# Betting Against the Job Market

I

My main aim in this paper is to defend job market regulation – or, stated more precisely, it is to defend much greater regulation of the job market than we witness in many parts of the world, including the liberal market economies of the United States and the United Kingdom. When pursing this goal, there are many means available to us. Amongst other things, we could do more to limit employers’ hiring decisions through the use of tighter anti-discrimination law or quota legislation; we could do more to prohibit employment contracts that pay very poorly or demand very many hours from workers; and we could do more to ensure that firms are set up and run in more democratic ways. I mention these measures for purely illustrative purposes. My ambition is not to defend any of them in particular; rather, it is to theorise about, and indeed to defend, the justifiability of job market regulation at a more fundamental level.

There are many kinds of reasons that might be thought to support my conclusion, and it is plainly beyond the scope of any single paper to examine the full range of arguments in defence of greater job market regulation. Instead, I restrict my attention to justifications that are *fairness-based*. By this, I mean to refer to arguments that justify interventions in the job market exclusively by appeal to their role in securing a fairer distribution of opportunities amongst individuals.[[1]](#footnote-1)

These arguments are especially important for two reasons. First, though disputes about fairness are central to a great deal of contemporary normative philosophy, until recently there have been very few investigations into its implications for the regulation of the job market in particular. This is perhaps surprising, given the widespread appeal of fairness-based arguments, and the potential for these arguments to be politically forceful.

Second, fairness-based arguments in defence of greater job market regulation are philosophically interesting since they are sometimes thought to be vulnerable to a powerful objection. Stated roughly, this objection holds that these arguments are problematic since they depend upon appealing to a class of controversial reasons that we cannot expect every reasonable individual to accept, and that therefore violate a fundamental constraint on liberal political morality.[[2]](#footnote-2) In other words, the objection states that we must resist these arguments on the grounds that they are *illiberal*.[[3]](#footnote-3)

Taken together, then, my aim is to articulate a novel and plausible fairness-based defence of greater job market regulation that is consistent with the demands of liberal political morality. My strategy is to develop an *insurance argument*, according to which we can justify greater job market regulation on the grounds that it protects individuals against the risk of suffering certain kinds of disadvantage. This argument has its roots in the political philosophy of Ronald Dworkin, though my recommendations go beyond his.[[4]](#footnote-4) The details of my argument are in some ways complex and, for this reason, I shall postpone any detailed summary.

This paper unfolds as follows. In section II, I specify more precisely the exact demands of my task, by clarifying the demands of liberal political morality. In section III, I consider and reject recent attempts to defend greater job market regulation from within a Rawlsian perspective. In sections IV and V, I introduce and defend Dworkin’s insurance argument, before then showing how we can extend it so as to justify further interventions in the job market. In section VI, I reply to an important objection.

Before moving on, it may add to the interest in this paper for me to emphasise two further payoffs. First, I show how our concern for the demands of liberal political morality does not prevent us from recommending quite extensive interventions in the job market. This is important, for it helps to defuse the worry that liberals who accept these demands are ill-equipped to offer compelling normative analysis of the job market.[[5]](#footnote-5) In this respect, not only do I contribute to our understanding of the job market regulation, I also partially vindicate those who uphold the demands of liberal political morality.[[6]](#footnote-6)

Second, my insurance argument serves partly to illustrate the versatility and merits of Dworkin’s political philosophy, or at least parts of it. Accordingly, though my interest in this paper is not the history of political thought, my arguments have the added bonus of clarifying some of the core features of Dworkin’s view, thus (hopefully) guarding them against certain misinterpretations.[[7]](#footnote-7)

II

One formidable objection to extensive job market regulation is that it wrongfully privileges the pursuit of some ways of life over others and, in virtue of this, it is objectionably illiberal. The intuitive force of this objection is illustrated by Richard Arneson, who concludes that:

…implementing the right to meaningful work elevates one particular category of the good, intrinsic job satisfaction, and arbitrarily privileges that good and those people who favor it over other equally desirable goods and equally wise fans of those other goods.[[8]](#footnote-8)

Though Arneson is concerned only with the right to meaningful work, the general point might be thought to apply to many interventions designed to enhance the position of certain groups of workers (say, by regulating working hours or the firm’s organisational structure, for example).

We can flesh out the details of this objection in many different ways, with varying levels of plausibility. Rather than do this, I shall instead develop what I take to be its strongest version. This task is important, since the constraint to which it gives rise then frames the remainder of this paper. In other words, my task in subsequent sections is to provide a defence of greater job market regulation that does not violate this constraint on liberal political morality.

To begin, let me draw attention to three distinct claims, each of which has considerable intuitive appeal.[[9]](#footnote-9)

1. We should protect certain fundamental liberal rights, such as freedom of conscience and freedom of thought.
2. We may appeal to any valid reason to justify the exercise of political power.
3. We should protect political autonomy.

I take it that, though their precise content is disputed, claims (1) and (2) are both familiar and widely-shared. For this reason, I shall say no more about them here. By contrast, claim (3) requires some elaboration. As I shall understand it, *political autonomy* refers to the condition that obtains when an individual is able to identify freely with the constraints that she faces, such that she can understand and accept the justifications of those constraints.[[10]](#footnote-10) This ideal is intrinsically valuable. It is also instrumentally valuable, in so far as it increases the probability of individuals then conforming to (the demands of) those constraints.

I draw attention to these claims because, though we can simultaneously accept any pair, we cannot simultaneously accept all three. Let me explain. If we accept claim (1), then there will predictably arise irreducible disagreement amongst individuals about the value of various accounts of human flourishing. This disagreement is the outcome of the free exercise of human reason, and it is explained by empirical claims relating to the fact that no two individuals are likely freely to reach identical judgments about the world.[[11]](#footnote-11) As a consequence of this, we must choose between claims (2) and (3). This is because it is likely that at least some individuals will fail to recognise the validity of certain reasons and, indeed, form beliefs that are inconsistent with them. As a result, if we accept claim (2) and therefore permit appeals to any valid reason to justify the exercise of political power, we risk failing to protect the political autonomy of at least some individuals. Accordingly, the only way in which we may simultaneously preserve claims (2) and (3) is by rejecting claim (1). For these reasons, claims (1), (2), and (3) therefore constitute a *trilemma*.

Liberals, such as John Rawls, claim that we should reject claim (2) in order to protect claims (1) and (3). In other words, we ought to prioritise the protection of certain fundamental liberal rights and political autonomy, even though a consequence of this is that we may not appeal to certain valid reasons to justify the exercise of political power.[[12]](#footnote-12) Our commitment to claims (1) and (3) therefore imposes on us the need to exercise restraint when we justify the exercise of political power. For brevity, I shall refer to this as the *Liberal Constraint*.[[13]](#footnote-13)

A consequence of the Liberal Constraint is that we ought to justify the exercise of political power by appeal exclusively to so-called *public reasons* – that is, reasons that all free and equal individuals can be expected to accept in the light of principles and ideals acceptable to common human reason. Public reasons are a subset of valid reasons, where valid reasons refer to all reasons that an individual has, and so also includes non-public reasons, which are reasons that derive from a certain class of sound but controversial claims.[[14]](#footnote-14) Rawls notes this implication of (what I have called) the Liberal Constraint, when he issues the following clarification:

…those who believe that fundamental political questions should be decided by what they regard as the best reasons according to their own idea of the whole truth – including their religious and secular comprehensive doctrine – and not by reasons that might be shared by all citizens as free and equal, will of course reject [the Liberal Constraint].[[15]](#footnote-15)

As a result, even if an individual has a sound reason to believe that a certain sort of meaningful work is necessary for a flourishing life, she ought not to appeal to it to justify the exercise of political power. In this respect, the Liberal Constraint generates a principled inhibition on appealing to a certain class of valid reasons – these reasons are off the table, so to speak.[[16]](#footnote-16)

The Liberal Constraint is particularly relevant to the topics I address in this paper, since it prohibits us from appealing to any justification of job market regulation that refers to the idea that some jobs are more valuable than others. To repeat, this is because justifications of this kind must rely upon a controversial account of human flourishing that at least some individuals will reject. This result is significant, for it seems to impugn fairness-based defences of job market regulation. After all, arguments of this kind aim to secure a fairer distribution of opportunities amongst individuals, and it is perhaps difficult to make sense of this ambition if we are prohibited from assigning value to these opportunities on the grounds that there is no way of doing so that is consistent with the Liberal Constraint.[[17]](#footnote-17)

This worry is especially acute in the case of justifications for job market regulation. Whilst there is considerable agreement about the value we should assign to opportunities to earn an income, there is very little agreement about the value of other components of various jobs. For example, whereas some individuals greatly value work that is itself interesting, others are much more willing to forgo this, especially when doing so frees up time with which to spend with one’s family and friends.[[18]](#footnote-18) The pervasiveness of these disagreements helps to illustrate formidable nature of the challenge that we face in developing and defending a fairness-based justification of job market regulation that is consistent with the Liberal Constraint.

III

In recent years, there have been a number of contributions attempting to defend further interventions in the job market from within the perspective of Rawls’s justice as fairness.[[19]](#footnote-19) In the most part, the aim of these contributions has been to extend or to amend the difference principle in ways that yield more plausible and determinate conclusions concerning the just arrangement and distribution of work.[[20]](#footnote-20) It is interesting to begin with these views, since their proponents claim to accept the Liberal Constraint, or at least some close cousin of it.

Very roughly, the difference principle holds that, subject to protecting prior rights, inequalities ought to be to the greatest benefit of the least advantaged members of society.[[21]](#footnote-21) More specifically, the difference principle governs the distribution of *social primary goods*, where these refer to all-purpose means that every reasonable individual is presumed to need or want.[[22]](#footnote-22) As Rawls notes, the task of identifying social primary goods therefore ‘rests on identifying a partial similarity in the structure of citizens’ permissible conceptions of the good’.[[23]](#footnote-23) It is only by pursuing this strategy that we can identify income and wealth as social primary goods.

Several commentators invoke the difference principle in order to support greater job market regulation. The general strategy is to exploit the fact that, in addition to income and wealth, the social primary goods also include ‘powers and prerogatives of offices and positions of authority and responsibility’.[[24]](#footnote-24) As a result, the difference principle therefore ranges over ‘*social* and economic inequalities’ and it applies ‘to the design of institutions that make use of difference in authority and responsibility’.[[25]](#footnote-25)

For example, let us consider a detailed division of labour, in which job complexity, authority, and responsibility are distributed very highly unequally.[[26]](#footnote-26) This practice is interesting for at least two reasons. First, since positions of authority and responsibility qualify as social primary goods, a detailed division of labour must distribute these social inequalities in a way that satisfies the difference principle for it to be just.[[27]](#footnote-27)

Second, it arguable that job complexity may itself qualify as a distinct social primary good.[[28]](#footnote-28) The argument in defence of this claim draws upon the idea that job complexity seems to be as much of an all-purpose means to a large number of individuals as other social primary goods, such as income and wealth. If we are correct to treat job complexity in the same way as income and wealth, then similarly the demands of the difference principle should also be sensitive to its distribution.

It is on the basis of each of these two factors that Rawlsians may maintain that a detailed division of labour produces inequalities that are subject to evaluation by the difference principle.

This does not exhaust the Rawlsian toolkit. One possibility here is also to include discretionary time within the index of social primary goods. Though Rawls expresses sympathy with this idea, Julie Rose presents the most sustained case in defence of this move.[[29]](#footnote-29) Essentially, her central claim is that discretionary time is equally as generally necessary for the effective pursuit of one’s conception of the good as material resources, such as income and wealth, and so similarly qualifies as a social primary good.[[30]](#footnote-30) This move would supply us with the additional theoretical resources by which to condemn as unjust certain arrangements and distributions of work. In turn, it may provide a basis by which to support measures that regulate the distribution of discretionary time, such as working time directives, for example.

At first blush, these defences of greater job market regulation are highly promising for our purposes. This is because they seem to satisfy our two criteria – that is, they seem to be both fairness-basedand consistent with the Liberal Constraint. Regarding the first, it is clear that part of the appeal of the difference principle is its dependence upon the idea that there is something distinctively unfair when certain inequalities do not maximally serve the interests of the least advantaged. Regarding the second, part of the motivation for the principle’s reliance of social primary goods is that these are supposedly goods whose value we can reasonably expect all individuals to accept. The fact that the value of the social primary goods is capable of wider public acceptance is therefore essential to the appeal of the difference principle, precisely because it ensures that it operates in a way that is consistent with the Liberal Constraint.[[31]](#footnote-31)

Of course, none of these arguments itself establishes that certain arrangements of work are unjust, and that we are therefore justified in intervening in the job market so as to prevent them. For example, a defender of a detailed division of labour may seek to justify the highlighted inequalities by pointing to the efficiency gains that a detailed division of labour makes possible.[[32]](#footnote-32) The reply goes as follows: though a detailed division of labour distributes positions of authority and responsibility unequally and it reduces job complexity, the system maximally benefits the position of the least advantaged because it generates economic gains that would otherwise not be possible. Moreover, these economic gains are said to compensate for the unequal positions of authority and responsibility and reduced job complexity that the detailed division of labour brings about.

Though I do not find this reply compelling (at least in a large range of cases), I shall not defend my scepticism here.[[33]](#footnote-33) This is because, as I shall explain, my resistance to these kinds of appeals to the difference principle enters at a more fundamental level.

Proponents of these Rawlsian arguments maintain that it is clear that we must reject as unjust certain arrangements and distributions of work*.* However, even if we were to concede this in some cases, it remains much less clear which arrangements and distributions of work we ought to acceptas just. This is a consequence of the *index problem*.[[34]](#footnote-34) The index problem arises because the difference principle requires us to make judgments concerning the relative weightings of distinct social primary goods.[[35]](#footnote-35)

To illustrate the index problem, let’s consider a policy that increases the amount of discretionary time enjoyed by the least advantaged, but only by reducing their level of income and wealth. When the increase in discretionary time is particularly large, and the decrease in income and wealth is particularly small, it may be clear that the difference principle justifies this policy. However, when this is not the case, it is not clear whether the policy advances or reduces the position of the least advantaged. Accordingly, it is not clear whether the difference principle justifies this policy. This lack of clarity in the institutional prescriptions of the difference principle originates from the necessity of ‘judging complex trade-offs between different elements of the bundle of social primary goods’.[[36]](#footnote-36)

The index problem cuts deeper than it may first appear. The point is not merely that there is an epistemic difficulty in determining who the least advantaged are and how best to improve their situation. Perhaps this problem could be overcome by the use of averaging, say. Rather, as Arneson points out, the point is that ‘Even if the agency responsible for implementing [the difference principle] had complete knowledge of all pertinent information, she still would not know how to arrange institutions to satisfy a primary goods standard, in the absence of an index’.[[37]](#footnote-37) At the heart of the index problem, therefore, is the claim that the difference principle is insufficiently fine-tuned to be able to yield helpful institutional recommendations in a large range of cases. Given how the justness of so many interventions in the job market depends upon judgments concerning the relative weightings of distinct social primary goods, this problem is a particularly pressing one.[[38]](#footnote-38)

There are three ways in which a defender of the difference principle may respond to the index problem. First, we may stipulate the relative weightings of distinct social primary goods. For example, we could stipulate that an increase in discretionary time from 30 hours a week to 35 hours a week is equivalent to an increase in annual salary from $25,000 to $29,000. This approach is unsatisfactory. This is because it risks either being arbitrary or violating the Liberal Constraint. If there is no argument in defence the weightings, then the stipulations are arbitrary, and hence lack a justification. If we arrive at the weightings by appeal to an account of human flourishing, then the justification will be one that is reasonably rejected by certain individuals, and hence results in the violation of the Liberal Constraint.

Martin O’Neill suggests a second response. He claims that we can overcome the index problem ‘through the deliberations of democratic processes at the legislative stage of government’.[[39]](#footnote-39) That is, democracy provides our answer. The problem with this solution, however, is that it conflates justiceand legitimacy. Whilst it may be legitimate to implement a democratically-mandated policy, it does not follow that this policy is just, strictly speaking.[[40]](#footnote-40) Accordingly, an appeal to democracy cannot help us to answer the question of what justice demands. In so far as we are interested in just(rather than legitimate) arrangements and distributions of work, therefore, this response is unhelpful.

In reply, a proponent of the difference principle could maintain that there is no single just outcome and, perhaps, that a range of policies that could arise from a democratic process are all (equally) just.[[41]](#footnote-41) If this were the case, justice as fairness would not abrogate its responsibility as a theory of justice, since all policies (presumably within a given range) qualify as just. This is the third response. The problem with this response is that we should not think of these kinds of disagreements in this way. When two individuals debate a given policy, each thinks that the other is wrong. The present response cannot explain this. On this view, debates about the justness of a given policy are like debates about the best flavour of ice-cream, where both could be correct. This cannot be right.

In summary: even if the difference principle can plausibly identify certain ways in which arrangements and distributions of work can be unjust, it is insufficiently fine-tuned to be able to determine which social institutions we should accept as just. Moreover, it is not clear how we can overcome this index problem in a plausible and principled way. For these reasons, the difference principle fails to supply us with an appealing fairness-based defence of further job market regulation that is consistent with the Liberal Constraint.

IV

In the remainder of this paper, I develop and defend an alternative justification for greater job market regulation. For reasons that will become apparent, I shall call this the *insurance argument*.

The insurance argument has its roots in Dworkin’s resource egalitarianism and, in particular, in his model of fair insurance. Stated in a rough and incomplete way, the model of fair insurance holds that each individual should enjoy the opportunities she would have had, if she had enjoyed access to a fair insurance market.[[42]](#footnote-42) It will help for me briefly to elaborate on three features of this claim that have special significance to our inquiry.

First, the model of fair insurance operates as a response to instances of bad brute luck only, and thus not as a response to good brute luck or bad option luck.[[43]](#footnote-43) The reasons for this are complex, and they do not bear upon my argument in this paper.[[44]](#footnote-44) Accordingly, I shall put them aside. Instead, let me draw attention to the fact that this restriction of the model ensures that it is fairness-based. This is because it therefore identifies the just response to the fact that some individuals have less valuable opportunities than other individuals, through no fault or responsibility of their own.[[45]](#footnote-45)

Second, the model of fair insurance is sensitive to differences between individuals with respect to their *personal resources*. Personal resources are ‘qualities of mind and body that affect people’s success in achieving their plans and projects: physical and mental health, strength and talent’. We can distinguish these from *impersonal resources*, which are ‘parts of the environment that can be owned and transferred: land, raw materials, houses, televisions sets and computers, and various legal rights and interests in these’.[[46]](#footnote-46) We distinguish between personal and impersonal resources at least partly by appeal to an account of prior rights that set the limits of when we are morally permitted to interfere with an individual’s body.[[47]](#footnote-47) Whereas libertarians who affirm a prior right to self-ownership will treat all body parts as personal resources, liberals who deny such a prior right may be willing to treat at least some body parts as impersonal resources.

Again, the justification for this restriction is complex, and it need not concern us here.[[48]](#footnote-48) What is significant is simply that the model of fair insurance is sensitive to differences between individuals with respect to their levels of talent. As a result, this model may claim to govern our response to the inequality that arises when an individual enjoys less valuable opportunities merely in virtue of the fact that her talents are less marketable than others’ talents. The importance of this point for the insurance argument should be obvious.

Third, let me clarify the core conviction that motivates the model of fair insurance. Insurance markets operate by offering protection against risk and, in the case of the model of fair insurance, the risk of suffering disadvantage as a result of the differential impact of brute luck in personal resources. When an individual purchases insurance, she agrees to pay a premium and, in return, she becomes entitled to a corresponding indemnity if the risk that she insures against materialises. The indemnity mitigates or eliminates the disadvantage she would otherwise suffer and so, in effect, the insurance policy offers protection against a certain level of risk.

In order for an insurance market to be *fair*, such that specifies a choice situation whose outcome is necessarily just, it must satisfy three conditions.[[49]](#footnote-49) First, each individual must enjoy an equal opportunity to take out insurance on equal terms. We can model this by assuming both (i) that each individual has an identical sum with which to insure, and (ii) that every insurance firm must offer the same packages on identical terms to every individual. Without this assumption, those with less wealth and those believed to have a greater likelihood of becoming a victim of bad brute luck would find it more costly to take out insurance, and so the insurance market would unfairly disadvantage them. Second, we must also assume (iii) that, though each individual is aware of the average likelihood of any individual becoming a victim of bad brute luck, she is unaware of her own specific likelihood of becoming a victim. Without this assumption, it would be possible for an individual to exploit her epistemic position, and so the insurance firms would soon either go bankrupt or fail to offer much insurance. Finally, we must also assume (iv) that both insurers and insurance firms have (near) perfect information about the costs and effects of different policies. Without this assumption, insurance firms could not accurately determine which offers to make, and insurers could not know which policies best serve their interests.

In allowing each individual’s level of protection against risk to depend upon the premiums that she pays, the model of fair insurance ties each individual’s entitlements to the liabilities that she is willing to bear. This is appealing for reasons that relate directly to the Liberal Constraint. This is because, as Dworkin notes, ‘it allows people to make decisions about the relative importance of various risks for themselves, so that they can tailor their use of their own resources to their own judgments, ambitions, tastes, convictions, and commitments’.[[50]](#footnote-50) As a result, it provides a justification for job market regulation that appeals to reasons that individuals themselves accept.[[51]](#footnote-51) In doing so, it dispenses with the need to defend further interventions in the job market by appeal to the kind of controversial reasons that the Liberal Constraint rules out.

To help concretise what I have said so far, it may help to introduce an example that illustrates the way in which the model of fair insurance identifies the just response to the fact that some individuals have less valuable opportunities than other individuals. To do this, we can consider the following case, discussed by Dworkin:

*The Luck of the Draw:* Imagine a disabling disease that is in no degree either genetic or class biased, and that strikes people randomly but only after the age of forty, and suppose a community in which wealth is distributed fairly and all citizens are below that age. The insurance approach requires the community to offer insurance against contracting the disease, at market rates, either privately through commercial insurers or publicly through a state program, so that citizens can decide for themselves whether to buy such insurance and at what level of coverage.[[52]](#footnote-52)

Each individual may take out a different level of insurance cover. These differences reflect the differences both in attitudes towards risk and in attitudes towards the various states of affairs that they may encounter. Whereas one individual may be willing to gamble by refusing to take out any insurance, another may play safe in order to guarantee protection against suffering a certain level of disadvantage. Similarly, whereas one individual may be indifferent to contracting the disease, and will therefore not take out any insurance, another may be willing to pay costly premiums in order to protect herself against the risk.

It is also worth noting that the model of fair insurance determines not only the *extent* of the level of assistance or risk-protection to which individuals are entitled, but also the *form* that the assistance or risk-protection should take. In particular, the model directs us towards each individual’s own insurance decisions to arbitrate between the various forms that assistance or risk-protection can take. In this respect, the model of fair insurance is more informative than rival models, such as the difference principle, that seek to determine only the extent of assistance or risk-protection.

Of course, neither the real world nor any attractive and feasible world resembles *The Luck of the Draw*. This is because we do not live, and do not wish to live, in a society in which each individual has an identical sum with which to insure, and in which each individual is unaware of her own likelihood of suffering bad brute luck in her personal resources.[[53]](#footnote-53) For these reasons, we can seldom make good use of actual insurance markets. Our alternative is to engage in counterfactual speculation in order to determine the entitlements that an individual would have had, if she had access to a fair insurance market. Often, this kind of individualised speculation will be too epistemically demanding, and it will therefore make sense simply to utilise judgements about the decision that the *average* insurer would have made. Though not ideal in all respects, this approach has certain clear merits. Chief amongst these is the fact that an individual who is subject to the exercise of political power that is justified in this averaged way can take comfort in the knowledge the she is not a victim of arbitrary discrimination, and that there may be no better alternative available.[[54]](#footnote-54)

V

Having outlined the structure of the model of fair insurance, I shall now defend its relevance for theorising about job market regulation. This is the insurance argument. This argument begins with the fact that there is a tight connection between an individual’s talents and her chances of suffering disadvantage: an individual whose talents are less marketable possesses a lesser degree of bargaining power in the job market than an individual whose talents are more marketable. A consequence of this is that she will enjoy her less valuable occupational opportunities than others do. An upshot of this is that it makes sense to appeal to the model of fair insurance in order to theorise about the just response to occupational disadvantage. In an important respect, lacking marketable talents is similar to having a disabling disease. As Dworkin puts it, ‘Though skills are different from handicaps, the difference can be understood as one of degree: we may say that someone who cannot play basketball like Wilt Chamberlain, paint like Piero, or make money like Geneen, suffers from an (especially common) handicap’.[[55]](#footnote-55)

The insurance argument therefore holds that the just response to occupational disadvantage is to regulate the job market to grant each individual the occupational entitlements that she would have had, if she had enjoyed access to a fair insurance market. That is, we should consider the insurance decisions that each individual – or, in this case, the average individual – would take out if fair insurance were available, and then use political power to mimic these decisions. On this basis, we can justify a legal minimum wage, as well as financial transfers to those individuals unable to find employment. Elaborating on this, Dworkin writes:

We can insist that our officials use at least that coverage level as a guide to redistributive programs of different kinds. We might aim to collect from the community, through taxes, an amount equal to the aggregate premium that would have been paid for universal coverage at that level and then distribute, to those who need it, services, goods, or funds that match what that coverage would have provided them in virtue of their bad luck. We would fund unemployment and low wage insurance.[[56]](#footnote-56)

However, the insurance argument has much more wide-reaching implications than this. In particular, it is in principle capable of justifying a much larger range of interventions in the job market. To take an example close to home, let’s consider policies of compulsory retirement. This regulation requires individuals to retire at a given age or level of seniority, and thus (assuming these employees are replaced) this ensures that there are more job opportunities available to younger generations. Plausibly, we can see this policy as the outcome of the model of fair insurance. The policy offers each individual protection against a certain risk of unemployment (the indemnity) in return for being prohibited from being in paid employment beyond a given age or level of seniority (the premium). This policy may be popular amongst those insurers who disvalue unemployment, those insurers who do not disvalue being prohibited from being in paid employment beyond a given age or level of seniority, as well as those insurers who experience some combination of the two.

For the purposes of this paper, I am not interested in whether or not many individuals, including the average individual, would select this policy, were there a fair insurance market. The point of mentioning this example is simply to illustrate the versatility of the model of fair insurance for justifying a wide range of job market regulation. Most specifically, it is noteworthy that the model can justify policies that are not at all concerned with cash transfers. In the present case, the indemnity takes the form of protection against a certain level of risk of unemployment, and the premium takes the form of a requirement to retire at a given point. This conclusion is noteworthy since some commentators mistakenly reject the model of fair insurance partly on the mistaken basis that the model lacks this flexibility.[[57]](#footnote-57)

To conclude this section, let me emphasise two points. First, though I have shown that the insurance argument justifies a wide range of interventions in the job market, I have not proved that it justifies *more extensive* regulation than we witness in many parts of the world. It is difficult to provide a water-tight defence of this more ambitious claim. This is because, to do so, would demand more careful engagement with empirical (and philosophical!) claims than I can manage there. Despite this, I remain optimistic that the insurance argument can play this role. This is because, even though it is difficult to make precise judgments, it is clear enough that existing job markets expose individuals to levels of risk that very many individuals would be strongly motivated to protect themselves against.[[58]](#footnote-58)

Second, it bears repeating (given its centrality to this paper) that the insurance argument is consistent with the Liberal Constraint. This is because it consults individuals’ own attitudes to determine both the extent and kind of justifiable interventions in the job market, and, in doing so, it avoids appeals to the kind of reasons that the Liberal Constraint rules out.

VI

The insurance argument may be thought to be vulnerable to a range of powerful objections. For example, it has been alleged to be insufficiently egalitarian, informationally too demanding, and/or mere window-dressing. In each of these cases, however, the objection is not specific to the insurance argument in defence of greater job market regulation, but instead to the model of fair insurance more generally.[[59]](#footnote-59) I put these objections aside and instead restrict my attention to an objection that seems especially salient to disputes about the job market (even if it too has alleged implications that extend beyond domain).

The objection that I shall now consider focuses on the fact the insurance argument requires us to justify the exercise of political power on the basis of counterfactual speculation about the entitlements that an individual – indeed, the average individual – would have had, if she had access to a fair insurance market. This objection asserts that an individual’s *hypothetical* insurance decision fails to provide an appropriate basis upon which to justify the exercise of political power, since these decisions are merely hypothetical and do involve actual consent. This is the *consent objection*.

An ambitious version of the objection expresses general scepticism about the moral force of hypothetical consent *in all cases*. For reasons that will become obvious, this version of the objection is highly implausible. Instead, I shall consider a more restricted version of the objection, which expresses scepticism about the moral force of hypothetical consent only in the kinds of cases that the insurance argument utilises. On this view, even if hypothetical consent has moral force in some cases, the fact that an individual – or, perhaps, the average individual – *would* have agreed to pay a premium in return for a specified indemnity fails to justify coercing existing individuals without their actual consent.[[60]](#footnote-60)

Certainly, the consent objection supplies us with the resources to object to at least some uses of the model of fair insurance. To see this, we can consider the following case:

*Survival Lottery*: A firm offers individuals the opportunity to buy into a Survival Lottery, whereby, if any two members of the scheme need vital organ transplants in order to survive, a lottery is carried out amongst all of the scheme’s members in order to determine who must provide the two vital organs.[[61]](#footnote-61)

Here, it is implausible to maintain that we can justify coercive vital organ transplants by appeal to the model of fair insurance, even if we knew that a given individual would have bought into the scheme under fair conditions. Put simply, merely hypothetical consent is insufficient in this case.[[62]](#footnote-62) Proponents of the consent objection appeal to cases such as these in order to resist a wide range of interventions in the job market whose justification depends upon the success of the insurance argument.

The consent objection may identify grounds upon which to reject some interventions in the job market, perhaps including ones that are especially intrusive. None the less, the objection is not forceful in a large range of cases, let alone all cases. This is because *Survival Lottery* has a distinguishing feature: it involves violating some *fundamental right*. Very plausibly, this at least partly explains our reaction to this case.[[63]](#footnote-63) Since most instances of job market regulation do not share this property, we therefore cannot straightforwardly appeal to *Survival Lottery* in order to reject the moral force of hypothetical consent in most cases of job market regulation.

We can strengthen this reply by noting that there are a range of everyday examples not involving fundamental rights in which we should be guided by hypothetical consent. For instance, many believe that the doctor of a senile patient should be guided by her patient’s hypothetical consent. Similarly, some believe that a parent’s actions should be guided at least in part by her child’s hypothetical consent.[[64]](#footnote-64) Cases of this kind differ from cases such as *Survival Lottery* in ways that crucially explain the differences in the moral force of hypothetical consent.

Needless to say, this reply to the consent objection makes use of a controversial claim, around which there has emerged considerable dispute. In particular, it relies upon the idea that many interventions in the job market do not in fact violate fundamental rights.[[65]](#footnote-65) Fairly obviously, it is beyond the scope of this paper to resolve this issue. For this reason, I shall have to limit myself to simply registering my support of (rather than defending) this somewhat controversial reply.

To summarise, then, I have not sought fully to dismiss the consent objection, and thus we must leave open the possibility that it will successfully impugn some interventions in the job market. Despite this, I suspect that this will be the case only very rarely, and that the insurance argument is therefore immune from the consent objection in most instances of job market regulation. At the very least, I have shifted the burden of proof onto proponents of the consent objection, who must do more to justify their scepticism about the insurance argument’s reliance on hypothetical consent.

VII

My aim in this paper has been to defend a particular way of theorising about job market regulation – the insurance argument – and to appeal to this argument in order to support much greater regulation of the job market than we witness in many parts of the world. The argument is ambitious partly because I have accepted the Liberal Constraint, which imposes on us the need to exercise restraint when we justify the exercise of political power.

It is significant that I have conducted my inquiry at a quite general level, and thus I have not sought to defend any measure in particular. For example, I have left it open whether we should increase minimum wage, enforce working time directives, or require higher levels of economic democracy. Despite this, it bears emphasising that the insurance argument furnishes us with the resources to make progress with this task. Indeed, this is one of the key ways in which the insurance argument is superior to the Rawlsian approach that I discussed in section III. It is this feature of the insurance argument that makes it so politically, as well as philosophically, attractive.[[66]](#footnote-66)

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   We can contrast this justification with those that defend greater job market regulation by appeal to a concern for self-respect, republican freedom, or exploitation, for example. Each of these kinds of arguments is distinct, and the success or failure of one does not determine the success or failure of any other. [↑](#footnote-ref-1)
2. For an early, but very influential, version of this obection, see Richard Arneson, ‘Meaningful Work and Market Socialism’, *Ethics,* 97 (1987), 517-45. [↑](#footnote-ref-2)
3. This objection has its foundations in John Rawls*, Political Liberalism* (Columbia: Columbia University Press, 1996). [↑](#footnote-ref-3)
4. See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA.: Harvard University Press, 2000), esp. chs 2 and 9. [↑](#footnote-ref-4)
5. For a related version of this objection to the demands of liberal political morality within the context of questions about work, see Russell Muirhead, *Just Work* (Cambridge, MA.: Harvard University Press, 2004), 24. [↑](#footnote-ref-5)
6. For helping me to appreciate the force of this point, I thank Simon Caney. [↑](#footnote-ref-6)
7. Here, I have in mind some of the mistinterpretations present in Elizabeth Anderson, ‘What is the Point of Equality?’, *Ethics*, 109 (1999), 287-337. To be sure, I am aware that this piece is a polemic, and that it may not reflect Anderson’s settled view. None the less, it is worth noting that Anderson has surely done more to promote these misinterpretations than anyone else (even if she does not herself accept them as fully accurate). [↑](#footnote-ref-7)
8. Arneson, ‘Meaningful Work and Market Socialism’, 536-7. It is worth noting that Arneson later rejects this claim. See his ‘Meaningful Work and Market Socialism Revisited’, *Analyse & Kritik,* 31 (2009), 139-51. [↑](#footnote-ref-8)
9. In the remainder of this section, I am strongly influenced by Andrew Williams, ‘Political Constructivism’ (unpublished manuscript). [↑](#footnote-ref-9)
10. This idea plays an important role in Rawls, *Political Liberalism*. Moreover, as Rawls notes, the idea also has an important historical tradition, present in the work of Jean Jacques Rousseau, for example. See John Rawls, ‘The Idea of an Overlapping Consensus’, in Samuel Freeman (ed.), *Collected Papers* (Cambridge, MA.: Harvard University Press, 1999), 426 n. 10; and Joshua Cohen, ‘Reflections on Rousseau: Autonomy and Democracy’, *Philosophy & Public Affairs*, 15 (1986), 275-97. [↑](#footnote-ref-10)
11. Rawls, *Political Liberalism*, 54-8. [↑](#footnote-ref-11)
12. Strictly speaking, liberals need not hold that we ought *always* to sacrifice claim (2) in the pursuit of claims (1) and (3). Rather liberals need hold only that we should prioritise claims (1) and (3) over claim (2) in standard or non-extreme cases. The first view is extreme and highly implausible. For example, see Rawls, *Political Liberalism*, 152; and, for a more general treatment of the issue, Matthew Clayton and David Stevens, ‘When God Commands Disobedience: Political Liberalism and Unreasonable Religions’, *Res Publica*, 20 (2014), 65-84. [↑](#footnote-ref-12)
13. In this vein, Rawls famously writes: ‘Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason’. See Rawls, *Political Liberalism*, 137. [↑](#footnote-ref-13)
14. Andrew Williams, ‘The Alleged Incompleteness of Public Reason’, *Res Publica*, 6 (2000), 199-211 at 201. [↑](#footnote-ref-14)
15. John Rawls, ‘The Idea of Public Reason Revisited’, in Samuel Freeman (ed.), *Collected Papers* (Cambridge, MA.: Harvard University Press, 1999), 579. [↑](#footnote-ref-15)
16. This is what makes the Liberal Constraint a feature of *anti-perfectionist* political morality. For Joseph Raz, we can say that perfectionism ‘is merely a term used to indicate that there is no fundamental principled inhibition on governments acting for any valid moral reason’, and that anti-perfectionism is simply the denial of perfectionism. See Joseph Raz, ‘Facing Up: A Reply’, *Southern California Law Review*, 62 (1989), 1153-235 at 1230. [↑](#footnote-ref-16)
17. Gina Schouten discusses the same worry within the context of a discussion about interventions designed to combat gendered divisions of labour. See Gina Schouten, ‘Is the Gendered Division of Labour a Problem of Distribution?’, in David Sobel, Peter Vallentyne, and Steven Wall (eds), *Oxford Studies in Political Philosophy*, vol. 2 (Oxford: Oxford University Press, 2016). [↑](#footnote-ref-17)
18. This point is repeatedly made in Arneson, ‘Meaningful Work and Market Socialism’. [↑](#footnote-ref-18)
19. John Rawls, *Justice as Fairness: A Restatement*, Erin Kelly (ed.), (Cambridge, MA.: Harvard University Press, 2001). [↑](#footnote-ref-19)
20. For example, see Samuel Arnold, ‘The Difference Principle at Work’, *The Journal of Political Philosophy,* 20 (2012), 94-118; Martin O’Neill, ‘Three Rawlsian Routes Towards Economic Democracy’, *Revue de Philosophie Economique,* 9 (2008), 29-55; and Julie Rose, ‘Money Does Not Guarantee Time: Discretionary Time as a Distinct Object of Distributive Justice’, *Journal of Political Philosophy,* 22 (2014), 438-57. [↑](#footnote-ref-20)
21. Rawls, *Justice as Fairness*, 42. [↑](#footnote-ref-21)
22. There are further conditions on the definition of social primary goods. For example, social primary goods must also be *public*, such that their distribution must be both capable of effective regulation and epistemically accessible. See Rawls*, Political Liberalism*, 182. [↑](#footnote-ref-22)
23. John Rawls, ‘The Priority of Right and Ideas of the Good’, *Philosophy & Public Affairs*, 17 (1988), 251-76 at 256-7. See also Samuel Freeman, *Rawls* (London: Routledge, 2007), 153-4. [↑](#footnote-ref-23)
24. Rawls, *Justice as Fairness*, 58-9. [↑](#footnote-ref-24)
25. John Rawls, *A Theory of Justice: Revised Edition* (Cambridge, MA.: Harvard University Press, 1999), 53 [emphasis added]. [↑](#footnote-ref-25)
26. Arnold, ‘The Difference Principle at Work’, 109. [↑](#footnote-ref-26)
27. Ibid., 108. [↑](#footnote-ref-27)
28. Ibid., 101-3. [↑](#footnote-ref-28)
29. Rose, ‘Money Does Not Guarantee Time’. See also John Rawls, ‘Reply to Alexander and Musgrave’, *The Quarterly Journal of Economics*, 88 (1974), 633-55 at 654; and Rawls, *Justice as Fairness*, 179. [↑](#footnote-ref-29)
30. Rose, ‘Money Does Not Guarantee Time’, 442. [↑](#footnote-ref-30)
31. John Rawls, ‘Social Unity and Primary Goods’, in Samuel Freeman (ed.), *Collected Papers* (Cambridge, MA.: Harvard University Press, 1999). For more general discussion of this claim, see Matthew Clayton and Andrew Williams, ‘Egalitarian Justice and Interpersonal Comparison’, *European Journal of Political Research*, 35 (1999), 445-64 at 459-60. [↑](#footnote-ref-31)
32. For this reply, see John Tomasi, *Free Market Fairness* (Princeton: Princeton University Press, 2012). [↑](#footnote-ref-32)
33. For evidence against the force of this reply, see the case discussed in Arnold, ‘The Difference Principle at Work’, 114. [↑](#footnote-ref-33)
34. Richard Arneson, ‘Primary Goods Reconsidered’, *Noûs*, 24 (1990), 429-54. [↑](#footnote-ref-34)
35. Ronald Dworkin similarly notes that the principle ‘is not sufficiently fine-tuned’ and that there is a ‘degree of arbitrariness in the choice of any description of the worst-off group’. See Dworkin, *Sovereign Virtue*, 113. [↑](#footnote-ref-35)
36. O’Neill, ‘Three Rawlsian Routes Towards Economic Democracy’, 52. [↑](#footnote-ref-36)
37. Arneson, ‘Primary Goods Reconsidered’, 446. [↑](#footnote-ref-37)
38. Rawls concedes that in these cases ‘we admittedly rely upon intuitive estimates. But this cannot be avoided entirely’. See Rawls, *A Theory of Justice*, 80. It is not clear why Rawls believes this to be a satisfactory response. [↑](#footnote-ref-38)
39. O’Neill, ‘Three Rawlsian Routes Towards Economic Democracy’, 52. [↑](#footnote-ref-39)
40. Here, I follow Rawls, *Political Liberalism*, 428. [↑](#footnote-ref-40)
41. I thank Martin O’Neill and Julie Rose for suggesting this response and for pressing me on this issue. [↑](#footnote-ref-41)
42. Dworkin, *Sovereign Virtue*, 73-83. [↑](#footnote-ref-42)
43. For the canonical discussion of the distinction between brute luck and option luck, as well as what makes either good or bad, see ibid., 73-7. [↑](#footnote-ref-43)
44. For a defence of this restriction, see Andrew Williams, ‘Resource Egalitarianism and the Limits to Basic Income’, *Economics and Philosophy*, 15 (1999), 85017 at 103. [↑](#footnote-ref-44)
45. For an analysis of the model’s *egalitarian* credentials, see Andrew Williams, ‘Equality, Ambition, and Insurance’, *Proceedings of the Aristotelian Society*, 78 (2004), 131-50. [↑](#footnote-ref-45)
46. Ronald Dworkin, ‘Foundations of Liberal Equality’, *Tanner Lectures on Human Values* (Salt Lake City: University of Utah, 1991), 3-119 at 37. [↑](#footnote-ref-46)
47. Ronald Dworkin, ‘In Defence of Equality’, *Social Philosophy and Policy*, 1 (1983), 24-40 at 39. [↑](#footnote-ref-47)
48. For discussion of this restriction, see Dworkin*, Sovereign Virtue*, 80. [↑](#footnote-ref-48)
49. Ibid., 77-8. [↑](#footnote-ref-49)
50. Dworkin*, Sovereign Virtue*, 344. [↑](#footnote-ref-50)
51. The feature of resource egalitarianism is emphasised in William Baumol, *Superfairness* (Cambridge, MA.: The MIT Press, 1986), 18; and Matthew Clayton, ‘Liberal Equality and Ethics’, *Ethics*, 113 (2002), 8-22 at 10-11. [↑](#footnote-ref-51)
52. Dworkin, *Sovereign Virtue*, 342. [↑](#footnote-ref-52)
53. Ibid., 77. [↑](#footnote-ref-53)
54. Richard Arneson, ‘Property Rights in Persons’, *Social Philosophy and Policy,* 9 (1992), 201-30 at 207. See also Dworkin, *Sovereign Virtue*, 322. [↑](#footnote-ref-54)
55. Dworkin, *Sovereign Virtue*, 92. [↑](#footnote-ref-55)
56. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA.: Harvard University Press, 2011), 331-40. [↑](#footnote-ref-56)
57. See Colin MacLeod, *Liberalism, Justice, and Markets: A Critique of Liberal Equality* (Oxford: Clarendon, 1998), 105-9; and Andrew Mason, *Levelling the Playing Field: The Idea of Equal Opportunity and Its Place in Egalitarian Thought* (Oxford: Oxford University Press, 2006), 152. [↑](#footnote-ref-57)
58. Let me pre-empt the objection to the insurance argument that holds that the model of fair insurance is vulnerable to the same objection that I levelled at the difference principle – namely, that it is insufficiently fine-tuned to be able to determine which social institutions we should accept as just. This objection fails to hit the mark. This because, though the model of fairness insurance is epistemically demanding, it none the less provides ‘a structure within which a public debate could usefully take place, a structure that both sets the terms of argument and provides limits to the range of answers that any side could in good faith take to be plausible’. In this respect, the model of fair insurance is able to play an important role that the difference principle is not. See Dworkin, *Sovereign Virtue*, 322. [↑](#footnote-ref-58)
59. General objections of this kind to the model of fair insurance are discussed and responded to in Paul Bou-Habib, ‘Parental Subsidies: The Argument from Insurance’, *Politics, Philosophy & Economics*, 12 (2012), 197-216 at 206-7; and Matthew Clayton, *Justice and Legitimacy in Upbringing* (Oxford: Oxford University Press, 2006), 70-5. [↑](#footnote-ref-59)
60. The force of this objection may vary depending upon whether the insurance argument proceeds in an individualised way or by appeal to the decisions of the average insurer. Plausibly, the objection has greater force when we must make use of averaging. [↑](#footnote-ref-60)
61. See John Harris, ‘The Survival Lottery’, *Philosophy*, 50 (1975), 81-7. [↑](#footnote-ref-61)
62. I put aside the separate issue of whether even actual consent can generate a morally binding agreement in this case. [↑](#footnote-ref-62)
63. To see this, we can contrast *Survival Lottery* with a less extreme lottery in which, because eye transplants are cheap and painless, we can conscribe individuals into a lottery whereby its losers must transfer an eye to others who would otherwise be blind. Though there are complications, I believe this lottery may be permissible, and that this verdict is partly explained by the fact that it does not involve violating any fundamental rights. For this case, see Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974), p. 206. [↑](#footnote-ref-63)
64. For example, see Matthew Clayton, ‘The Case Against the Comprehensive Enrolment of Children’, *Journal of Political Philosophy*, 20 (2012), 353-64. [↑](#footnote-ref-64)
65. Much of this engages with, and responds to, Tomasi, *Free Market Fairness*. [↑](#footnote-ref-65)
66. A version of this paper was presented at a workshop on ‘Justice and Work’ at the University of Manchester, and I thank the participants there for their insights and questions. Thanks also go to Clare Burgum, Simon Caney, Matthew Clayton, Adam Swift, Andrew Walton, and Andrew Williams. [↑](#footnote-ref-66)