

## Institutions in Theories of Justice

CPSA, 2008

Neil Hibbert

### Introduction

Institutions hold a central place in theories of social justice. As Rawls famously argues, the basic institutional structure of society is the *subject* of social justice, and further that social justice is the first virtue institutions (1999: 3-6). Rawls' conception of the status of institutions in a theory of justice is based on a view of society that consists of a set of institutions designed for a range of purposes that profoundly shapes our life prospects, that is involuntary, and that is marked by levels of consensus and conflict. The aim of social justice in the Rawlsian view is to reconcile individuals to the involuntary condition they are born into and to bring legitimacy to society's institutions. For Rawls, then, questions of social justice arise in a context of social cooperation and are distinct from justice between persons 'not bound together by any society or collaborative arrangement' (Taylor: 35). With this cooperative pre-condition, social justice in the Rawlsian view is uniquely 'political'.

This 'political' view of institutions as the subject of justice, and the related set of considerations that goes along with it on the nature of social justice, is not one that is widely held by political theorists. In many cases, the rights and obligations of social justice are theorized as pre-existing a particular institutional structure. Rather than being unique to the relationship between citizens and institutions, social justice is more often theorized as having pre-political roots in either moral conceptions of persons and/or the ethical relationships that are constitutive of different types of non-political relationships. Social cooperation, in this view, is not a pre-condition for social justice but itself is an attempt to collectively realize its principles. In this view, institutions are not taken as a pre-condition of social justice but as *mechanisms* by which prior obligations can be collectively realized. This conception of institutions sits at the foundation of theoretical debates concerning the scope of justice and the nature of associative duties, as well as on the nature of political obligation itself.

This paper seeks to identify some of the key differences between the mechanism and the subject view of institutions, and their implications. It further aims to outline a defence of the subject view and of the connection between justice and political legitimacy, while identifying some problems with the mechanism view of institutions. It also considers a third view of institutions – what is called the pluralist view – that argues against theorizing justice as the first virtue of institutions in favour of a broader range of non-ordered egalitarian values (an 'egalitarian ethos') that institutions should promote. It argues against de-prioritizing justice because of its connection to political legitimacy and seeks to show that adopting and developing the political role of social justice in the subject view of institutions, and its relationship to democratic forms of decision-making, can satisfy criticisms of prioritizing justice in institutional formation and policy design.

## Institutions as Mechanisms of Justice

Theorizing institutions as mechanisms of social justice requires a pre-institutional, or pre-political, conception of the demands of social justice as a property of the relationship between persons, and of the nature and scope of the obligations persons hold in realizing its principles. With this conception in place, the political task is to select the proper institutional mechanisms for implementing the requirements of justice. Social justice is in this regard a goal, something that is desirable for its own sake (Pogge, 2000), and which functions as a principle of institutional justification. Justice makes positive demands, and institutions are justified insofar as they work towards realizing these demands.

The mechanism view of institutions informs a range of related approaches to theorizing justice, which conceptualize institutions as a sort of collectivization of other types of pre-political obligations and entitlements. One area where it is particularly evident is in questions over the nature of associative duties. Take, for instance, the disagreements between ethical particularists (say, liberal nationalists) and ethical universalists, in their respective searches for foundational duties, and their assessment of the permissibility of special ties. Despite varying degrees of scope, the underlying assumption is that social justice is founded on, and its institutions are justified as, collective realizations of the obligations owed between persons. In the spectrum spanning particularists and universalists, the underlying belief is that the duties that are in large part constitutive of relations between persons are the foundations of justice, and institutions are justified in relation to these obligations, that is as mechanisms for realizing prior obligations of justice.

In general there are two types of liberal nationalists, what might be labeled instrumental and ethical nationalists. Instrumental nationalists advance no necessary position on the nature of institutions. Instead, they more strategically point to the motivational virtues of national political communities for supporting just institutions (Kymlicka: 252-58). In this regard, they need not be interpreted as suggesting that justice itself uniquely springs from the relationship of compatriots, but rather that a sense of shared nationality can provide the political solidarity required to support just institutions.

Ethical nationalists, on the other hand, do make this case. The type of obligations that give rise to social justice are those uniquely found in the relationship between ethically situated persons. Miller, for example, theorizes nations as ‘ethical communities’, which possess ‘rationally defensible special obligations’. The possession of specific ‘rights and obligations of nationality’, according to Miller, ‘invokes a different conception of the ethical universe, in which agents are already encumbered with a variety of ties and commitments’ (1995: 50). And, it is the existence of relational, pre-political ‘ties and commitments’ that legitimate institutions. As an explanatory theory it conceptualizes the welfare state as the institutionalization of the special duties that are constitutive of the relationship between co-nationals.

Miller’s view on the welfare state combines the position that redistributive institutions are justified and designed for realizing obligations that are rooted in prior ethical relationships, such that justice is rooted in natural duties between situated persons, with the further claim that the

obligations between persons that give rise to social justice are unique to the relationship between co-nationals. Moreover, it further posits that communities that are not grounded on the natural duties between co-nationals cannot sustain redistribution. Societies lacking a 'communitarian background', and based instead on 'pure' citizenship, will only be able to support minimal redistribution from self-interested forms of insurance (1995: 71-2).

This position is confronted with the historical fact that many modern national identities did not precede the institutionalization of nations and the development of citizenship. In many cases, the sequencing was reversed such that nations developed on the foundation of common institutions (i.e., citizenship), which had as one of their explicit purposes, the function of nation-building (e.g., Banting; Kuhnle, et al eds.; Rimlinger). According to Weale, '...the immediate occasion for the development of welfare states was not a concern with equality but, rather, with a different value which we might term social solidarity' (477). It is dubious, then, to advance the explanatory claim that the specific egalitarian duties and solidarity thought to be unique to nationality, understood pre-politically, gave rise to the institutions of existing welfare states, since in many instances social policy and citizenship has been constitutive of shared a national identity (Marshall).

Beyond empirical issues of sequence in the history of states and national-identity, the consistency between this account of obligations and institutions, and a *liberal* theory of nationality is questionable. That is, a pre-political identity of this sort cannot coherently give rise to a liberal national citizenship. For Greenfeld, liberal, or 'civic' nationalism' is 'identical with citizenship' and so 'is at least in principle open and voluntaristic' (11). A conception of a pre-institutional nationality does not satisfy the principles of openness and voluntarism, for there exist no grounds on which one can go from being a non-member to a member. Membership is simply a matter of fact. A conception of nationality that begins life as shared citizenship is, however, conceptually open and so liberal in this basic sense.

If we accept the view that citizenship is the foundation of liberal nationalism, then we cannot coherently appeal to pre-political ties as the basis of legitimacy. As such, the welfare state should not be theorized as a set of institutional mechanisms for performing the antecedent moral duties of shared nationality. For liberal nations are unintelligible prior to their institutionalization.

So, *if* institutions come from, or are the collectivization of, pre-political obligations, these must be considered to be general or universal obligations between persons, rather than co-nationals. Of course making this move presents substantial justificatory hurdles in defending the institutional development of associative duties that have accompanied the formation of political communities. Because of the vast inequality between states, national welfare states are extremely unsatisfactory mechanisms for realizing the entitlements and obligations of all persons, and so could scarcely be justified as such.

Nevertheless, certain universalists – that is, those who deny the existence of 'independent non-derivative principles with a restricted scope' (Miller, 1998: 167) – defend the political creation of associative obligations, specifically national systems of distribution. A common defence here is

an argument made from efficiency, whereby we ‘assign responsibility’ to specific institutions for carrying out certain obligations, since if we all were to try at the same time we would produce sub-optimal results. According to Nussbaum we can, and should, go from cosmopolitan attachments and duties to localized responsibilities because things generally work better if, for example, we give more weight to our children rather than others, and if we give more weight the needs of our fellow citizens than to all persons: ‘...politics, like childcare, will be poorly done if each thinks herself equally responsible for all’ (13). Thus, particularist institutions are justified as mechanisms designed to more easily realize prior, universal, obligations.

A similar view is expressed by Goodin, according to whom, ‘there are at root, no distinct special duties, only general ones...the duties that states have *vis a vis* their own citizens are not in any sense special...they are merely the general duties that everyone has toward everyone else worldwide’ (679, 681). Like Nussbaum, though substituting lifeguards for parents, Goodin contends that from efficiency concerns we ‘pick’ nation-states onto which we ‘devolve’ general duties thereby creating derivative special duties. National welfare states are mechanisms by which the universal obligations between persons are best realized.

This view improves upon some of the noted shortcomings of the ethical-nationality approach by presenting a view of liberal states in which citizenship precedes, and is constitutive of, nationality. In particular, it accords with the voluntarism and openness of a liberal nationalism, such that citizenship precedes nationality. In this regard, it is consistent with the view that a liberal nation begins life as the institutionalization of rights and obligations, and not before as a shared pre-political identity in which political rights and obligations are ultimately embedded.

Despite making improvements on some of the shortcomings of the nationality approach, the move of interpreting specific institutional locations as a set of mechanisms designed to efficiently realize pre-political universal obligations faces significant difficulties, that are themselves rooted in the view of institutions as mechanisms for realizing some sort of prior obligations.

The modern welfare state is a very complex and comprehensive set of institutions, which covers much of the range of socioeconomic life, from birth to death (or, ‘the cradle to the grave’). Attributing the types of obligations between citizens in these political communities to pre-political entitlements is irreconcilable with the comprehensiveness of modern welfare states. Because the welfare state provides the resources for meeting such a wide array of contextual and evolving needs and interests, the obligations citizens hold in supporting institutions of this sort cannot be straightforwardly derived from a conception of what we owe each other in the absence of institutions. The rights and obligations that are constitutive of citizenship in the advanced welfare states cannot be understood apart from their political-functional development in producing and providing legitimacy to processes of social reproduction and state formation. Thus, the complex structure of the rights and duties of citizenship in advanced welfare regimes cannot be coherently theorized as the ‘assignment’ of general duties that are owed between persons. They should, rather, be theorized as endogenously developing in the formation of these regimes. Doing so, however, calls into question the coherence of theorizing institutions as mechanisms of social justice, since it is in very large part institutionally created and defined resources, needs and interests that the welfare state produces and addresses.

The disconnect between how we can conceive of what might be termed the natural obligations that exist between persons in a pre-institutional, pre-political setting, and the obligations of citizens in a developed political society to meet the institutionally defined needs of fellow citizens casts more general doubt on the *monistic* approach to political theory, of which the associative debate is one instance. For monists, the obligations of social justice emerge from moral obligations between persons – these are the ‘fundamental principles that give rise to derivative political principles’ (Murphy: 263). Further, these fundamental principles are in place before institutional relationships, and are owed with or without institutions.

A natural or philosophical conception of rights in pre-political, pre-institutional world does not easily translate into either a conception of citizenship rights, or a more expansionist functional conception of human rights. A pre-institutional conception of human rights, and the obligations they give rise to, would presumably be thin and connected to the inviolability of persons. It would be thin in this regard because many of the objects of rights-claims in a political society would not exist, so this conception cannot make sense of the majority of rights-claims in political society. The meaning of justice is strained when it is used to compel the production of benefits – social cooperation is not motivationally rooted in justice.

The inequalities and injustices that are the subject of contestation and rights-claims in political forums are ‘institution-specific’; social justice requires a concept of social injustice. To satisfactorily address institution-based injustices we must move beyond the natural or philosophical conception of human and citizenship rights to a functional conception, which responds to specific political processes (Beitz). But in making this move, institutions in the first place cannot be coherently seen as mechanisms of justice, since they are causing the relevant injustice. Institutions are created to realize a host of goals that have to do with coordination, state-building, and social reproduction; few are created for justice, and no society has emerged for the purpose of justice. It is patterns of the distribution of rights, opportunities and burdens in the production and allotment of cooperative gains that social justice interrogates. In this regard, institutions are the subject of social justice. In a secondary sense, once the principles of justice have identified unfair inequalities, positive reformist steps can be taken, whereby institutions are mechanisms for realizing justice, or to reform unjust structures. But making these types of evaluations and reform proposals depends on a prior account of the subject.

### Institutions as the Subject of Justice

In the subject view, institutions are theorized as mechanisms designed to secure the production of cooperative gains (Rawls, 1999: 4; Heath: 313). Social cooperation, and the creation of institutions, is not motivated by social justice but rather by the more basic motivation of improvement in general well-being. Institutions produce numerous benefits that we cannot achieve on our own and consensus can be achieved on overall improvements. Institutions are thus mechanisms for securing a wide range of cooperative benefits that are in the interests of all. The basic motivation behind social cooperation is efficiency, such that society can be characterized as a system for mutual advantage.

This characterization of society however does not include the creation of justice. Through political agency, and the development of citizenship, justice has developed in certain societies as a principle of legitimacy and concerns social inequality. Justice is the extension of fair reciprocity to disadvantaged members that allows for the acceptance of inequality.

The capacity of institutions to successfully function as mechanisms for producing valuable cooperative functions, and to provide advantages to members, depends in large part on the attitudes of members regarding their institutions. To be efficacious, institutions must be seen as legitimate. While legitimacy comes in many forms (Weber: 79), in regimes that are self-justified as egalitarian, legitimacy rests on justice (in addition to the ongoing production of cooperative benefits). With legitimacy, institutions that do not accord perfectly with one's sense of justice or concept of the good are still accepted and complied with, and change is pursued within consolidated democratic forums.

Following Hurrell, legitimacy rests between 'purely' self-interested support and coerced compliance (16). Legitimate institutions are supported from moral reasons and possess a degree of acceptance that is independent of straightforward calculations of self-interest and successful coercion. Legitimacy is needed due to the limits of self-interested support (society consists of disagreement, so not all will find any specific institutional form to be in their interests) and coercion (the state cannot always be present, and social cooperation depends on informal modes of voluntary compliance and trust between members). Legitimacy performs the valuable social function of bringing stability and efficacy to the institutional mechanisms of cooperation (Buchanan and Keohane: 408).

The legitimacy of institutions is undermined by inequality in the distributive patterns of the burdens and benefits of social cooperation. Structurally, these inequalities are objective social positions that persons are born into, which 'have different expectations of life determined, in part, by the political system as well as by economic and social circumstances' (Rawls, 1999: 7). The egalitarian state faces the legitimacy requirement of reconciling these inequalities with the principle of equal respect that is inherent in the status citizenship – a person is only a citizen if her institutions treat her interests with equal respect as those of others (Waldron: 303). In this regard, justice is a pre-condition of equal citizenship; politically, regulating institutional formation by principles of justice makes an imposed institutional structure acceptable to those subject to it by equally accounting for their interests, moving society closer to the ideal of voluntarism (Nagel: 36).

In treating institutions as the subject of social justice, justice itself has a specific political function and is valued for reasons other than its own good. In the subject view, the political role of social justice is to bring legitimacy to institutions. However, in assigning this political role to justice, it is important to note that legitimacy should not be fully collapsed into justice.

No egalitarian state really comes close to satisfying the demands of a fully worked out theory of justice, and yet they prove stable in a way that reflects acceptance and legitimacy. In this regard, citizens have accepted the responsibility to adjust their expectations in light of the reasonable constraints on realizing justice, indicating space between justice and legitimacy, such that it is

possible to have unjust though legitimacy institutions.

The most basic constraint on realizing an ideal theory of justice in a political society is the fact of disagreement, of both moral and a self-interested kinds, that characterizes free and democratic societies, as well as political participation, mobilization and contestation in these societies. A theory of justice includes democratic rights, and so must account for the open-ended outcomes of democratic procedures in order to respect their role in providing legitimacy. This is so for different conceptions of democracy. In a deliberative conception (Gutmann and Thompson), citizens might agree on some end of social policy, say reducing poverty. However, it is very likely they will disagree on the best type of policy to achieve this goal (e.g., extending markets versus public provision). Democratic decision-making must allow for the implementation of different policy forms when the policy goal is widely shared, and an account of legitimacy must accommodate limited institutional capacity.

However, most conflicts in politics do not consist in deliberative disagreements but of the advancement of more particularistic interests. And it is very dubious to anticipate that increasingly constrained modes of deliberation will effectively diminish this sort of disagreement and conflict; as Shapiro contends, ‘deliberation attends too little to the degree to which moral disagreements in politics are shaped by differences of interest and power’ (29).

This should not be entirely lamented. Most of the historic advancements towards social justice have been the result of disadvantaged social groups pursuing their interests, both democratically and through civil disobedience. Nevertheless, in competitive or aggregate conception of democracy (e.g., Schumpeter) democratic conflict is rooted in differences in immediate, position-based interests of this sort, which does prevent a straightforward march to justice. In both deliberative and competitive conceptions of democracy, theorizing social justice as performing the social function of bringing legitimacy to institutions (in part through the principal of reciprocity of fair democratic procedures) illuminates how a theory of justice imposes procedural limits on pursuit of various of its own demands.

Because of disagreement, and other barriers to justice, conflating justice and legitimacy ‘would thwart the eminently reasonable goal of securing coordinated support for valuable institutions on the basis of moral reasons’ (Buchanan and Keohane: 412). And yet some degree of justice is required for citizens to accept social inequalities, beginning with the demand of formal equality and gradually including more substantive aspects of entitlement. Given the foundational and aspirational elements of the politics of social justice, how might we characterize the connections between justice and legitimacy in the subject view, short of full conflation given the self-imposed limits on the realization of a theory of justice?

In specifying the relationship between justice and legitimacy, I think a promising approach is to theorize justice as functioning to create a dynamic ‘range of legitimacy’ that is regulative of institutional formation and policy design (Rawls, 1996: 428). The range of legitimacy, as established by justice, guides policy formation and institutional design, while stopping short of providing exact policy prescriptions in all areas (only ruling out some options and indirectly weighing in favour of others). The range of legitimacy consists of both procedural and

substantive principles of justice (428-29), and develops both constitutionally and politically.

Linking social justice to the legitimacy of egalitarian regimes influences how its demands, and the limits to its pursuit, should be theorized. Because institutions are involuntary, the primary role of social justice is an evaluative one. In its role in establishing the range of legitimacy, justice begins by ruling out certain forms of inequality. Prior to making specific institutional demands, justice addresses inequalities and determines which are legitimate. A theory of social justice first tells us how institutions cannot function and identifies impermissible sorts of treatment and inequality (Pogge, 1989: 213). This establishes the negative dimensions of the range of legitimacy; that is, what is not within the range.

Few institutions have justice as their founding purpose but have it imposed on them through the exercise of political agency. Historical advances made towards social justice in political societies have proceeded as processes of removing types of inequality from the range of legitimacy that were once tolerated. Similarly, legitimacy does not pertain to the origins of states but to ongoing processes and structures of distribution (Copp). Institutions are created for a host of functional reasons, particularly the production of cooperative benefits and to meet the requirements of stable social reproduction. Justice concerns patterns of the distribution of the burdens and benefits of social cooperation. These patterns, what can be called social classes, are the institutional subject of social justice.

The view of politics in the subject and mechanism view is quite distinct. In the mechanism-understanding of institutions, politics consists of administering the implementation of a pre-political conception of justice. This differs from the view of legitimacy being advanced as central to the subject view, in which social justice is part of making an imposed institutional structure acceptable to those connected by it in a political relationship. It suggests against a pre-political view of justice because the demands of justice require institutionally determined inequality. There are no natural inequalities that can be construed as unjust. There are only natural differences that are mediated into social inequality by institutions (Jacobs). Mitigating the effects of institutional mediation of morally arbitrary natural differences (as well as social ones) on outcomes in the distribution of social resources is a specifically political function of social justice.

Prior to the presence of cooperative gains and burdens, and specific modes of their production and distribution, there is not a question of social justice. Social justice is a virtue of institutions, and specifically of the relationship between citizens and institutions. Showing equal respect to the interests of citizens is the unique requirement of the state; equality, as Dworkin says, is the sovereign virtue (1). The political obligations of individuals are those of citizenship, and 'the content of just institutions must be defined before the requirements for individuals can be set out' (Rawls, 1999: 95). Thus, social justice does not concern what we owe to one another (as realized through our institutions), but what is owed to us as citizens by the shared institutions which bind us in that relationship.

Though the historical motivation behind institutions is plural, justice can be imposed on ongoing institutional formation in a political community that is legitimated by equality of citizenship.



Justice in this regard is reformist. So in a secondary sense, institutions do function as mechanisms of justice, that is, as mechanisms of reform. Of course, political reform will only come after identifying unfairness in specific distributions of burdens and benefits, and policy changes must stay within the range of legitimacy.

For ‘monistic’ theories defending the mechanism view of institutions it is ‘implausible’ that the end of social justice is ‘legitimate governance’ (Murphy: 277). According to Cohen, it is ‘implausible that the only point of distributive justice, the only reason for avoiding distributive injustice, is that distributive justice implies political tyranny’ (2000: 165). This is likely the case for the ‘egalitarian’, materially understood in the goal conception of justice. However, egalitarianism should be considered more broadly in its relation to justice, as stemming from the requirement of equal respect. Murphy asks rhetorically that if distributive equality (in his case the principle of ‘weighted beneficence’) is the ‘underlying concern that produces a theory of justice, why would people to be directly concerned’ with it? But material equality of some sort is not the underlying aim of social justice – legitimacy is. When the demands of justice are expanded beyond material equality to include the distribution of non-material entitlements and freedoms, the monistic rooting of the demands of social justice in a pre-political conception of moral obligations loses its coherence. The basic liberties are political in nature and are unintelligible in a pre-institutional world. They concern how we are treated by institutions – what they tolerate and what they prohibit.

The final section considers the view of the relationship between institutions and justice that de-prioritizes justice as the first virtue of institutions in favour of a looser cluster of non-prioritized institutional values. It tries to show that developing the subject view of institutions, and the related idea of the range of legitimacy, reconciles the priority of justice with other societal aims and a wide-ranging scope of democratic decision making.

### Pluralism

Generally, in both the mechanism and subject view of institutions, social justice is taken as the first virtue of institutions. In the mechanism view, justifying institutions proceeds by demonstrating how institutions realize pre-political obligations. In the subject view, justice is the legitimacy demand of institutions – institutions can pursue a wide range of ends and take a number of different forms, so long as they satisfy the demands of justice.

The third conception of the relationship between institutions and social justice seeks to deny the position that justice is the first virtue of institutions. For these theorists, egalitarianism consists of a range of non-prioritized values that bear on institutions, and which have no necessary priority, and so it is sometimes permissible and desirable to create unjust institutions to realize other values (Wolff).

Often arguments of this type develop from considerations of policy implications, and specifically from what are perceived to be the absurd or undesirable policy implications of a theory of justice. If following a (correct) theory of social justice sometimes leads to unfeasible or undesirable policies, we should de-prioritize justice itself.

Arguments of this sort have been directed at luck egalitarianism (Dworkin; Cohen, 1989), and its interpretation of the demands of justice (e.g., Anderson; Scheffler; Wolff). Institutionalizing luck egalitarianism, it is argued, would violate other important egalitarian values, specifically self-respect (which is undermined when a person making an entitlement-claim to income support must show she is poorly-off not because of some circumstance but because she lacks the capacities required to achieve self-reliance). Given conflicts between egalitarian values (e.g., respect and fairness) of this type, we must choose between values, and in doing so appeal to broader societal questions rather than straightforward questions of distributive justice. And sometimes, we should choose certain values, other than justice, to prioritize in institutional design, in which cases justice would not be the first virtue of institutions.

This is, in my view, an unacceptable move given what I take to be the important connections between justice and legitimacy. Equal respect for the interests of citizens is the legitimacy requirement of egalitarian states; citizens are treated with equal respect when their institutions are regulated by principles of justice; an unjust institution fails to treat some citizens with equal respect and so are illegitimate in this regard; and, institutions that lack legitimacy and broad acceptance will be unable to perform their social functions. Thus, institutions can have more than one virtue (or end), however the pursuit of various ends must not violate justice.

There are two possible ways to argue against the pluralist criticism of the priority of justice. One way would be to adjust the theory of justice that is in question in light of its undesirable institutional implications. To show that implementing luck egalitarianism would severely undermine the self-respect of the poorly-off, would be to cast doubt on it as a good theory of social justice. We might also re-work some of its basic commitments, particularly the view that to redistribute unconditionally fails to show equal respect to contributors. In other words, we could move (back) in the direction of Rawls's theory of justice, which includes self-respect as a primary good, and which permits unconditional redistribution in the specific sense of entitlement resting only on class position without reference to the choice/circumstance distinction.

But reworking the demands of any one theory of justice only moves the ball down the field, rather than eliminating the problem, as seen in the range of similar pluralist criticisms directed at Rawls' theory of justice. So the second response to the pluralist criticism of taking justice to be the first virtue of institutions is to more clearly articulate and defend a position on the political role of social justice and the range of legitimacy that addresses pluralist concerns. I think developing the subject view of institutions in theories of justice goes a long way in doing so. I will outline this approach in relation to one of Colin Farrelly's recent arguments against the serially ordered nature of Rawls' theory of justice that moves in the direction of de-prioritizing justice towards a plurality of values, based on institutional considerations (Farrelly). It is maintained that theorizing institutions as the subject of social justice, and relatedly social justice as politically functioning to provide a range of legitimacy to institutional formation and policy design, helps make sense of both ordering principles of justice and of their relation to policy-making and democratic decision-making.

Rawls' ordering of the principles of justice reflects his concern of legitimacy, and the role of justice in an egalitarian theory of the state. Equality of formal entitlement to the basic liberties is

a pre-condition of citizenship, which moves society from stable domination to ‘stability for the right reasons’ – viz., legitimacy (Rawls, 1996: 391-2). These liberties are both procedural and substantive, and constitute the baseline of the egalitarian range of legitimacy – certain forms of inequality are ruled out. Without formal equality, there is no citizenship; thus to maintain citizenship, justice is the first virtue of institutions.

As mentioned, this is not to say that justice and legitimacy are one in the same, or that institutions cannot pursue a range of non-justice related goals, which a political community can decide for itself democratically. Farrelly, however, argues that Rawls’ serially ordered principles of justice work against democratic-decision making of this sort by binding a community’s scarce resources to the pursuit of the basic liberties at the expense of other ends; ‘satisfying the basic liberties principle...could be a never-ending aim’ (852; also Van Parijs). Moving in a pluralistic direction will unbind the democratic community and allow for prioritizing values and making trade-offs between them.

However, institutionally creating a pre-determined conception of the basic liberties is not a demand of justice. The presence of social spaces of freedom and security are benefits of social cooperation. Political communities decide for themselves what type of benefits they seek to secure, and go about designing institutions for this purpose. Justice enters the scene in evaluative considerations of modes of benefit production (e.g., restricting forced labour) and in questions of fairness in the distribution of cooperative gains. Justice does not bind a community to a pre-conceived conception of liberties or mandate expenditures – for example, a political community can decide how much of its resources it should invest in a police force, and justice does not compel a certain amount. What justice does require is that the distribution of security across society is justifiable to equal citizens. Justice does not compel the production of cooperative benefits (such as security), and indeed questions of justice are not raised prior to their production.

Thus, while Farrelly is right to hold that the supposedly negative basic liberties have large costs (and so are redistributive and require egalitarian justification), the fact that justice compels that these liberties are to be distributed equally does not compel a specific level of expenditure on them. The presence of whatever amount and type of cooperative benefit a community sets to ensure is the subject of justice. It is not the case, then, that prioritizing (a serially ordered conception of) justice ‘will severely constrain the public funds available to promote other laudable aims’ (854). The principle of priority does not apply to expenditure levels and only holds that lower-prioritized principles of justice cannot be realized through violating higher-prioritized ones; for example, equal opportunity or the difference principle cannot be secured through denying the basic liberties of some.

In the view of justice being advanced, in which institutions are its subject and legitimacy is its aim, justice has a circumscribed role in political development. It does not come in before democratic processes and constrain democratic deliberation by identifying a set of mandated goals. As Rawls says, a theory of justice is not meant to provide the aims and forms of policy-making. Justice, rather, provides legitimacy to the institutions of a political community. A theory of justice does not tell us how much we should spend on, for example, health care and only comes in once we’ve decided democratically how much of society’s resources will be

directed to health care in order to ensure that its distribution is fair.

Thus, we can consistently maintain that social justice is the first virtue of institutions without encountering the dilemmas of a strict or direct connection between its principles and democratic politics. Theorizing institutions as the subject, rather than as mechanisms, of justice allows ample space for a community to be self-governing and to determine which type of, and how much, collective benefits it should produce through its institutions. Once these institutions are in place, justice plays an evaluative role and offers guidance in institutional reform to secure legitimacy.

### Conclusion

This paper has attempted to identify different conceptions of institutions in approaches to theorizing social justice. It sought to defend a conception of institutions as the subject of justice against mechanism and pluralist views and objections. In doing so, it identified a political role for social justice in bringing political legitimacy to institutions that is reconciled with democratic self-governance.

Adopting the subject view of institutions helps to clarify some of the questions concerning the nature of associative duties that undergird questions of the scope of justice. In arguing that social cooperation is a pre-condition for social justice, the subject view helps to clarify debates concerning global justice. It explains why justice has thus far been largely constrained to nation-states, but also indicates prospects for identifying the subject of transnational justice, as the institutions of global governance are consolidated. Justice in the subject view is not bound by any particular form of political organization, but can take hold in different sites of governance when their legitimacy is connected to the status and expectations of citizenship. The challenge of global justice in this view is, then, to extend citizenship to transnational levels of governance, such that their legitimacy comes to overlap with egalitarian principles. Global justice itself however is offered a toe-hold by the development of institutions of global governance, and the history of justice in the nation-state offers a 'usable past' (Morrison) for theorizing and realizing justice beyond its boundaries.

## Works Cited

- Anderson, Elizabeth (1999). 'What is the Point of Equality?' *Ethics*, 99.
- Banting, Keith (1995). 'The Welfare State as Statecraft', in S. Liebfried and P. Pierson eds., *European Social Policy*, Washington: Brookings Institute.
- Beitz, Charles (2003). 'What do Human Rights Mean?' *Daedalus*, 132.
- Buchanan, Allen and Robert Keohane (2006). 'The Legitimacy of Global Governance Institutions', *Ethics and International Affairs*, 20.
- Cohen, G. A. (1989). 'On the Currency of Egalitarian Justice', *Ethics*, 99.
- Cohen, G.A. (2000). *If You're an Egalitarian how Come your so Rich?* Cambridge: Harvard University Press.
- Copp, David (1999). 'The Idea of a Legitimate State', *Philosophy and Public Affairs*, 28.
- Dworkin, Ronald (2000). *Sovereign Virtue*, Cambridge: Harvard University Press.
- Farrelly, Colin (2007). 'Justice in Ideal Theory: a Refutation', *Political Studies*, 55.
- Goodin, Robert (1988). 'What is so Special about our Fellow Countrymen?' *Ethics*, 98.
- Greenfeld, Liah (1992). *Nationalism: Five Roads to Modernity*, Cambridge: Harvard University Press.
- Gutmann, Amy and Dennis Thompson (1996). *Democracy and Disagreement*, Cambridge: Harvard University Press.
- Heath, Joseph (2006). 'The Benefits of Cooperation' *Philosophy and Public Affairs*, 34.
- Hurrell, Andrew (2005). 'Legitimacy and the Use of Force: Can the Circle be Squared?' *Review of International Studies*, 31.
- Jacobs, Lesley (2004). *Pursuing Equal Opportunities*, Cambridge: Cambridge University Press.
- Kuhnle, Stein et al eds. (1999). *State Formation, Nation-Building and Mass Politics in Europe*, Oxford: Oxford University Press.
- Kymlicka, Will (2002). *Contemporary Political Philosophy*, Oxford: Oxford University Press.
- Marshall, T.H. (1964). *Class, Citizenship and Social Development*, New York: Double Day and Co.
- Miller, David (1995). *On Nationality*. Oxford: Oxford University Press.
- Miller, David (1998). 'The Limits of Cosmopolitan Justice', in D. Mapel and T. Nardin eds., *International Society: Diverse Ethical Perspective*, Princeton: Princeton University Press.
- Morrison, Bruce (2003). 'Transnational Democracy: the Pursuit of a Usable Past', in B. Morrison ed., *Transnational Democracy in Critical and Comparative Perspective*, Burlington: Ashgate.
- Murphy, Liam (1998). 'Institutions and the Demands of Justice', *Philosophy and Public Affairs*, 27.
- Nagel, Thomas (1991). *Equality and Partiality*, Oxford: Oxford University Press.
- Nussbaum, Martha (1996). 'Patriotism and Cosmopolitanism', in J. Cohen ed., *For Love of Country*, Boston: Beacon Press.
- Pogge, Thomas (1989). *Realizing Rawls*,. New York: Cornell University Press.
- Pogge, Thomas (2000). 'On the Site of Distributive Justice: Reflections on Cohen and Rawls', *Philosophy and Public Affairs*, 29.
- Rawls, John (1996). *Political Liberalism*, New York: Columbia University Press.
- Rawls, John (1999). *A Theory of Justice* (revised edition), Cambridge: Harvard University Press.

- Rimlinger, Gaston (1971). *Welfare Policy and Industrialization in Europe, America and Russia*, New York: Wiley and Sons.
- Shapiro, Ian (1999). 'Enough of Deliberation: Politics is About Interests and Power', in S. Macedo ed. *Deliberative Politics*, Oxford: Oxford University Press.
- Scheffler, Samuel (2003). 'What is Egalitarianism?' *Philosophy and Public Affairs*, 31.
- Schumpeter, Joseph (1950). *Capitalism, Socialism and Democracy*, New York: Harper and Row.
- Taylor, Charles (1986). 'The Nature and Scope of Distributive Justice', in F. Luchash ed. *Justice and Equality Here and Now*, New York: Cornell University Press.
- Van Parijs, Philippe (2003). 'Difference Principles', in S. Freeman ed., *The Cambridge Companion to Rawls*, Cambridge: Cambridge University Press.
- Waldron, Jeremy (1993). 'Social Citizenship and the Defence of the Welfare State', in *Liberal Rights*, Cambridge: Cambridge University Press.
- Weale, Albert (1990). 'Equality, Social Solidarity and the Welfare State', *Ethics*, 100.
- Weber, Max (1948). 'Politics as Vocation', in H. Gerth and C. Mills eds., *From Max Weber*, London: Routledge.
- Wolff, Jonathan (1998). 'Fairness, Respect and the Egalitarian Ethos', *Philosophy and Public Affairs*, 26.