to hold operationally, and S_2 the formal constraints in the knowledge set of participants (also called the Veil of Ignorance);
- there is a secondary counterfactual whose antecedent is cotenable with S_2 and S_4 (the set of the formal constraints of the concept of right);
- both the primary and secondary counterfactuals are logically connected by a material implication.

Finally, the Overlapping Consensus boils down to a complex framework that stems from the following features:

- there is a tertiary counterfactual whose antecedent is cotenable with S_5 (whose contents shape the Overlapping Consensus) and S_6 (whose contents exhibit Considered Judgments and the Reflective Equilibrium)
- both the primary and tertiary counterfactuals are logically connected by a material implication.

With the help of counterfactuals we can understand much better what the Original Position involves to the extent of logical linkage and descriptive scope. By no means they allow for proving the

factual truth or material realization of the Primary Counterfactual, because a heuristically decision-making device should not be misconceived as an explanation.

REFERENCES

Anderson, C. (1990). *Pragmatic Liberalism*. The University of Chicago Press, Chicago and London.

Edgington, D. (1995). *On Conditionals*. *Mind*, volume 104, issue 414, pp. 235-329.

Fearon, J. (1991). *Counterfactuals and Hypothesis Testing in Political Science*. *World Politics*, volume 43, issue 2, pp. 169-195.

Goodman, N. (1947). *The Problem of Counterfactual Conditionals*. *The Journal of Philosophy*, volume 44, issue 5, pp. 113-128.

Kearns, K. (2000). *Semantics*. Macmillan Press, London.

Nagel, T. (1973). *Rawls on Justice*. *The Philosophical Review*, volume 82, issue 2, pp. 220-234.

Nolt, J. (1986). *What are possible worlds?* *Mind*, volume 380, 432-445.

Nozick, R. (1974). *Anarchy, State, and Utopia*. Basic Books, New York.

Rawls, J. (1971, revised edition 1999). *A Theory of Justice*, The Belknap Press of Harvard University Press, Massachusetts.

Rawls, J. (1985). *Justice as Fairness: Political not Metaphysical*. *Philosophy and Public Affairs*, volume 14, issue 3, pp. 223-251.

Rawls, J. (1993). *Political Liberalism*. Columbia University Press, paperback edition, 1999.

Snare, F. (1975). *John Rawls and the Method of Ethics*. *Philosophy and Phenomenological Research*, volume 36, issue 1, pp. 100-112.

Talisso, R. (2001). *On Rawls: A Liberal Theory of Justice and Justification*. Wadsworth, Thomson Learning, California.