

# Justice and the Priority of Politics to Morality\*

ANDREA SANGIOVANNI

Philosophy, King's College, London

IT is uncontroversial that the limits imposed by existing institutions and practices are relevant in determining how best to *implement* a particular conception of justice. The set of precepts, rules, and policies that best realize the demands of justice (whatever one thinks they are) in Corsica will be different from those required in Poland. It is uncontroversial, that is, that information about institutional and political context is needed in coming to a concrete judgment regarding a particular course of action or policy. No one disagrees that constraints derived from particular institutional forms and practices should play a crucial role in the application of a theory to the 'real world'.

Less well understood, by contrast, is whether existing institutions and practices should play any role in the basic *justification* and *formulation* of first principles.<sup>1</sup> A common view holds that, in setting out and justifying first principles of justice, one should seek a normative point of view unfettered by the form or structure of existing institutions and practices. To assign any greater role to institutions and practices—to allow them, as I have said, to influence the formulation and justification of first principles of justice—is a fundamental mistake: constraining the content of justice by whatever social and political arrangements we happen to share gives undue normative weight to what is, at best, merely the product of arbitrary historical contingency or, at worst, the result of past injustice itself.

This article aims to bring to light, clarify, and defend the opposite view: existing institutions and practices, I shall argue, should play a crucial role in the *justification* of a conception of justice rather than merely its *implementation*. Our task is to explain both why and how. What I call the 'practice-dependence thesis' in its most general form is as follows:

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<sup>1</sup>By 'first' principles of justice, in turn, I mean principles of justice that are not themselves derived from the application of other principles of justice to particular circumstances; according to this definition, there is no embargo on deriving first principles of justice from *inter alia* facts about human nature, facts about practices and institutions, and/or moral values (such as impartiality, fairness, and respect) that are not principles of justice as such. For a similar use of the term, see G. A. Cohen, *Rescuing Justice and Equality*, (unpub. ms.).

*Practice-dependence Thesis*: The content, scope, and justification of a conception of justice depends on the structure and form of the practices that the conception is intended to govern.<sup>2</sup>

For those who accept the thesis, the content, scope, or justification of first principles of justice—rather than merely the lower-level precepts, rules, and courses of action that follow from their application to particular instances—can vary according to the institutions and practices which they are meant to regulate.<sup>3</sup> The thesis does not imply, however, that *all* variations in underlying practices are associated with corresponding variations in the first principles of justice that apply to them. Only *some* differences in the structure and form of underlying practices determine differences in the nature of first principles.

At least two different types of practice-dependence can be distinguished, which differ regarding both which relations shape the reasons we have for endorsing the content, scope, or justification of those principles as well as how they do so. Those whom I will refer to as *cultural conventionalists* claim that social goods, such as health or leisure, acquire value and meaning from the culturally distinct practices through which they are distributed; they further claim that these culturally contingent values and meanings give content to and bound the scope of first principles of justice.<sup>4</sup> Those to whom I will refer as *institutionalists* claim that it is not cultural or social meanings that change the reasons we have for endorsing or rejecting first principles of justice, but the nature of shared social and political institutions. Social and political institutions fundamentally alter the relations in which people stand, and hence the first principles of justice that are appropriate for them.<sup>5</sup> For example, for some institutionalists, sharing subjection to the modern state (or, alternatively, sharing membership in a constitutional democracy) gives rise to first principles of justice that are different in content, scope, and justification from those that should govern, say, the European Union

<sup>2</sup>I use the term ‘practice’ in Rawls’s sense, namely as ‘any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure’; see John Rawls, *Collected Papers*, ed. S. R. Freeman (Cambridge, Mass.: Harvard University Press, 1999), p. 20.

<sup>3</sup>The claim that the content, scope, and justification of principles of justice (rather than merely their application) vary by context is not meant to be debunking. The thesis, that is, gives us no reason to take justice less seriously or more ‘skeptically’ than those who reject the thesis in favor of a more practice-independent view. It is an instance of what Scanlon calls a ‘benign’ view. See Thomas Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998), p. 328 ff.

<sup>4</sup>See, e.g.: Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983); David Miller, *Citizenship and National Identity* (Cambridge: Polity Press, 2000).

<sup>5</sup>For such ‘institutionalist’ views, see, e.g.: Thomas Nagel, ‘The problem of global justice’, *Philosophy & Public Affairs*, 33 (2005), 113–47, at pp. 119–22; Michael Blake, ‘Distributive justice, state coercion, and autonomy’, *Philosophy & Public Affairs*, 30 (2001), 257–96, at pp. 261–66; Leif Wenar, ‘Contractualism and global economic justice’, *Global Justice*, ed. T. Pogge (Oxford: Blackwell, 2001); Charles R. Beitz, *Political Theory and International Relations* (Princeton, N.J.: Princeton University Press, 1999); Aaron James, ‘Constructing Justice for existing practice: rawls and the status quo’, *Philosophy & Public Affairs*, 33 (2005), 281–316. See also John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 262 and ‘Kantian constructivism in moral theory’, *Collected Papers*, ed. Samuel Freeman, esp. pp. 305–6 and 322–330 [hereinafter KCMT].

or the World Trade Organization. For others, facts about the role justice should have in facilitating social cooperation within an institutional scheme make values like publicity or stability relevant to what can count as a principle of justice in the first place.<sup>6</sup>

Those who claim that first principles of justice are practice-independent, on the other hand, endorse the view with which we began. Practice-independent theorists reject the idea that the contingent, practice-mediated relations in which we find ourselves should change or affect the justifying reasons and premises sustaining a particular conception of the content and scope of justice.<sup>7</sup> Conceptions of justice grounded in the basic intuition that we should aim to mitigate or eliminate the unequal or unfair effects of bad brute luck on individual prospects, and which regard this intuition as independent of whether individuals share in any practices or institutions, are practice-independent.<sup>8</sup> So are accounts which claim that Rawls's two principles of justice can be grounded directly in a conception of moral personhood, and hence do not appeal to the notion of society as a 'fair system of social cooperation' or a culturally specific conception of the person as 'free and equal'.<sup>9</sup> And, finally, libertarian conceptions of justice that assign basic rights of self-ownership and derive principles of entitlement from them are practice-independent, as are various forms of classical utilitarianism (if understood, perhaps idiosyncratically, as setting out conceptions of justice). In each case, the principle of entitlement, utility, equality, or priority (and the currency in which it is specified), is justified by appealing solely to moral values or to facts about human beings as such. No reference is made to existing

<sup>6</sup>See, e.g., Andrew Williams, 'Incentives, inequality, and publicity', *Philosophy & Public Affairs*, 27 (1998), 225–47.

<sup>7</sup>The distinction between practice-dependent and practice-independent conceptions is different than Liam Murphy's distinction between 'monism' and 'dualism'. Practice-dependent conceptions are agnostic on the question of whether principles of justice apply first and foremost to individual conduct (and to institutions only derivatively). Practice-dependent views hold that for principles of distributive justice to apply at all—whether to individuals or to institutions—individuals must stand in an appropriate relationship. As Liam Murphy notes, 'It could be thought that the existence of institutional interaction simply defines the scope of our (strong) obligations in respect of human inequality or well-being; on this view people's responsibility would be to promote equality or general well-being among those with whom they are interacting in the relevant way and not necessarily . . . to promote the justice of the ground rules of that interaction' (Liam B. Murphy, 'Institutions and the Demands Of Justice', *Philosophy & Public Affairs*, 27 (1998), 251–91 at pp. 274–5).

<sup>8</sup>See, e.g., G. A. Cohen, 'On the currency of egalitarian justice', *Ethics*, 99 (1989), 906–44 and Richard Arneson, 'Luck egalitarianism and prioritarianism', *Ethics*, 110 (2000), 339–49 at p. 339 for the prioritarian version of the basic intuition. See also Larry Temkin, *Inequality* (New York: Oxford University Press, 1993), p. 13. For an alternative view, which argues that the basic luck-egalitarian intuition can be seen as flowing from a prior conception of the institutionally mediated relations in which people stand, see Andrea Sangiovanni, 'Global justice, reciprocity, and the state', *Philosophy & Public Affairs*, 35 (2007), 2–39.

<sup>9</sup>See, e.g., David A. J. Richards, 'International distributive justice', *Ethics, Economics, and the Law*, eds. J. R. Pennock and J. W. Chapman (New York: New York University Press, 1982); Charles R. Beitz, 'Cosmopolitan ideals and national sentiment', *Journal of Philosophy*, 80 (1983), 591–600 at p. 595.

institutions or practices, and the content, scope, and justification of such principles in no way depend on the underlying structure or functioning of such practices and institutions.

In sum, for practice-dependent theorists, institutions put people in a special relationship, and it is the nature of this special relationship that gives rise to first principles of justice that would not have existed otherwise. Practice-independent theorists, on the other hand, hold that institutions and practices do not ‘give rise’ to first principles of justice, but merely create conditions affecting their application to particular instances. While practice-independent theorists can allow for facts about human beings as such to enter into justification, they deny what practice-dependent theorists assert, namely that empirical and interpretive facts about institutions and practices matter in this way.<sup>10</sup>

The choice between practice-dependence and practice-independence not only fundamentally shapes how one conceives of the nature of justice but also has wide-ranging practical implications. This is clearest in the global justice debates. If one adopts a practice-independent stance, one will most likely affirm first principles with global scope, by which I mean that they are held to apply, without exception, to human beings or persons as such.<sup>11</sup> On the other hand, if we want to allow for the content and justification of first principles of justice to vary by the institutional context they are intended to regulate—which would allow for (though not entail) first principles with a more restricted scope—then we will need to explain in what way justice depends on the institutions for which it is intended. Because the implications of the thesis are most evident in the case of the global justice debates, I will draw all of my illustrations and examples from them.

Given its centrality, it is surprising that the distinction between practice-dependent and practice-independent views, though often referred to, has received very little attention.<sup>12</sup> In ‘The Problem of Global Justice’, for example,

<sup>10</sup>Practice-independent theorists therefore need not deny that the justification of first principles of justice can be ‘fact-sensitive’; they only deny that justification should be sensitive to facts about existing practices and institutions. Practice-independence, as I have defined it, is therefore much less restrictive than Cohen allows in his manuscript Cohen, *Rescuing Justice and Equality*, which eschews all forms of fact-sensitivity, and I imagine that, given this possibility, many more would be confident in asserting it (including some Rawlsians). For an example of such a less restrictive view, see Andrew Mason, ‘Just constraints’, *British Journal of Political Science*, 34 (2004), 251–68.

<sup>11</sup>Two qualifications are in order. First, it is not sufficient for a principle to be universally quantified over all individuals for it to have global scope in the sense intended. For example, a principle such as, ‘for any individual *i*, it is morally impermissible for *i* to kill an animal by slitting its throat unless *i* is a Muslim’, does not have global scope, since it contains an exception. On this distinction within universalist theories, see also Onora O’Neill, *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996), p. 11. Second, the claim that principles of justice have global scope is not, strictly speaking, logically entailed by adopting a practice-independent stance. One might hold that, for example, principles of justice are determined by querying divine will, and the divine will commands that the principles have restricted scope, or, similarly, one might simply affirm that scope-restricted principles of justice are self-evident. What makes both views practice-independent is that empirical and interpretive facts about the character of existing institutions and practices make no contribution to the justification of the scope restriction. I thank an anonymous reviewer for pressing me on this point.

<sup>12</sup>For an important exception, see James, ‘Constructing justice for existing practice’.

Thomas Nagel uses the idea of practice-dependence to contrast a ‘political’ with a ‘cosmopolitan’ conception of global justice. According to the cosmopolitan conception, ‘the demands of justice derive from an equal concern or a duty of fairness that we owe in principle to all our fellow human beings, and the institutions to which standards of justice can be applied are instruments for the fulfillment of that duty’. On the other hand, according to the political conception:

sovereign states are not merely instruments for realizing the preinstitutional value of justice among human beings. Instead, their existence is precisely what gives the value of justice its application, by putting the fellow citizens of a sovereign state into a relation that they do not have with the rest of humanity, an institutional relation which must then be evaluated by the special standards of fairness and equality that fill out the content of justice.

Nagel then goes on to say that though he finds ‘the choice between the two difficult’ he will not ‘explore the possibility [of defending the political conception] further’; instead, he proposes to ‘pursue a fuller account of the grounds and content of the political conception’.<sup>13</sup> I believe there is more to be said for the ‘political conception’ and the practice-dependence on which it relies than Nagel allows. In this article, I intend to take the fork in the path that Nagel left behind.

The article is organized as follows. Sections I-II explore two different types of practice-dependence and sketch a methodology for moving from the structure and form of existing institutions to the first principles of justice that should govern them. The aim of these sections is to demonstrate that, in justifying any conception of justice, we first need an interpretation both of the point and purpose of the institutions that the conception is intended to govern, and of the role principles are intended to play within them. Sections III-IV aim to lend plausibility to the thesis by (a) contrasting a practice-dependent and practice-independent approach to human rights, and (b) showing the way the idea of practice-dependence incorporates a central insight from the realist tradition in political thought, namely that *politics is prior to morality*. This idea is associated with such *bêtes noires* as Machiavelli, Hobbes, Weber, and Morgenthau, and also with skepticism regarding the possibility not only of global justice, but of any justice at all. Part of the ambition of this article is to show that realist insights into the nature of the political realm can be embedded into the very structure of a theory of justice without posing any direct threat to it; indeed, properly understood, such realist insights strengthen our case for practice-dependence.

## I.

In this section, I seek to sharpen the distinction between practice-dependent and practice-independent points of view by demonstrating how practice-dependent

<sup>13</sup>Nagel, ‘The problem of global justice’, pp. 120, 124.

theories, in justifying a conception of justice, assign a central role to *social interpretation* that practice-independent theories deny.

There are at least two stances one can take with respect to what I will call an ‘institutional system’: a *descriptive* and a *critical* one. By an institutional system, I mean the set of formal and informal rules, norms, and decision-making procedures regulating a political or social activity. A *social* or *political* activity, in turn, defines the basic division of social opportunities and advantages in the competitive struggle for resources.<sup>14</sup> An institutional system can be either a political organization or a regime. A political organization has an internal structure governed by a set of formal and informal rules, which together constitute it as a collective actor that exercises *de facto* authority over its members. A political organization has *de facto* authority when it claims a right to impose duties, confer rights, issue directives, and have them enforced, and it is common knowledge that, for whatever reason, most of those subject to it will comply. A political organization exercises *de jure*, or legitimate, authority when this exercise is justifiable to all its members. Stated in this way, states are not the only instances of political organization. So are the WTO, EU, and the UN, all of which claim a right to impose duties, confer rights, and issues directives, and have them enforced (though they do not have the means of enforcing them directly). A regime, by contrast, is a set of formal or informal rules, norms, and decision-making procedures governing an issue area. While a regime may be in part constituted and regulated by political organizations, it need not be. International human rights practices are examples of regimes that are not organized solely via political organizations. Because a regime is not organized as a collective actor, its rules, norms, and decision-making procedures *have* (rather than *exercise*) *de facto* authority.

According to the first, *descriptive*, stance, one attempts to explain what a particular institutional system *is* by explaining how its various components fit together as parts of an integral whole. As in exploring the meaning of a play or novel, to be successful, the descriptive task requires interpretation. The character of an institutional system cannot simply be read off from a text—e.g., the legal constitution or charter—or from the results of the latest opinion poll. The process of interpretation aims to understand the unity of the institutional system in terms of the point or purpose of the practices that make it up. It represents an attempt to bring ‘to light an underlying coherence or sense’ in

<sup>14</sup>Institutional systems, in this sense, are narrower than practices. Games, etiquette, art forms, rituals, and so on would, for example, not normally be considered institutions in the sense I am using because they do not determine the basic division of social opportunities and advantages in the competitive struggle for resources. The distinction between practices and institutional systems is, however, not meant to be sharp. My use of the term institutional system is much broader than Rawls’s idea of a basic structure: international organizations and regimes are institutional systems, though they do not define a ‘basic structure’ in Rawls’s sense.

something ‘which is in some way confused, incomplete, cloudy, seemingly contradictory’.<sup>15</sup>

The descriptive *cum* interpretive task also demands specificity. There is no general answer to the question: What is the institutional system? There are only specific interpretations of different aspects of that system. Examples might include: What principles animate Britain’s commitment to a National Health Service? What is the point and purpose of European integration? Is Christianity relevant to that point? How can we understand the way in which environmental concerns are relevant (or not relevant) to the GATT/WTO system? How do French understandings of *laïcité* flow from France’s republican tradition, and how do they affect French attitudes towards immigrant and immigration policy, especially with regards to Muslims?<sup>16</sup> What is the standing constitutional law on the division of roles between the Vatican and the state in Italy, and in terms of what more general historical, legal, and moral principles can it be understood? Each of these questions can be answered in ways that the more general question cannot. Nonetheless, the idea of an institutional system *taken as an integral whole* still plays an important role. A successful interpretation of a particular social practice that is a component of the institutional system should fit the system as a whole; if it does not, then the interpretation fails. In giving an alternative account of, say, *laïcité* and its influence on attitudes to Muslim immigration, a challenge to a purely republican interpretation might bring to bear both the history of France’s imperial involvements and the wider context of French educational policy, in an effort to show that French ‘secularism’ and its impact on attitudes towards Islam cannot be understood solely in terms of an idealized model of French citizenship.<sup>17</sup>

The second stance one can take with respect to an institutional system is a *critical* one. In this case, one does not ask what the institutional system *is*, but what it *should be*.<sup>18</sup> This is the stance in which justice becomes relevant. A conception of justice specifies first principles that could form the basis of a system of higher-level standards, rules, and procedures for an institutional system that can be justified to all its members.

<sup>15</sup>Charles Taylor, ‘Interpretation and the sciences of man’, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985) pp. 15–58 at pp. 15–6.

<sup>16</sup>On *laïcité*, see Cécile Laborde, ‘On republican toleration’, *Constellations*, 9 (2002), 167–84 and ‘The culture(s) of the republic: nationalism and multiculturalism in French republican thought’, *Political Theory*, 29 (2001), 716–36.

<sup>17</sup>Another example might be Geertz, who brings other Balinese practices, institutions, and symbols to bear on the cockfight. The distinctiveness and indeed success of Geertz’s project depends on this integral picture of Balinese life. See Clifford Geertz, ‘Deep Play: Notes on the Balinese Cockfight’, *The Interpretation of Cultures* (New York: Basic Books, 1973).

<sup>18</sup>This is not to deny that there can be forms of critique which do not depend in any way on a conception of justice, and which do not have as their goal the presentation of such a conception. I consider one class of such views—‘ideology critique’—in the form of an objection below. There are also, of course, many other possible and valid grounds on which one can criticize institutions or specific policies which do not make any reference to the value of justice or any other moral values at all.



With this distinction between a descriptive and a critical stance, we can now return to our initial concern with practice-dependence from a different perspective and ask: To what extent must a conception of justice be *interpretive*? To what extent, that is, must a conception of justice be sensitive to the structure and character of an institutional system as it actually is? For someone who rejects the practice-dependence thesis, a conception of justice specifies first principles whose justification makes no reference to social arrangements, conventional understandings, common opinions, or shared practices. From this perspective, a descriptive *cum* interpretative account of the institutional system is unnecessary. The primary aim of a conception of justice is to guide reform of existing practices; whether or not it deepens a particular association's self-understanding or serves to illuminate the functioning of its main social and political institutions is beside the point. The critical stance defines, the practice-independent theorist says, a purely normative point of view, and should be clearly distinguished from the descriptive with its different aims and purposes.

In the terms of our discussion of critical and descriptive stances, practice-dependent views do not draw as sharp a distinction between the two. For a practice-dependent conception, the critical stance, to be successful, must itself depend on the character of the institutional system as it actually is, and hence on a description *cum* interpretation of it. But the nature of this dependence remains obscure: what does it mean for the justification of a conception of justice to *depend* on the interpretation of an actually existing institutional system?

## II.

### A. CULTURAL CONVENTIONALISM

My ultimate interest in this article is to delineate a specific kind of practice-dependence—namely what I call *institutionalism*. To bring out its distinctiveness, however, I first briefly discuss a different kind of practice-dependence, namely *cultural conventionalism*. For the cultural conventionalist, the justice of an institutional system is to be assessed by (inter alia) its relations to the distributive criteria implicit in the cultural practices sustaining it. This process is analogous to the way in which the value of a particular jazz performance is assessed by (inter alia) its relations to the defining standards of jazz as a practice. A *just* institutional system realizes and embodies, in its law and public policy, the values implicit in its cultural practices, in this case values governing the distribution of social goods. The paradigmatic form of cultural practice-dependence is Walzer's *Spheres of Justice*. In constructing a conception of justice, the conventionalist requires an interpretation of the meanings of social goods, which he then uses to generate the criteria that are appropriate for its distribution. I will not say more here either about how conventionalists generate criteria of justice from social meanings, or about how



social criticism, for the conventionalist, is analogous to other forms of cultural criticism (for example, in art or music).

It is important to emphasize that conventionalism does not entail relativism, if by that is meant that the criteria of justice implicit in cultural practices bind their participants simply because they are theirs. Quite the contrary, the point of conventionalism is to show that participants have good reasons to honor the criteria of justice intrinsic to their cultural practices. These reasons are usually understood in one of two ways. First, we have good reason to respect local social meanings and the criteria of justice intrinsic to them *because they are constitutive of our identity*. Walzer writes,

What we do when we argue is to give an account of the actually existing morality. That morality is authoritative for us because it is only by virtue of its existence that we exist as the moral beings we are. Our categories, relationships, commitments, and aspirations are all shaped by, expressed in terms of, the existing morality. Discovery and invention [Walzer's terms for practice-independent approaches] are efforts at escape, in the hope of finding some external and universal standard with which to judge moral existence.<sup>19</sup>

The thought is, I take it, that to seek principles that are not interpretively derived from the 'actually existing morality', while not strictly speaking *inconceivable*, would be to disregard the way in which the moral communities in which we grow up constitute us. In attempting 'escape', we fail to recognize ourselves as who we are. Respecting the shape and contours of our actually existing morality is necessary to be sensitive to the nuance and complexity of our moral lives and to demonstrate a kind of integrity that the (practice-independent) 'inventor' and 'discoverer' of morality lacks.

On a second related but distinct reading, we are bound by local social meanings because they are the product of a mutual commitment that stops just short of 'actual' contract, but with the same normative consequences. The 'idea of communal integrity', Walzer writes, 'derives its moral and political force from the rights of contemporary men and women to live as members of a historic community and to express their inherited culture through political forms worked out among themselves'. It is in this way, Walzer continues, that the 'members of the community are bound to one another'.<sup>20</sup> Though Walzer here is discussing the rights of political communities against foreign intervention, the account can be extended, as Walzer himself implies, to apply to the political community itself. The basic idea is this. In the same way that friends become bound to one another through an 'ongoing process of association and mutuality', we become bound to fellow members of the political community by growing up and shaping a common life. Although no one has made a contract or stipulated a set of

<sup>19</sup>Michael Walzer, *Interpretation and Social Criticism* (Cambridge, Mass.: Harvard University Press, 1987), p. 21.

<sup>20</sup>Michael Walzer, 'The moral standing of states', *Philosophy & Public Affairs*, 9 (1980), 209–29 at p. 211.

obligations in either case, our everyday ‘association and mutuality’ generates a commitment which we are bound to honor. In the case of friendship, the commitment is established by common participation in the network of expectations and mutual exchanges mediated by the practice of friendship. In the case of political community, the commitment is established through common participation in the network of reciprocal expectations and mutual exchanges mediated through participation in a common way of life. It follows that to honor the commitment, we should respect the obligations that the best interpretation of the practice (in the case of friendship) and culture (in the case of political community) reveals.

## B. INSTITUTIONALISM

Both cultural conventionalism and institutionalism allow for the content of first principles of justice to vary with the context they are intended to regulate. However, they emphasize (a) different objects of interpretation and (b) different ways of constructing first principles of justice from them.

(a) For the conventionalist, first principles of justice vary according to the societal culture they are meant to guide; for the institutionalist, justice varies instead with institutional form.<sup>21</sup> When I say that cultural conventionalists and institutionalists focus on distinct objects of interpretation, the distinction need not be a sharp one. The form of an institutional system will in many cases constitutively depend on cultural beliefs and practices. For our purposes, however, it is sufficient that the form and structure of institutions not be *reducible* to cultural beliefs and practices. The best way to see this is to conceive of practices that are clearly institutions, but where there is nothing like the kind of societal culture that conventionalists require for the derivation of first principles of justice. Examples include most international (and regional) institutions, such as the WTO, EU, and so on. To put it another way: institutionalists deny that the existence of a societal culture is either necessary or sufficient for justice to apply or have a determinate content. But they do not deny that the form and structure of institutions often depend on underlying cultural beliefs and practices.

(b) A second feature of institutionalism also distinguishes it from conventionalism. In institutionalism, the normative force of principles of justice derives directly from the first-order arguments supporting these principles, rather than indirectly via claims about value pluralism, mutual commitment, toleration, or identity. Whereas conventionalism gives us moral reasons to comply with the scheme of values intrinsic to actually existing political and social practices,

<sup>21</sup>By culture, I mean what Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995), p. 76, calls a *societal* culture, namely ‘a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language’.

institutionalism does not require us to comply with participants' self-understanding, or whatever principles of justice can be gleaned directly from them. For the institutionalist, institutions establish more a network of relationships than a network of beliefs; that is, they establish a set of background conditions which alters the way in which participants interact. And these institutionally mediated relationships, in turn, shape the reasons we might have for endorsing (or rejecting) a given set of principles. For the institutionalist, relationships established by shared institutions *condition* rather than *determine* appropriate criteria of justice.

This may seem to make institutionalism into a form of practice-*independence*. To see the force of this objection, consider the higher-level moral principle that all human beings should be treated with equal, ultimate, and general moral concern (let us call it principle P).<sup>22</sup> Must an institutionalist deny this to be the case? It may seem that he must, since P has global scope, applying to persons as such and independently of institutions. This would, however, be a mistake. The institutionalist can (a) affirm P, but argue that the reasons for endorsing first principles of justice for which P is a premise (call them  $J_1, J_2, \dots, J_n$ ) cannot be derived from P alone, and (b) claim that those further reasons must (in part) derive from an interpretive understanding of the institutional contexts to which  $J_n$  is intended to apply ( $C_1, C_2, \dots, C_n$ ). Though the practice-independent theorist need not deny (a)—first principles of justice can be derived from P in conjunction with other higher-level moral values—he does deny (b). For him, there is no independent layer of first principles  $J_n$ : there is only P, principles that can be directly derived from P and other higher-level moral values ( $P^*$ ), and different contextual applications of  $P^*$  to  $C_n$ . The relation of  $P^*$  to  $C_n$  is therefore the same (for the practice-independent theorist) as the relation of the principle 'drive only as fast as road conditions allow' is to the context 'the road is wet' to the course of action 'drive 20 mph.' For the institutionalist, by contrast, sharing context  $C_n$  shapes the *reasons* we might have for endorsing specific principles of justice  $J_n$  for which P is a premise ( $J_1$  for context  $C_1, J_2$  for context  $C_2$ , and so on), rather than the *courses of action* we should adopt in implementing them.<sup>23</sup>

To make this more concrete, let us draw an example from the global justice debates. According to a popular view of global justice, one can derive the conclusion that first principles of justice must have global scope ( $P^*$ ) from P (the principle that all human beings are of equal, ultimate, and general concern). The argument, simplified, is as follows. P implies that morally arbitrary features of people's circumstances—such as social background—cannot justify unequal

<sup>22</sup>For this general principle, see Thomas Pogge, 'Cosmopolitanism and sovereignty', *Ethics*, 103 (1992), 48–75 at pp. 48–9.

<sup>23</sup>I am indebted here to discussion in Scanlon, *What We Owe*, p. 328ff; Thomas Pogge, 'Moral universalism and global economic justice', *Politics, Philosophy & Economics*, 1 (2002), 29–58, at pp. 39–41; David Miller, 'Two ways to think about justice', *Politics, Philosophy & Economics*, 1 (2002), 5–28.

entitlements to resources, capabilities, or well-being. Our place of birth is an arbitrary feature of our circumstances. Therefore, correct first principles of distributive justice (whatever they are), should be unaffected by our place of birth, which entails  $P^*$ , namely that first principles of distributive justice must have global scope.<sup>24</sup> The argument does not appeal, at any point, to existing institutions or practices, including the strength or depth of international interdependence.

To challenge this view, an institutionalist could argue that, once we have a proper interpretive understanding of the state, we will see that the relations in which we stand with respect to other citizens give us reason to reject the inference from the moral arbitrariness of our place of birth to the conclusion that the correct first principles of distributive justice should have global scope. For example, we could contend, along with Thomas Nagel, that our relations as joint authors of the state ( $C_1$ ) gives us the standing to demand a special justification ( $J_1$ ) for the laws imposed in our name which our participation in the global institutional order ( $C_2$ ) does not.<sup>25</sup> Though we also affirm  $P$ , we deny that  $P$  entails  $P^*$  by appealing to special features of the institutional context ( $C_1$ ).<sup>26</sup>

Let us now delve more deeply into how the institutionalist conceives of this interpretive task, and to clarify how it is that the ‘point and purpose’ of an institution or set of institutions conditions the elaboration of a conception of justice. We can identify three stages in any interpretation (whether of a text, practice, work of art, and so on).<sup>27</sup> At the ‘pre-interpretive’ stage, we identify (or simply assume) a shared *object* of interpretation. We are interpreting, say, the EU as an institutional system, not the Council of Europe. The aim of the pre-interpretive stage is to fix the basic contours of the practices we seek to interpret and in this way to provide a shared platform for further discussion. This step, though it does require a shared understanding of what counts as paradigmatic instances of the institution, should be uncontroversial. Its aim is to ensure that participants are not speaking at cross-purposes.

There are two main steps which belong to the ‘interpretive’ stage. First, the interpreter seeks to determine the point and purpose of the institution in question. What aims and goals is it intended to serve? Second, the interpreter assumes the point of view of the participants in order to reconstruct what reasons they might have for affirming its basic rules, procedures, and standards. Why and how do the participants arrange their affairs to achieve the goals and aims of the

<sup>24</sup>For similar versions of this argument, see Richards, ‘International distributive justice’; Beitz, ‘Cosmopolitan ideals and national sentiment’, at p. 595; Kok-Chor Tan, *Justice without Borders* (Cambridge: Cambridge University Press, 2004); Simon Caney, *Justice Beyond Borders* (Oxford: Oxford University Press, 2005).

<sup>25</sup>Nagel, ‘The problem of global justice’.

<sup>26</sup>For my own version of this ‘statist’ argument, see Sangiovanni, ‘Global Justice’.

<sup>27</sup>My account of the three stages of interpretation follows Dworkin’s discussion in Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard University Press, 1986), ch. 2. See also the helpful discussion in James, ‘Constructing justice for existing practice’.

institution? In achieving both tasks, the interpreter seeks to understand the institution (or set of institutions) as an integral whole, whose parts work together in realizing a unique point and purpose. This constraint is given by the task of interpretation rather than by the practice itself; the various elements that make up the main social and political institutions of a system—like the various elements of a work of art—may not immediately seem to cohere or work together at all. Trying to connect and arrange them as parts of a coherent whole is a requirement of interpretive charity.<sup>28</sup>

We may be worried that in interpreting an institutional system in this way, we must apply standards of value that we already endorse independently of the institutions we are considering. Without such initial assessments of value, we will not be able to make sense of the point and purpose of a practice or activity, or why those engaged in it continue to affirm it (if they do). And this may seem to make the interpretive step in the justification of a conception of justice viciously circular. While there is no doubt that the interpreter must provisionally rely on his own assessments of merit in making sense of the institutional system, there is no reason why this assessment must be question-begging. The assessment of merit is a general and provisional one, aimed at seeking understanding of what in the institutional system might motivate the affirmation of its participants, rather than a judgment about whether it is, all-things-considered, just or unjust. The aim of the interpretive stage is to establish the parameters and fixed points which a full-blown conception of justice must take into account. But it is not yet meant to connect or explain their place in a systematic theory. It only begins, we might say, the search for reflective equilibrium; the further refinement and development of the theory that ties together our assessments (and in some cases revises them) is yet to come.

The role interpretation plays at this stage in institutionalism should not be confused with its role in cultural conventionalism. As we have already noted, the conventionalist aims to derive his conception of justice directly from the scheme of values implicit in the wider culture and its central practices. The criterion of success is, as Walzer tells us, that the participants should ultimately be able to recognize themselves in the conception of justice the theorist introduces, even if, at first, it is unfamiliar.<sup>29</sup> The conception should represent what they already believe about justice in distribution, and it is for this reason that they should be able to affirm it. For the institutionalist, the interpretive step is meant to provide structure to the justification of a conception of justice, but the theorist does not ultimately derive the conception of justice directly from participants' beliefs. It is

<sup>28</sup>Donald Davidson, *Inquiries into Truth and Interpretation*, 2nd edn (Oxford: Oxford University Press, 2001). This does not exclude, of course, that different (plausible) interpretations are possible of the same set of institutions. The success of the interpretation must be judged in light of the theory as a whole (including the principles of justice ultimately derived from it). Nor does the discussion here imply that a set of institutions cannot be rejected *in toto*.

<sup>29</sup>Walzer, *Interpretation and Social Criticism*, pp. 21–3.

not a criterion of success that participants be able to recognize their own beliefs about justice in the conception being defended. This is because, as we have already discussed, there is no sense in which participants are obligated to comply with others' beliefs about justice.

So far we have discussed the first two stages in the elaboration of a conception of justice. In the first, we set out the main contours of the object of interpretation. In the second, we seek to understand the point and purpose of an institution (or set of institutions), as well as how and why its participants affirm it. But we have yet to understand how the interpretative stage contributes directly to the justification of a conception of justice. To do so, we turn to the third, post-interpretive stage, whose aim is explicitly critical. It is at this stage that we move to the derivation of first principles of justice.

We begin by extending our interpretive understanding of institutions. We move from the point and purpose of institutions and the reasons those involved have for affirming them, to the way they shape relations among participants. We ask: How are the relations in which people stand altered by the institutions they share? What kinds of interaction become possible within those institutions? To what degree do the institutions make their participants interdependent, and how are we to understand the nature of this interdependence? And, perhaps most importantly, what role is justice meant to play among participants? How does the demand for justice emerge within the contingent historical and political contexts constituted by the institutions?

With these interpretive materials in hand, we turn to the derivation of first principles of justice. At this stage, the content, scope, and justification of a conception of justice is worked out in the light of both its intended role within existing institutions and the interpretation of the point and purpose of those institutions. Without the constraints provided by the interpretive step, justice, the institutionalist says, would have neither a determinate content nor an application. To illustrate, we can briefly consider the way Rawls has characterized *justice as fairness* since the early 80s, which is in many ways a paradigmatic instance of institutionalism.<sup>30</sup> For Rawls, as I have already mentioned, justice as fairness is constructed, in part, from *institutionally contingent* conceptions of the person (as free and equal) and of society (as a fair system of social cooperation). The conceptions of the person as free and equal and of society as a fair system of cooperation are conceptions specific to the political self-understanding of constitutional democracies. But why should the fact that these conceptions of person and society are implicit in the

<sup>30</sup>It is important to note, however, that Rawls's specific version of institutionalism makes much greater use of culturally contingent factors than other forms of institutionalism. For example, according to the view defended in Sangiovanni, 'Global justice' and Blake, 'Distributive justice', equality as a demand of justice would apply among members of any modern state, whether or not it is a constitutional democracy. For Rawls, it is less clear in what sense, if any, his two principles apply to nonliberal regimes, including ones that meet his criteria of 'decency'. See Rawls, *Law of Peoples*, pp. 78, 83–4; cf. p. 70.

self-understanding of constitutional democracies matter for Rawls? Rawls's argument does not depend on the idea that we should endorse his principles of justice because they are already, at some level, implicitly endorsed by, say, Americans. That is much too crude. Rather, his view can, I believe, best be understood in the light of institutionalism as I have just presented it. In a nutshell, his view is that appealing to interpretive facts about the 'history and traditions embedded in our public life'—including conceptions of society and person—is necessary (but not sufficient) for the justification of a conception of justice because of the social role that a conception of justice is meant to play for us here and now, namely, 'to enable all members of society to make mutually acceptable to one another their shared institutions and basic arrangements, by citing what are publicly recognized as sufficient reasons, as identified by that conception'.<sup>31</sup> For *justice as fairness* to be justified, that is, it must be publicly acceptable not to all persons *qua* human beings but to all *citizens of a democratic society*. The constraints on the veil of ignorance, for example, are the result of an interpretation of the role of a citizen in a constitutional democracy, given some understanding of the conflicts and disagreements justice is meant to resolve within a society understood in this way.<sup>32</sup> Put in our terms, the content, scope, and justification of a conception of justice is determined, for Rawls, in terms of the function justice is intended to play within the social and political institutions of a constitutional democracy. Hence:

An immediate consequence of taking our enquiry as focused on the apparent conflict between freedom and equality in a democratic society is that we are not trying to find a conception of justice suitable for all societies regardless of their particular social or historical circumstances. We want to settle a fundamental disagreement over the just form of basic institutions within a democratic society under modern conditions. We look to ourselves and to our future, and reflect upon our disputes since, say, the Declaration of Independence.<sup>33</sup>

This is one of the reasons explaining why, in turn, *justice as fairness* does not apply to the international institutional order. Because the role of justice in

<sup>31</sup>Rawls, KCMT, p. 207. I take the opportunity here to emphasize that for Rawls, the full justification of justice as fairness does not appeal *only* to institutionally contingent premises; higher level moral values, such as the values of fairness and impartiality, are also used to, for example, model the veil of ignorance.

<sup>32</sup>See Rawls, KCMT, pp. 329–30: 'in order to explain why the veil of ignorance excludes certain kinds of beliefs, even when we as individuals are convinced they are true, I have cited the public role that a conception of justice has in a well-ordered society. Because its principles are to serve a shared point of view among citizens with opposing religious, philosophical, and moral convictions, as well as diverse conceptions of the good, this point of view needs to be appropriately impartial among those differences. Now this brings out in striking fashion the practical purposes and social role that a conception of social justice must fulfill. The very content of the first principles of justice, in contrast with the content of derivative standards and precepts, is determined in part by the practical task of political philosophy. . . . First principles themselves are not widely regarded as affected by practical limitations and social requirements. In Kantian constructivism, at least, the situation is different . . . [:] the first principles of justice are thought to depend on such practical considerations'.

<sup>33</sup>Rawls, KCMT, p. 206.



international affairs, as interpreted against the background of international law, is not to mediate relations among citizens of a constitutional democracy, the first principles appropriate for the international order will have a correspondingly different content, scope, and justification.

### III.

To further clarify how such a practice-dependent mode of formulating and justifying first principles of justice might unfold, I turn in this section to a specific case, namely human rights. There are two reasons human rights present us with a compelling case to illustrate an institutionalist approach. First, human rights are a particularly hard case for institutionalism: if first principles of justice can be specified independently of the contexts to which they are meant to apply, this would seem most plausible in the area of human rights, which is often interpreted as setting minimal criteria of justice and legitimacy for any political regime at any time. Explaining why one does better to take a practice-dependent, institutionalist approach *even in the case of human rights* should therefore bolster our defense of the thesis. Second, international human rights regimes are not ordered or regulated by a single set of institutions or organizations (though the UN obviously plays a central role). Developing an approach to human rights for the specific case of *interstate* interaction allows us to demonstrate the importance of being clear about the purposes and contexts one needs a conception of human rights *for*. In what follows, I do not aim to lay out a full blown conception of human rights. I merely aim to illustrate how an institutionalist would go about doing so.

According to what we might call the *prevailing view*, human rights are general moral claims that individuals have independently of any interaction or relationship.<sup>34</sup> ‘Human rights’, according to John Simmons:

are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity . . . [They] will have the properties of universality, independence (from social or legal recognition), naturalness, inalienability, non-forfeitability, and imprescriptability. Only so understood will an account of human rights capture the central idea of rights that can always be claimed by any human being.<sup>35</sup>

The prevailing view identifies what human rights we have by seeking a pre-institutional, pre-political, and timeless ground from which to criticize and evaluate political and social institutions, whether domestic or international. The procedure for delineating the list of human rights is to seek those human interests

<sup>34</sup>For this critique of the prevailing view, I draw heavily from Charles R. Beitz, ‘Human rights and the law of peoples’, *The Ethics of Assistance: Morality and the Distant Needy*, ed. D. Chatterjee (Cambridge: Cambridge University Press, 2004). See also Joshua Cohen, ‘Minimalism about human rights: the most we can hope for?’ *Journal of Political Philosophy*, 12 (2004), 190–213.

<sup>35</sup>Quoted in Beitz, ‘Human rights’, p. 196.

or capabilities or needs which any human being requires for a decent and dignified human life within any cultural, institutional, historical, political, or social context. Indeed, it is taken as constitutive of the very concept of a human right that it has this practice-independent character. The prevailing view of human rights is based on the model of *natural* rights, namely rights which are intrinsic to our natural condition.

For an institutionalist conception of human rights, it is a mistake to model human rights on the idea of natural rights. Natural rights theories were constructed in a different historical context for a very different purpose. Within a Hobbesian framework, for example, the language of natural rights was intended to displace a Christian idea of natural law and sociability, and as something on which to erect an alternative conception of political authority. For Locke, the inalienability of rights to freedom, non-aggression, and mutual aid was inseparably tethered to the idea that we are God's 'Workmanship . . . made to last during his, not one another's pleasure'.<sup>36</sup> His arguments against absolutism flowed directly from that fundamentally Christian worldview. By contrast, human rights today (even on the prevailing view) represent a more ambitious, non-sectarian program for social and political reform, intended both to regulate international practice as well as provide a standard of public criticism for individuals wherever they may reside. The appeal to human rights, in turn, is directed towards a global community, which is now understood to be under an obligation to recognize and come to the aid of individuals and groups who can rightly lay their claim to protection in a conception of human rights. There is little that ties together the reasons for turning to the language of natural rights in the early modern period and our own current search for international standards of criticism for the wide array of domestic, trans-, inter-, and supranational institutions.

This brings us to a second point. The institutionalist contends that it is equally a mistake to conceive of human rights as 'timeless', as if human rights could meaningfully be used to govern our evaluation of human conduct in, say, ancient Babylon.<sup>37</sup> Current human rights regimes presuppose the trappings of the modern state—a comprehensive legal system, a centralized capacity for resource extraction and coercion, an extensive apparatus for monitoring populations and for the provision of collective goods, and so on. Indeed, their role within this context is to mitigate the worst consequences for human well-being likely to emerge within political systems with precisely those features. To conceive of human rights as a subspecies of natural rights, once again, mischaracterizes the need for human rights instruments within international and global practice.

<sup>36</sup>John Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge: Cambridge University Press, 1988), II.2.5. See also John Dunn, *The Political Thought of John Locke* (Cambridge: Cambridge University Press, 1969).

<sup>37</sup>Beitz, 'Human Rights', p. 200.

It is important to emphasize that the institutionalist need not deny that a central component of the concept of human rights is the idea of human dignity or human needs; what he denies is that it is sufficient for developing a fully articulated *conception* of human rights (which is aimed to establish the content, scope, and justification of those rights). The reasons we might have for rejecting or endorsing a certain understanding of human dignity or human needs *as a part of a justification of a particular conception of human rights* will be fundamentally shaped by the role human rights are intended to play in current international practice.

To see the point, consider that we have so far assumed a very inclusive understanding of the role human rights play within current global and international practice, namely as standards for the public criticism of social and political institutions at the domestic, global, and inter-, supra-, and transnational levels. This role is only slightly less expansive than the role implicit in the prevailing view (namely, as standards which should apply to all forms of human conduct whether past or present). In both cases, it is doubtful, I now want to claim, that a determinate and unified conception of human rights can be successfully and meaningfully articulated. The kinds of human rights standards which should govern the activities of a body like the UNCHR, for example, are very different from those that should govern norms regulating the conditions under which states may (coercively and noncoercively) interfere in one another's affairs. This is precisely in virtue of the fact that the UNCHR has only modest monitoring powers, and therefore serves a rather limited, mainly declaratory role. For the prevailing view, these are simply different contexts of *application* for a master list of human rights worked out from first principles. For the institutionalist, by contrast, the different contexts constrain the content, scope, and justification of the human rights standards which should apply (including whether the idea of a human right would be useful at all). There is no master list: the functional role that human rights are intended to play within given social and political contexts is taken to be definitive of the very idea of a human right.<sup>38</sup> To construct a conception of human rights, we must pay closer attention both to the way in which demands for human rights emerge from within actual political and social institutions, here and now, and, equally importantly, the way in which they shape the relations among those affected.

We can make this more concrete by considering what is arguably the central case in current international practice, namely human rights as a standard of foreign policy.<sup>39</sup> Our discussion will be brief and cursory; our goal will be met if

<sup>38</sup>*ibid.*, p. 204.

<sup>39</sup>This is not to say that this is the *only* context in which human rights discourse is employed to justify various forms of political action (including mere public criticism or evaluation with no consequences for action). Of course, there are many dimensions to the international practice of human rights, but that is precisely the point: we need to be aware of those dimensions and the ways they differ, before we can come to a stable idea of what the content, scope, and justification of human rights might be.

we are able to demonstrate how a full institutionalist view of human rights would proceed. The point and purpose of human rights in interstate practice has at least two aspects. First, human rights serve to justify various forms of (coercive and noncoercive) interference in the internal affairs of other states. Examples include not only humanitarian intervention, but also economic and diplomatic sanctions, the cessation of aid, and membership in international organizations. Second, human rights require states to commit resources for their enforcement, promotion, and protection. Human rights are not simply 'manifesto' rights: they require an allocation of remedial duties and liabilities in the event of their violation (or expected violation).<sup>40</sup> International human rights regimes, understood in this way, alter the relations between states and their citizens, as well as between target societies and the international and transnational organizations involved in them. The context in which trade deals are made, wars fought, conditions for receiving assistance laid down, and so on, operates in the shadow of human rights. This fundamentally changes the expectations and possibilities for political action of those involved.

There are at least four ways in which this understanding of the functional role of human rights regimes in current international practice might be understood to constrain the content of human rights. Each of these explains how human rights regimes shape and alter the nature of interaction among the major parties concerned. First, the scope of human rights is understood to be universal. All human beings have the same human rights (whatever they are). If an individual or group whose human rights have been violated has a prima facie claim to our protection, then any individual or group in relevantly similar circumstances would have the same claim. Second, the justification of human rights must take into account the particularly deep and pervasive nature of cultural and institutional pluralism among societies, demonstrating to those affected why they can have no reasonable objection to their enforcement. This justification, in turn, must be particularly stringent, since violations of human rights (as their functional role indicates) warrant forms of interference which will likely be immensely disruptive to the daily life of all within the target societies. (If we were, by contrast, justifying a conception of human rights as a platform for public criticism of other societies but without the consequences involved in their judicial, military, and economic enforcement, this justification would not need to be as stringent.) Third, values cannot count as human rights if their enforcement and implementation in international practice would likely warrant the use of disproportionate means, usually but not limited to the use of military force. Fourth, as standards employed in foreign policy, there are few if any mechanisms

<sup>40</sup>Cf. Beitz, 'Human rights', at pp. 194–5. Though I am also much indebted to discussion in Onora O'Neill, *Faces of Hunger* (London: Allen & Unwin, 1986), I am not here endorsing the *conceptual* claim that a manifesto right must be 'empty'. My claim is much weaker: an allocation of duties is required not in virtue of the very meaning of rights but in virtue of the functional role human rights are intended to play in international practice.

of accountability either for the way a particular intervention was conducted (*ex post* accountability) or for whether it was justified in the first place (*ex ante* accountability).<sup>41</sup> Although states sometimes seek multilateral forums in which to vet proposals and generate support, this is not required. This increases the chances that human rights will be instrumentalized or appropriated by states in the pursuit of unrelated foreign policy aims, which may work to the detriment of the target society. Once again, for the institutionalist, each of these constraints is taken to be relevant both in the *implementation* of human rights and in deciding which conception of human rights we should recognize in the first place.<sup>42</sup>

If we were aiming to lay out a comprehensive conception of human rights, it would be at this point in the discussion that we would turn to its justification—a justification which would fill out the content and scope of human rights in light of the interpretation just provided. That further task would take us, as I have said, far beyond the scope of this article. I will, however, provide one example of how to move from the interpretive to the post-interpretive stage below, where I will assess the right to freedom of speech as a candidate for inclusion in a conception of human rights for interstate practice. But before we turn to that, we need to have a better grasp of the deeper reasons why we should prefer an institutionalist view of human rights to a practice-independent one.

#### IV.

Above I said that one of the aims of this article was to lend plausibility to institutional practice-dependence by showing how it embeds the idea that politics is prior to morality. We are now ready to make good on that claim.

Rather than aim for a conception of right in general, independent of any historical contingency, and then apply it, the institutionalist begins from social and political institutions as they are here and now. The elaboration of a conception of justice is, in this sense, both a philosophical task and a historical and political one. The history of institutions is important, the institutionalist says, because it records the results of cooperation in conditions of fundamental political conflict and disagreement. The fact that it is *political* rather than merely *moral* disagreement is important.<sup>43</sup> Of course, institutions present solutions to

<sup>41</sup>See also Allen Buchanan and Robert O. Keohane, 'The preventive use of force: a cosmopolitan institutional proposal', *Ethics & International Affairs*, 18 (2004), 1–24; Allen Buchanan, 'Institutionalizing the just war', *Philosophy & Public Affairs*, 34 (2006), 2–38.

<sup>42</sup>To forestall possible misunderstanding: When I say that the content of human rights should be constrained by their role in justifying various forms of interference, this does not imply that, in a particular instance, there must be a case for interference before we can say that human rights are being violated. The justification of a conception of human rights departs from *general* facts and tendencies about the operation of the regime. It is therefore possible to say that, in a *particular* case, there is a *prima facie* case for interference derived from a functional understanding of human rights, but that other factors make it inadvisable *all things considered*.

<sup>43</sup>For this point I am indebted to Bernard Williams, 'Realism and moralism in political argument', *In the Beginning Was the Deed*, ed. G. Hawthorn (Princeton, N.J.: Princeton University Press, 2005), p. 12.

disagreements that might involve moral—and indeed ideological, interpretive, and evaluative—questions. The crucial point is that they are not *merely* about moral, ideological, interpretive, or evaluative questions. They are not merely disagreements about sentiments or beliefs—X is right, good, true, best, genuine—but, more fundamentally, about how those sentiments or beliefs justify *the exercise and command of political power*. The disagreements are not merely about which party is *epistemically* justified (in claiming, for example, that a policy is right or good or just), but which party is *politically* justified in laying claim to the armature of political authority and military power that shapes basic constraints and opportunities. Institutions, seen in this light, are successful attempts at sublimating and controlling the potential for violent conflict implicit in all political disagreement.<sup>44</sup>

We might understand the point in this way. For the institutionalist, the sphere of politics not only operates differently from other spheres of interaction (law, economics, aesthetics, and so on), but also is a fundamental precondition for their pursuit. The first aim of any social or political institution is to secure conditions of order, trust, cooperation, and security among human beings. Political authority is necessary because without it, distrust, insecurity, and the desire for recognition—‘you must recognize that our party is justified and therefore submit’—will thwart any possibility of cooperation or render it incredibly fragile. This is the primary role of political institutions, but it is not their only one. Once a basic structure for solving the primary political problem is in place, attention can shift to other concerns; indeed, we might say that the structure for solving the first political question is not an end in itself, but a means for making other concerns eligible to political and social choice—such as the further development and protection of capabilities for developing and acting on a plan of life, the quality of urban life and the environment, the importance of cultural recognition and identity, and so on. As Rousseau writes in the *Social Contract*, ‘the social order is a sacred right, which provides the basis for all the others’.<sup>45</sup> This is not to say that the first political question disappears; it never does. It only recedes into the background. Like the theater, the operation of a political institution is most effective when its internal and sustaining apparatus is, though accessible, not immediately in view. But, to continue the metaphor, it would be a very poor understanding of the theater to view it only from the perspective of the audience.

The practice-independent theorist, on the other hand, believes that the way in which actual political institutions solve the first political question—and hence how questions of justice emerge within specific institutions—is irrelevant to the

<sup>44</sup>Cf. Freud, Sigmund (1989), *Civilization and Its Discontents*, ed. James Strachey (New York: Norton).

<sup>45</sup>Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings*, ed. V. Gourevitch (Cambridge: Cambridge University Press, 1997), p. 41. He continues: ‘Yet this right does not come from nature; it is therefore founded on conventions. The problem is to know what these conventions are’. This is in many ways a paradigmatic statement of the practice-dependence thesis.

justification and formulation of a conception justice. The task of the theorist of justice is to look beyond arbitrary historical contingency, and seek a general and overreaching view. Once this view has been acquired, it can then be applied to remake political life according to the script the practice-independent theorist has prepared. From such a high perch, the practice-independent theorist remains blind to the underlying and sustaining structures that make the pursuit of justice both possible and necessary. By trying to keep the realm of ‘morality’ unsullied by the demands of politics (which only become relevant after the philosopher has done his labor), the practice-independent theorist risks seeing institutions and the people participating in them as mere obstacles in the way of his ideal. He will tend either to overestimate the capacity of human beings to transform their condition through political action in controllable and predictable ways, or come to resent his fellows for not trying.<sup>46</sup>

Once we have the circumstances of politics in focus, it becomes clear why it is a mistake to conceive of political and social institutions solely as instruments in the realization of justice. We can see the point even if we use preambles to major treaties as a quick and very rough guide to the point and purpose of an international institution. In the preamble to the Constitution of the WTO, for example, the signatories declare their intention *inter alia* to enter ‘into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations’; the parties to the 1957 Treaty of Rome establishing the European Community are *inter alia* ‘determined to lay the foundations of an ever closer union among the peoples of Europe’. In both cases, the historical developments that have made possible the cooperation announced in both preambles cannot be represented as attempts to institutionalize a conception of justice. The parties would no doubt like to see themselves as *constrained* by norms of justice in their pursuit of other goals—these norms may after all be essential to their claim to wield political power or restrain others’ use of it—but they do not see themselves as organizing their international cooperation to achieve a *summum bonum* defined by a distributive ideal. By taking the point and purpose of actually existing institutions seriously, the institutionalist pays tribute to participants’ success (when it is a success) in

<sup>46</sup>With Montaigne, we might say, ‘There are two things that I have always observed to be in singular accord: supercelestial thoughts and subterranean morals. . . . They want to get out of themselves and escape from the man. That is madness: instead of changing into angels, they change into beasts. Instead of raising themselves, they lower themselves. These transcendental humours frighten me, like lofty and inaccessible places. We seek other conditions because we do not understand the use of our own, and go outside of ourselves because we do not know what it is like inside. Yet there is no use our mounting on stilts, for on stilts we must still walk with our own legs. And on the loftiest throne in the world, we are still sitting only on our own asses’; Michel Montaigne, *The Complete Essays of Montaigne*, ed. D. M. Frame (Stanford, Calif.: Stanford University Press, 1965), pp. 856–7. See also Max Weber, ‘The profession and vocation for politics’ in *Political Writings*, ed. P. Lassman and R. Speirs (Cambridge: Cambridge University Press, 1994); Hans J. Morgenthau, ‘The twilight of international morality’, *Ethics*, 58 (1948), 79–99; George F. Kennan, ‘Morality and foreign policy’, *Foreign Affairs* 64 (1985): 205–18.



surmounting the potential for violent conflict, in establishing a framework for further cooperation, and in creating political forms within which each party is better to realize their interests and aims despite deep and enduring conflict. The institutionalist pays tribute, that is, to the first, Hobbesian political question.<sup>47</sup>

We can illustrate the way in which institutionalism embeds the priority of politics to morality by discussing a last example: Is there a human right to free speech? In answering this question, the institutionalist does not begin with the further question: Is there a fundamental interest protected by the right of free speech? Or, is the right to free speech required by our best understanding of human flourishing? Or, is the right to free speech a constitutive element of our moral autonomy? Rather, he asks: What role is this right meant to play in actual political conflicts? For what political and social contexts do we need it?

Beginning in one way or the other has important implications for the kind of theory one offers in response to our initial question. Consider, for example, that the first (practice-independent) approach will lead us naturally to see a basic symmetry between what we might call the *external* and the *internal* dimensions of the right; that is, a basic symmetry between, on the one hand, its use as an instrument of foreign policy or justification for the exercise of political power through international organizations like the UN, and, on the other, its use as a political value within liberal societies. After all, the practice-independent theorist will say, if there is a fundamental interest in free speech in a liberal society, then there must be a fundamental interest in free speech everywhere. That is just what it *means* to be a fundamental interest, a constituent element of human flourishing, or a basic element of moral autonomy. The violation of the right is a violation anywhere it occurs; this is what makes it a *human* right. This doesn't imply, the practice-independent theorist will insist, that the political actions it will be prudent to take in light of the violation will be the same everywhere, but that is a question of *application* and *implementation*, not a philosophical question of *justification*. The practice-independent theorist believes his view is required to forestall a hapless relativism. To deny the practice-independent character of the right to free speech is to assert that principle X applies to us because we believe it, but that it cannot apply to them since they believe a different principle Y.

For the institutionalist, on the other hand, the different role the concept of a right is meant to play within different institutional structures conditions the content and scope of the right. First principles vary according to the institutional context they are intended to regulate, but their normative force does not depend on the fact that participants believe them. Internally, the institutionalist would point to the role free speech plays in the justification of political authority in modern constitutional democracies. In this context, he might say that its role is

<sup>47</sup>On the importance of the 'first political question', cf. Williams, 'Realism and moralism in political argument' to which I am indebted.

both to prevent the abuse of power and to promote publicity<sup>48</sup> (both forms of instrumental value) and to express the value liberal democracies place on personal autonomy<sup>49</sup> (a noninstrumental value). Further specifications of the right of free speech, as well as the way it operates as a value in different issue areas—such as the funding of political parties, pornography, terrorism, and so on—will, for the institutionalist, crucially depend on this interpretation of this dual role.

But the institutionalist would deny the idea that such an *internal* understanding of the right would be appropriate at an international level. Recall that the point and purpose of human rights regimes at an international level is to legitimize various forms of international interference—ranging from the use or threat of force to less coercive forms of pressure—all of which can have immensely disruptive effects on the daily lives of individuals in target societies. Because the concept of a right to free speech plays an altogether different role in the international context, the institutionalist claims that the content, scope, and nature of our basic rights should vary accordingly.

In this light, the institutionalist might well doubt, for example, whether there should be a human right to free speech at the international level at all. He might say that, unlike other human rights (for example, human rights against genocide or enslavement), what would count as a violation of the right to free speech internally cannot adequately justify forms of international intervention and interference, given (a) the need for justifications of human rights to be acceptable to those affected, in view of the range and depth of pluralism at the global level, (b) the danger that strong nations will instrumentalize the right to pursue self-serving goals (with the result that they will often use disproportionate means to achieve them), and (c) the lack of adequate international mechanisms to ensure *ex ante* and *ex post* accountability. These factors—themselves the product of the different shape and character of political authority at the international level—mean that interference in other societies on behalf of a human right to free speech could not succeed in promoting either personal autonomy (especially in societies in which the value is not recognized in the same way as it is within liberal societies) or in preventing the abuse of power. For this reason, a human right to free speech could not serve the ends for which it is internally justified. While we may still believe that other regimes would do better to implement a basic right to free speech within their own polity, we deny that this entails the existence of a human right to free speech. Were the right to be generally recognized at an international level, it would undermine its point and purpose. It is therefore not the case that there is a human right to free speech but that it is merely impracticable to implement it; rather, the institutionalist believes that there is no human right to free speech at all.

<sup>48</sup>The idea that justice must not only be done but also seen to be done.

<sup>49</sup>J. S. Mill's *On Liberty* is a prominent example. See also Thomas Scanlon, 'a theory of freedom of expression', *Philosophy and Public Affairs* 1 (1972): 204–26.

What I have tried to show is that the institutionalist is responsive, at a fundamental level, to the peculiar circumstances of politics in a way that the practice-independent theorist is not. By beginning with institutions (rather than ending with them), the institutionalist in this way embeds a kind of anti-utopian political realism into the structure of his theory. But this is not to say that one cannot be critical or that normative criteria of justice are irrelevant; it is only to say that critique and justification must take a very different form than the practice-independent theorist demands.<sup>50</sup>

One might object: ‘We misconstrue the aim of justice if we allow justice to be limited by our pre-existing institutions. Constraining the applicability of justice to whatever social arrangements we currently happen to have ‘would arbitrarily favor the status quo’, which is plainly contrary to the aim of justice’.<sup>51</sup> The argument takes this form:

- (a) We should not arbitrarily favor the status quo.
- (b) One favors the status quo by conditioning the content, scope, and justification of first principles of justice on the form and structure of existing institutions.
- (c) (b) is arbitrary because the ‘aim of justice’ is to provide a point of view external to existing institutions and practices from which to criticize them.

Leaving aside the truth of (b), the argument clearly begs the question: (c) simply asserts what practice-dependent views deny. Absent an argument for why justice (conceptually?) requires us to take a practice-independent view, the objection fails.

The more interesting way of posing a similar objection is from a very different point of view. The objector claims that the way I have cast the interpretive step, which aims to understand the point and purpose of an institution and the reasons the participants have for affirming it, makes it impossible to acquire an undistorted picture of our institutional system and the forms of consciousness that sustain it (e.g., liberalism). A correct interpretation of our institutional system could not in any way be preparatory for a conception of justice, and simply to assume that it could be reproduces its distortions. Interpretation should itself be a form of defetishizing, demystifying critique aimed to reveal the hidden, delusory, fettering, enslaving ends served by our institutional system and its supporting ideology. Although I don’t do so here, this objection could be dressed in Nietzschean, Marxian, Hegelian, Foucauldian, or any of a number of (early) ‘Frankfurt School’ colors.<sup>52</sup>

<sup>50</sup>If one wanted a tag for placing politics prior to morality, it would be this: ‘For to make the handful bigger than the hand, the armful bigger than the arm, and to hope to straddle more than the reach of our legs, is impossible and unnatural. Nor can man raise himself above himself and humanity; for he can only see with his own eyes, and seize only with his own grasp’; Montaigne, *The Complete Essays of Montaigne*, p. 457.

<sup>51</sup>Tan, *Justice without Borders*, p. 59, quoting Beitz, ‘Cosmopolitan ideals and national sentiment’, p. 595.

<sup>52</sup>See, e.g., Raymond Geuss, *The Idea of a Critical Theory* (Cambridge: Cambridge University Press, 1981); Seyla Benhabib, *Critique, Norm, and Utopia* (New York: Columbia University Press,

This is an objection well worth taking seriously, but it is important to understand it correctly. Our objector does not speak from a practice-*independent* point of view at all. He does not measure current institutions and practices against a standard derived independently of them. Indeed, his point is that it is only through a correct understanding of our current institutions—their history and evolution, and their supporting ideology—that we can come to see the way they ensnare us. And it is only through this understanding that we can see what the viable alternatives might be.<sup>53</sup> For the ‘ideology critic’, practice-independent views represent a form of ‘dogmatism’ just as they do for the institutionalist.<sup>54</sup> The goal is to see, to put it in Hegelian terms, the ‘rational’ in the ‘present and actual’.<sup>55</sup> Once seen in this light, it becomes clear that the objection is not to the idea of practice-dependence, but to the idea that it is worthwhile to attempt a justification of a conception of justice for a specific institution in the first place. Put in this way, however, I think the distance between the two views shrinks: ‘ideology’ or ‘immanent’ critique should be seen as a primarily negative, nonsystematic form of institutionalism.<sup>56</sup> It may even be, though I only mention

1986); Geuss, ‘Nietzsche and genealogy’; Raymond Geuss, ‘Preface to the paperback edition’, *Public Goods, Private Goods*, 2nd edn (Princeton, N.J.: Princeton University Press, 2003).

<sup>53</sup>Cf. the young Marx’s distinction between an ‘immanent’ and a ‘transcendent’ utopia, as discussed in a letter to Ruge: ‘It will then be shown that the world already possesses the dream of something, of which it must also possess the consciousness, before it can actually take possession of it. It will be shown that the task is not to insert a line between the past and the future, but the *fulfillment* of the thought of the past. Finally, it will be shown that humans begin no new task, but consciously bring old tasks to fruition’ quoted in Benhabib, *Critique, Norm, and Utopia*, p. 35.

<sup>54</sup>Cf. Geuss, *The Idea of a Critical Theory*, p. 65: ‘Critical theory is committed to the principle of “internal criticism”. Just as a critical theory is supposed to contribute to the agents’ self-knowledge, so the proponents of the critical theory recognize as “valid criticism” only what could in principle be part of the self-criticism of the agents to whom it is addressed; if the proponents of a critical theory wish to enlighten and emancipate a group of agents, they must find in the experience, form of consciousness, and belief of *those* agents the means of emancipation and enlightenment’.

<sup>55</sup>G. W. F. Hegel, *Philosophy of Right*, ed. T. M. Knox (Oxford: Oxford University Press, 1957), p. 10–1: ‘since philosophy is the exploration of the rational, it is for that very reason the apprehension of the present and the actual, not the erection of a beyond, supposed to exist, God knows where, namely in the error of one-sided, empty ratiocination. . . . *Hic Rhodus, hic saltus*. . . . It is just as absurd to fancy that an individual can overleap his own age, jump over Rhodes’.

<sup>56</sup>Cf. Geuss, *Public Goods, Private Goods*, pp. 113–4, where he discusses how one might construct the distinction between private and public: ‘so I wish to suggest that to make a *practically significant* distinction between public and private, a distinction, that is, that deserves to have moral, existential, social, or political standing, we first need a clear idea of the use to which we wish to put the distinction when we have made it. The first question is this: *Why* exactly do we want to distinguish private and public? What are our purposes and values? Because we can have a variety of different (legitimate) purposes, we can have a legitimate plurality of different ways of distinguishing between the two. From the fact that we do not begin with an ontologically realist account of the distinction *as a single, unitary distinction*, it does not follow that we cannot come to a rationally well-supported view that gives us reason to distinguish them for particular purposes in particular contexts. It follows only that the ‘reason’ we will use will be a contextually located human power, not some abstract faculty of reading off the moral demands of the universe from the facts of the case. To put the same thing another way, it is not as if there were simply *nothing* for our concepts and theories to track in the case of ‘the private’ and ‘the public,’ in the sense that there is nothing for zoological theories of unicorns to track. Rather, there are many *different* things to track, but tracking them distinctly requires knowing why you might want to catch them, and failure to distinguish will lead into a dismal conceptual swamp from which it will be very difficult to extricate oneself un-muddled’. See also Raymond Geuss, *Outside Ethics* (Princeton, N.J.: Princeton University Press, 2005), p. 232. It is

this as a possibility here, that the most plausible way to conceive of ‘progress’ in political philosophy would be through a kind of dialectic between these two different modes of engaging in social critique; that is, between the one which seeks to demystify what the other seeks to construct. But the important point is that they can be understood to be speaking on the same terms.<sup>57</sup>

In closing, I want to mention a more concrete way in which ideology critique can be understood as an option within an institutionalist view. Let us take an institution such as slavery, the concentration camp, or the caste system. Cases like these may seem to present a problem for institutionalism. The institutionalist gives some initial plausibility to the structure and form of institutions as they are. He must begin by taking seriously the history and aims of the institutions involved, and seek to understand how and why their participants affirm them before coming to an understanding of what principles of justice are appropriate for them. Does this mean that there is no way for the institutionalist to advocate the abolition of an entire set of institutions? No. Even after applying a principle of charity, and leaving aside how practices like the ones just mentioned are embedded in wider institutions and practices (such as the modern state or the international order), the interpretive step might reveal that the only thing propping up an institutional system is the exercise of unmediated coercion by one group over another. In such cases, there is no foothold upon which a conception of justice can be constructed for the institution in question. For a conception of justice to get off the ground, there must be some sense in which the terms of the institution are at least capable of being justified to all participants; if the institution must depend on systematic and unmediated coercion to reproduce and sustain itself, then the institution is incapable of such a justification and must therefore be rejected. In ideology critique, we can go further: even if disadvantaged participants in the practice uphold and affirm the institution, it might be that their acceptance can only be explained as a form of false consciousness.<sup>58</sup> A question of some interest, which I leave open here, is whether liberal social, political, cultural, and economic institutions are susceptible to such an ideology critique, or whether their operation is sufficiently noncoercive as to warrant the construction of ‘positive’ conceptions of justice for them.<sup>59</sup> But whichever way we resolve this dispute, it is, I submit, best understood as a dispute within an institutionalist framework.

relevant here that Geuss is not arguing that the distinction between ‘private’ and ‘public’ makes no sense; rather, he is arguing that the particular polemical uses to which it is put by liberalism obscures its contextual, or, in our terms, practice-dependent nature.

<sup>57</sup>I would like to thank Fabian Freyenhagen for helpful discussion on these and related points.

<sup>58</sup>On this point, see Bernard Williams, *Truth and Truthfulness* (Princeton, N.J.: Princeton University Press, 2002), pp. 219–32.

<sup>59</sup>It might be useful, in this context, to compare Bernard Williams’s use of genealogy to ‘vindicate’ liberalism in, e.g., *Truth and Truthfulness*, and Raymond Geuss’s use of genealogy to undermine it in *History and Illusion in Politics* (New York: Cambridge University Press, 2001).

## V.

In elaborating a conception of justice, we must first understand the role that the concept is meant to play in political action and criticism. Without some idea of this role, the journey from concept to conception would be traveled without a compass. To understand this role, in turn, we must seek an account of how it emerges within specific, institutionally mediated political and social contexts. This account, I have argued, is provided via an interpretation of both the point and purpose of the institutions for which the principles are needed, and the relations among participants in those institutions. It is only with these interpretive materials in hand, the institutionalist argues, that we can fill out the content of a particular conception of justice. The interpretation, we say, constrains the content of the principles by telling us what the principles are for. First principles of justice therefore vary, at a fundamental level, with respect to the institutional context they are meant to regulate.