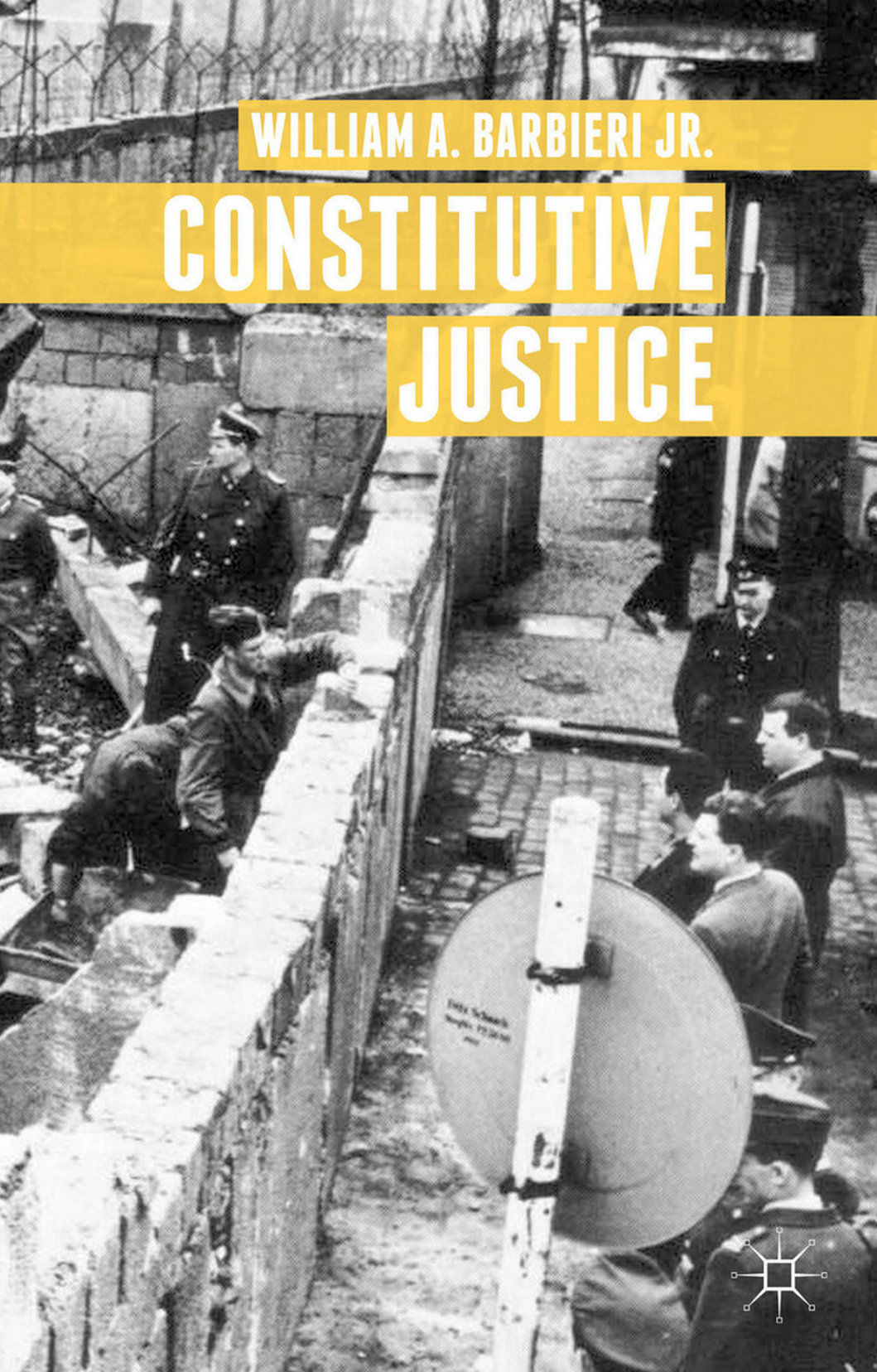
WILLIAM A. BARBIERI JR.

CONSTITUTIVE JUSTICE



Constitutive Justice

Constitutive Justice

William A. Barbieri Jr.
The Catholic University of America

palgrave
macmillan

© William A. Barbieri Jr. 2015

All rights reserved. No reproduction, copy or transmission of this publication may be made without written permission.

No portion of this publication may be reproduced, copied or transmitted save with written permission or in accordance with the provisions of the Copyright, Designs and Patents Act 1988, or under the terms of any licence permitting limited copying issued by the Copyright Licensing Agency, Saffron House, 6–10 Kirby Street, London EC1N 8TS.

Any person who does any unauthorized act in relation to this publication may be liable to criminal prosecution and civil claims for damages.

The author has asserted his right to be identified as the author of this work in accordance with the Copyright, Designs and Patents Act 1988.

First published 2015 by
PALGRAVE MACMILLAN

Palgrave Macmillan in the UK is an imprint of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan in the US is a division of St Martin's Press LLC, 175 Fifth Avenue, New York, NY 10010.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

Palgrave® and Macmillan® are registered trademarks in the United States, the United Kingdom, Europe and other countries.

ISBN: 978–1–137–26324–7

This book is printed on paper suitable for recycling and made from fully managed and sustained forest sources. Logging, pulping and manufacturing processes are expected to conform to the environmental regulations of the country of origin.

A catalogue record for this book is available from the British Library.

A catalog record for this book is available from the Library of Congress.

For Sophia, Maximilian, Felix, and Lukas

Contents

Preface and Acknowledgments ix

Introduction: What If We Held a Constitutional Convention and Everybody Came? 1
The structure of the book 7

1 The Scope and Scale of Justice 12
Justice and its types 15
The limits of justice: Aristotle 20
Scope and scale 23
On the relationship between the scope and scale of justice 29
Constitutive debates 31
Constitutive justice: why now? 34

2 Reservations about Constitutive Justice 39
The contingency objection 40
Excursus: historical justice 44
The political objection 48
The global distributive justice objection 55
The commutative justice objection 65

3 Constitutive Justice – A Paradox? 70
Constitutive paradoxes I: founding 72
The paradox of civic virtue 74
The paradox of precommitment 75
The paradox of revolutionary authority 76
The *demos* paradox 77
The constitutional paradox 78
Constitutive paradoxes II: revisions 79
The semiotic paradox of peoplehood 79
The democratic paradox 81
The paradox of democratic justification 83
The paradox of legal interpretation 83
The political paradox 84

4 Justice between Communitarianism and Cosmopolitanism 90
Spheres of justice 91

Membership 94
Between people and cosmopolis 101
The cosmopolitan imaginary 107

5 Four Transcommunal Approaches 118
Interdependence and the "Circumstances of Justice": Hume, O'Neill, Young 118
Recognition and the common good: Hegel, Ferrara, Tietz 130
Democracy and pragmatism: Dewey, Hurley, Fraser, Bohman 138
Deconstruction and reconstruction: Derrida 149

6 Constituents of a Theory 154
Stories of peoplehood 155
Agency 159
Boundary-making 173
Justice and injustice 184

7 Toward a Theory of Constitutive Justice 192
The just-war model 194
Cardinal values: responsibility, equilibrium, non-domination 198
Middle axioms 204
Territory and constitutive justice 214
Secession and constitutive justice 221
Immigration and constitutive justice 225
Coda 230

Bibliography 232

Index 253

Preface and Acknowledgments

This book is about the ethics of boundaries.

Boundaries of all sorts surround us, all of the time. The football match is bounded in space and time, and the players are marked to distinguish them from one another, as from the officials and the spectators. The objects on the field, the ball and boots, bodies and goals, have surfaces and outlines that separate them from their surroundings. The match and its immediate locale are pervaded with boundaries delineating facial features, offside traps, halves, cheering sections, genders, sponsor logos, hairstyles, zoning restrictions, power grids, religious identities, news beats, league standings, and many, many more things. Boundaries are omnipresent, and indispensable. We rely on them as we gather in perceptions, organize our thoughts, coordinate our actions and navigate through our physical and social environs. They are constitutive of our everyday mode of existence. Boundaries are so central to the way in which we organize our world that we tend to take them for granted. Consequently, we rarely notice how elusive they are. Yet there is something mysterious about boundaries. Although they are necessary components of divisions between continuous objects, they are somehow not part of the things they separate. They are located in time and space, but they do not take up time or space. And they raise this puzzle: can boundaries be understood to be natural and objective entities, or are they in essence mind-dependent products of human artifice?

There is no need to agonize over such conundrums so long as boundaries remain inconsequential. But sometimes boundaries matter greatly. Precisely where a geographical border runs, or when one becomes an adult, or what it means to be part of a given racial group, or nation, or religion, can have dire consequences for people and indeed be a matter of life and death. Social boundaries, especially, can produce suffering, large and small. When that happens, it makes a difference whether we think of boundaries as natural or artificial. Sometimes such suffering is the result of attaching improper distinctions to boundaries, and we condemn such cases as instances of discriminatory treatment. We may tend, however, to continue to think of the boundaries in question – of race, territory, nationality, gender, and so on – as essentially natural, and hence morally unproblematic in themselves. To do so is to fail to give the proper due to the ineliminably artificial aspect of boundaries in

general and social boundaries in particular. It is to ignore the possibility that boundaries themselves can be unjust.

In taking up the question of the justness of boundaries, I assume that to the degree to which boundaries may be said to be *constituted* through human agency (rather than merely perceived or acknowledged), it is right and proper to subject them to ethical analysis. To engage in such an analysis is to argue about what I call constitutive justice. This task is complicated, however, by the circumstance that justice is itself a bounded concept. As Wittgenstein noted in his *Remarks on the Philosophy of Psychology*, "[i]t is unnatural to draw a conceptual boundary line where there is not some special justification for it, where similarities would constantly draw us across the arbitrarily drawn line" (no. 628). Conceptual boundaries, if they are unjustified and arbitrary, are unnatural and unjust. I conclude from this proposition that the boundaries associated with any conception of justice should themselves be queried with respect to their justness. In that spirit, I conceive of this book as an exercise in bringing justice to bear on its own foundations. Whether it succeeds, of course, is for the reader to judge.

This book has been a long time in the making. It began to take shape not long after I completed the doctoral dissertation that later became *Ethics of Citizenship: Immigration and Group Rights in Germany*, as I mulled over some of the broader ethical ramifications of the construction not only of citizenship but of communal boundaries of various sorts. I received early encouragement from Thomas E. McCollough, Margaret Farley, Ian Shapiro, Lea Brilmayer, and Harold Koh, and I benefited from the opportunity to work out some initial ideas in the form of a course on the ethics of political community at the College of the Holy Cross in Worcester, Massachusetts.

In subsequent years I was able to continue exploring my topic alongside engagements on three continents. As a visiting scholar in the Political Science Department at the Hebrew University of Jerusalem I was able to present my work at the political theory workshop, and I profited from discussions with the late Baruch Kimmerling, Yoav Peled, Azmi Bishara, Daniel Elazar, Naomi Chazan, Yael Tamir, and Aviezer Ravitzky.

A generous fellowship from the Alexander von Humboldt Foundation allowed me to pursue further research in Germany at the Humboldt University in Berlin under the sponsorship of Herfried Münkler. There I found a constructive audience in the Political Theory Colloquium and learned from exchanges with Marcus Llanque, Bernd Ladwig, Harald Bluhm, Stefan Gosepath, Dieter Gosewinkel, and Steffen Angenendt.

In Washington, DC, I was able to continue work on the project first at the Institute for Policy Research and Catholic Studies, thanks to its director, Steve Schneck, and then during a six-month sabbatical at Georgetown's Berkley Center for Religion, Peace, and World Affairs, courtesy of Tom Banchoff. At my home institution, the Catholic University of America, I presented part of the book to the faculty seminar at the Center for the Study of Culture and Values, and I received helpful comments on an early draft of my arguments from my colleagues John Grabowski, Bill Mattison, Joe Capizzi, and Brian Johnstone. Several groups of doctoral students have insightfully discussed parts of the book in my Theories of Justice seminars at CUA, and I have been the grateful recipient of yeoman research assistance from Patrick Beldio, Daniel McClain, Beau Rieger, and Christopher Marentette.

Additional audiences have vetted parts of the book at New York University, the University of Tampere in Finland, People's University in Beijing, and meetings of the American Academy of Religion in Philadelphia and San Antonio. I have received additional support and helpful suggestions from Ingrid Creppell, Alessandro Ferrara, David Klassen, Charles Taylor, Michael Walzer, and Stephen K. White.

My editors at Palgrave Macmillan – Brendan George, Priyanka Gibbons, and Esme Chapman – have been expeditious and, just as important, patient in nurturing the book to completion.

My family has merrily and boisterously traipsed along during the work on this project, lifting me up and teaching me all the while more than anyone else could about how to constitute a community. This book is their due.

Introduction: What If We Held a Constitutional Convention and Everybody Came?

Our ever more mobile, globally interconnected, and diversifying world continually prompts new ethical questions about the borders and boundaries that unite and divide us. Human affairs impinge inevitably on questions of identity and belonging that hinge on and sometimes challenge state frontiers, national membership, civic ties, the bounds of religious and ethnic collectivities, and the limits of moral community. Any given day is likely to bring a new dispute or quandary regarding how our social and political divisions are constructed or understood. For instance: Who should have a place at the table when a new constitution is being drafted in Afghanistan, or Iraq, or the European Union? Under what conditions should the people of a basically self-sufficient region such as Somaliland or Kurdistan be recognized as an autonomous, sovereign political community? In referenda over proposals for secession or irredenta – in East Timor, or Southern Sudan, or Taiwan, for example – who should be viewed as entitled to vote? What restrictions might fairly be placed on those who wish to migrate to wealthy countries such as Japan or Norway and with what rationale? On what basis should persons be recognized as belonging to the Jewish people, or the German *Volk*, or the citizenry of the United States, with all the rights and privileges that attach to such memberships? For several decades now and with growing urgency, such questions of inclusion and membership have been carving themselves out a place that has reached beyond the headlines onto the agendas of philosophical debates about the meaning and requirements of justice.

That development represents a significant change from the heyday of theorizing about justice ushered in by the publication of John Rawls's landmark *A Theory of Justice* in 1971. The flowering of competing accounts of distributive justice devised in response to Rawls took place

with remarkably little attention paid to questions of boundaries and membership.[1] Instead, the tendency of most philosophers and political theorists was simply to assume that existing nation-states formed the sort of bounded societies within which it was appropriate to reason about the demands of justice.

Charles Beitz's 1979 treatise *Political Theory and International Relations*,[2] which proposed that Rawls's principles of justice should be extended beyond states and into the realm of international relations, presented an initial challenge to this assumption and proved influential in the gradual establishment of international ethics as a field in which questions about justice were also raised. More than anyone else, however, it was Michael Walzer who established a place for the problem of determining *who belongs* with respect to schemas of distributive justice. His seminal discussion of membership in the 1983 book *Spheres of Justice* established as an indispensable topic for theories of justice what he termed "the first and most important distributive question" – namely, how the community presupposed by the idea of distributive justice is constituted in the first place.[3]

And yet a revealing oddity attended Walzer's discussion of this problem. "The primary good that we distribute to one another is membership in some human community," he asserted – only to add shortly thereafter, "[b]ut we don't distribute it among ourselves; it is already ours."[4] There is an unmistakable dissonance here: the distribution of membership is portrayed as at once an *object* of distributive justice and a *precondition* for it. This tension is only partly dispelled by noting that Walzer's statements

---

1 Notably, Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); David Miller, *Social Justice* (Oxford: Oxford University Press, 1976); Bruce Ackerman, *Social Justice and the Liberal State* (New Haven, CT: Yale University Press, 1980); Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); and Virginia Held, *Rights and Goods: Justifying Social Action* (Chicago, IL: University of Chicago Press, 1984).

2 Charles Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979).

3 Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), p. 31. See also his "The Distribution of Membership" in Peter G. Brown and Henry Shue, eds, *Boundaries: National Autonomy and Its Limits* (Totowa, NJ: Rowman and Littlefield, 1981).

4 Walzer, *Spheres*, pp. 31–32. Another account explicitly placing the question of membership within the rubric of distributive justice is Jules L. Coleman and Sarah K. Harding, "Citizenship, the Demands of Justice, and the Moral Relevance of Political Borders," in Warren F. Schwartz, ed., *Justice in Immigration* (Cambridge: Cambridge University Press, 1995), pp. 18–62.

invoke two quite different first-person plurals: a general (and inclusive) "we," who distribute membership to one another, and a particular (and exclusive) "we," who already have it.[5] How, after all, does the membership that is "already ours" arise to begin with? And should this existing membership be regarded, for ethical purposes, as simply a *fait accompli*? Or is it appropriate to raise questions about its justness? If so, what sort of justice might we be talking about?

It is my contention in this book that the determination of membership in a community, contrary to Walzer's suggestion, does not properly fall under the rubric of *distributive* justice at all. The question of membership is, to the contrary, logically prior to considerations regarding the justness of distributions. That is not to say, however, that fixing the boundaries of community is an activity that is, as it were, *beyond* justice *tout court*. Rather, it seems to make intuitive sense to hold that how a community is constituted – who is understood or recognized to belong to it in the first place and who is excluded (and on what terms) – might itself be unfair or unjust. It follows that we are obliged to consider a set of questions about the parameters of justice under the aspect of what I will call "constitutive justice." By this, I mean to denote a perspective that departs from the "distributivist" paradigm that has been so dominant in recent discussions and that focuses instead on the task of determining just criteria for inclusion and exclusion in political (and, indeed, other sorts of ethically significant) communities.

Walzer's initial reflections on membership in the early 1980s prompted a round of further considerations of the justness of borders, nationalism and patriotism, immigration and naturalization policies, and the treatment of refugees and asylum seekers. In the era of identity politics and ethnic separatism that marked the 1990s, discussions of the ethics of multiculturalism and the morality of secession became the order of the day. Then, at the turn of the millennium, as globalization and its attendant inequalities came to constitute a dominant concern of social ethics, the topic of global justice established itself as a chief preoccupation of political philosophers. In these various phases of thinking through what might best be called the *ethics of community*, questions about belonging and boundaries have played an important role. And

[5] See the related discussion of "we_1"and "we_2" communities in Udo Tietz, *Die Grenzen des Wir* (Frankfurt: Suhrkamp, 2002), pp. 54–82. I discuss Tietz's account in Chapter 5 below. See also Andrew Mason, *Community, Solidarity, and Belonging: Levels of Community and Their Normative Significance* (Cambridge: Cambridge University Press, 2000).

yet, as I will show, none of these debates has fully succeeded in laying bare the distinctive features of justice that are related to the constitution of communities.

This failure, I will argue, is due in large part to our inheritance of entrenched ways of thinking about justice that obscure certain dimensions of the current issues we face. Western philosophy has bequeathed to us a set of categories – distributive, commutative, retributive – characterizing different forms or functions of justice, and it has been all too easy to fall back on them in attempts to make sense of the ethical questions linked to boundaries. But these categories are rooted in premodern assumptions about the nature of communities, the nature of human nature, the nature of agency, and even the nature of nature in general, and they incorporate understandings of social relations that are largely innocent of modern insights into sociology, the dynamics of large-scale economic forces, the hermeneutics of social imaginaries, "human geography," and the political construction of nationality or peoplehood. Consequently, they carry decisive blind spots. The groupings presupposed by traditional accounts of distributive justice, or the sort of individual exchanges that form the stock of commutative justice, do not enable us to get at the heart of the matter when it comes to the issues of inclusion and exclusion that we encounter in the modern world. For this, we need to think afresh about justice – to illuminate a type of justice that is, indeed, *sui generis*. We must endeavor to bring justice to bear on its own foundations. That is the chief goal of this book.

What I am undertaking here is an illumination of the main features of the genre of justice I have termed *constitutive*. Under what conditions does this genre come into play, and what circumstances does it address? What logical characteristics does it evince, and which modes of reasoning does it typically evoke? What is its ethical character: what normative structure does it carry, what modes of justification does it rely on, and what characteristic moral concepts – such as virtues, principles, or discernment – might it employ? What understandings of human agency and social processes does it presuppose? In assembling a composite sketch of constitutive justice, I will be at pains to differentiate it from other forms of justice and to illuminate its relationship to them.

I will further contend that clear thinking about the problems of justice accompanying the constitution of communities is not just an academic objective; it can help give us a better purchase on some real-world issues. I do not want to exaggerate the degree to which a constitutive lens

generates new perspectives on justice; nor do I want to overstate the potential of philosophical theories for solving thorny practical problems. Yet constitutive concerns provide a valuable service by asking us to focus on the ways in which societies and other groupings that are often taken as natural or given are in fact in some measure constructed and thus susceptible to human agency. They also help illuminate complex social phenomena – the formation of assumptions about human sociality, or the shaping of parameters of political belonging – that might otherwise remain invisible to us. As a consequence, constitutive questions can help provide a corrective to the bias in favor of the status quo – that is, the existing community, the "facts on the ground" – that is built into the construction of immigration questions as matters of distributive justice. Likewise, they can enable us to identify limits and weaknesses in the metaphor of the social contract as applied to problems such as secession or property. In other cases, the perspective of constitutive justice can help rein in the penchant for unfettered universalism in cosmopolitan accounts of socioeconomic equality or humanitarian intervention, thus generating more realistic proposals for reforms, or rescue. And attention to constitutive factors, I will contend, helps sharpen certain kinds of questions of historical justice and draw other features of the ethical landscape into greater focus.

In developing my conception of constitutive justice, I will seek to situate it with respect to other areas of ongoing development in the broad field of the ethics of justice. In particular, I will be concerned to elucidate the connections between the perspective I am offering here and the rich bounty of arguments and analyses regarding global justice that have emerged in recent years. In fact, a secondary purpose of this book is to provide an accessible map of the landscape of contemporary work on justice and a guide to some of the major themes that distinguish current thinking about justice, politics, and globalization.

In taking up this topic, I do not confine myself to a particular disciplinary discourse; nor do I identify myself with a particular theoretical orientation. Instead, my approach is avowedly omnivorous and deliberately eclectic. My study ranges freely over the fields of ethics, social philosophy, democratic theory, sociology, human geography, and religious studies, and I incorporate ideas and perspectives from sources as diverse as critical theory, political liberalism, hermeneutical phenomenology, deconstruction, and Catholic social thought. I realize that I venture at my own peril beyond my own areas of specialization in religious ethics, political theory, and German studies and that there will no doubt be those who contest to what extent some of the arguments

I deploy from different quarters ultimately cohere. But there is a three-part rationale for the approach I have adopted. First, since justice as an intellectual conception is not the exclusive preserve of any particular field or discipline but instead stands at the intersection of several, a case can naturally be made that understanding its normative complexity entails viewing it from, and attempting to integrate, several perspectives at once. A second ground for my mode of proceeding is more closely bound up with my focus on the *constitutive* dimension of justice, which leads me both to query to what degree established paths and paradigms of thought have obscured important aspects of the communal foundations of justice and to challenge the constitution of the disciplinary divides and boundaries that have, arguably, balkanized the study (and pursuit) of justice. Lastly, there is a methodological point to the eclecticism of this study, inasmuch as it shares in the sensibility of arguments that fields such as ethics and political theory stand in need of enrichment through a greater emphasis on comparative work and the dialogical mediation of views emerging from different intellectual traditions.[6] In its appropriation of diverse sources, this book attempts to exemplify these aims; whether it succeeds, of course, is for the reader to judge.

A further purpose of this book, finally, is to advance an argument about the historicity of conceptions of justice. In response to my attempt to articulate a problem of justice that, I claim, has hitherto eluded focused consideration, one can readily ask why the question of constitutive justice might be coming into focus only now, in our contemporary globalized and postmodern clime. Part of my response will be to concur, to an extent, with the perception of some theorists that there are certain dynamics in play, native to the exigencies of large-scale organized communities of justice, that occlude the processes, mechanisms, and forms of agency through which memberships and boundaries are constructed and maintained.[7] But I will also propose that the evolution of our social settings over time can produce new and fundamental dilemmas of justice – not unlike the predicaments in bioethics produced

---

[6] William A. Barbieri Jr., "Comparative Ethics and the Ethics of Comparison: Or, Why a Diet of Apples and Oranges Is Good for Us," *International Philosophical Quarterly* 41.3 (2001): 285–303; Fred Dallmayr, ed., *Comparative Political Theory: An Introduction* (New York: Palgrave Macmillan, 2010); Melissa S. Williams and Mark E. Warren, "A Democratic Case for Comparative Political Theory," *Political Theory* 42.1 (2014): 26–57.

7 This is the view, for example, of William Connolly; see his *The Ethos of Pluralization* (Minneapolis, MN: University of Minnesota Press, 1995).

by emerging technological possibilities – and that advances in human knowledge can likewise bring into focus new dimensions of ethical complexity.[8] Concealment and complication are both at work.

Under these circumstances, I maintain, continuing to rely on our established categories for thinking and arguing about justice can undermine our ability fully to grasp the character of the ethical problems that confront us. Articulating a conception of constitutive justice is a needed – even if, in the end, only provisional – step in updating our ethical vocabulary to reflect new insights into old problems and emerging understandings of new ones. Only such a conception can enable us to perceive, link together, and reason about the complex ways in which considerations of fairness, propriety, and proportion subtly infuse and inflect the processes through which we project and construct the very collectivities we take to be the grounds of systems of justice.

And while my primary concern is with constitutive questions bound up with the "communities of justice" attached to social institutions and political life, it is worth noting that the problematic of constitutive justice places us on a trajectory aimed at other sorts of constitutive issues beyond the purview of this book. The issues of justice bound up with the constitution of communities extend, *mutatis mutandis*, to the definition of ethnic and racial groups, to the delineation of religious denominations and traditions, and even to the construction of moral status *tout court*. As a result, questions of constitutive justice will ultimately need to be addressed in debates about, *inter alia*, abortion, gender definition, the rights of future generations, the rights of nonhuman animals, biotic rights, artificial intelligence, and transhumanism.

The structure of the book

In presenting my account of constitutive justice, I begin in Chapter 1 with a discussion of how the issue has percolated up in recent social philosophy, using Rawls's work in particular to illustrate how constitutive questions attend claims about distributive justice. This leads into a more sweeping survey of the character of talk about justice, in which I unfold a working conception of justice in general and comment on the time-honored practice of distinguishing among major types or genres of justice. After using Aristotle's account of the relationship between justice and communal life as a fulcrum to raise into view the notion of

[8] Cf. Bernd Rüthers, *Das Ungerechte an der Gerechtigkeit – Fehldeutungen eines Begriffs*, 3rd ed. (Tübingen: Mohr Siebeck, 2009).

constitutive justice, I elaborate on the manner in which this concept relies on distinctive elements that I term the "scope" and "scale" of justice. In tracing the relations between these two factors, I present my conception of "communities of justice" and elaborate on the central tasks for a theory of constitutive justice. I then provide a sketch of how constitutive questions have implicitly informed a range of recent political and scholarly debates, and I finish up by offering an explanation as to why this variety of justice has only recently emerged as a pressing concern for political theory.

In Chapter 2, I consider and respond to some prospective reservations about adopting the category of constitutive justice into our ethical vocabulary, reservations that can be linked to the contending positions of some prominent political philosophers. I first consider the view that boundaries are best viewed as historical givens immune to ethical criticism. My discussion of versions of this position found in the theories of Rawls and Robert Nozick leads eventually to an excursus on the problem and character of historical justice. I next take up the thesis that justice does not impact questions of inclusion, because they involve political choice rather than ethical judgment: here, Jürgen Habermas and Carl Schmitt are my principal interlocutors. From there I make an initial foray into current debates about global justice to address a third sort of reservation that accepts that constitutive questions are matters of justice but attempts to assimilate them under all-encompassing accounts of the scope of distributive justice inspired by the cosmopolitanism of Immanuel Kant. In response, I use a discussion of some representative cosmopolitan accounts – those of Mathias Risse and Gillian Brock – to suggest that adopting a global frame for justice still leaves crucial constitutive matters unaddressed. I adopt a similar strategy in response to a fourth reservation, expressed most influentially in the contractarianism of Otfried Höffe, who proposes that the category of commutative justice effectively dispenses with questions of how societies ought to be constituted.

A final reservation regarding the cogency of the category of constitutive justice is so challenging that it merits a more extended discussion. In Chapter 3, I present a sustained response to the worry that constitutive justice may fall prey to the paradoxical nature of the undertaking of, as I have put it, bringing justice to bear on its own foundations or structural preconditions. In the process, I situate my undertaking in a tradition of what I call "constitutive paradoxes" – articulated by thinkers as diverse as Jean-Jacques Rousseau, Paul Ricoeur, Giorgio Agamben, and Jacques Derrida – surrounding both the founding and ongoing

emendation of political communities and boundaries. Establishing the justness of particular communities of justice, I argue, is a perplexing but ultimately intelligible task that has a place alongside established antinomies of political theory, including the *sovereign* basis of *sovereignty*, the *constitutional* power to establish a *constitution*, the *popular* authority of a *people* to call itself into being, and the *democratic* legitimacy required to delineate a *demos*.

In Chapter 4, I turn to the job of staking out the rough normative structures of constructive theories of constitutive justice. I set this task against the backdrop of debates that pit communitarian against cosmopolitan theories of justice before arguing that constitutive issues ultimately militate against this dichotomy. The first step in this argument is an exercise in which, through a close reading of Michael Walzer's classic discussion of the ethics of membership in *Spheres of Justice*, I demonstrate that even strongly communitarian accounts of how communities should be constructed cannot avoid admitting the force of more broadly based external grounds of justice. Conversely, however, I then show why universalist conceptions of the scale of justice presumed by theorists of global justice also fall short in both theory and practice. The conclusion at which I arrive is that the most plausible accounts of constitutive justice occupy a space best termed "transcommunal," in which considerations stemming from within concrete communities and polities interact with rationales that exceed communal contexts without necessarily attaining full universality.

Chapter 5 is then devoted to canvassing a set of recent instances of transcommunal thinking about justice that, I suggest, make promising inroads into constitutive questions, even if they do not explicitly present themselves as taking up that task. I discuss four broad approaches here. The first takes as its principal theme *interdependence* as a ground for ties of justice; drawing on Hume's famous account of the "circumstances of justice," it can be traced in the work of Onora O'Neill and Iris Marion Young. The second view gives pride of place to conceptions of recognition, authenticity, and the *common good*. Claiming antecedents in Aristotle and Hegel, it finds contemporary expression in the "judgment view" of Alessandro Ferrara and in Udo Tietz's study of the "boundaries of 'we.'" A third approach, meanwhile, inspired by John Dewey's pragmatism, attempts to overcome the "*demos* problem" – the apparent impossibility of determining who belongs to "the people" through purely democratic processes – by finding grounds for determining membership that remain endogenous to democratic theory. Here, Susan Hurley, drawing on models from cognitive science, provides a particularly astute account

of how recursive or self-generative criteria of constitutive justice might be developed and defended, while Nancy Fraser and James Bohman also develop innovative accounts of how the ways in which democracies are framed might themselves be democratized. The final mode I consider is rooted in Jacques Derrida's late work on violence, law, and sovereignty, in which he envisages justice as an undeconstructible condition that exerts a constant force on ethical and political life but is never attained. Although I argue that each of these approaches has its shortcomings, I conclude that individually and collectively, they contribute to illuminating constructive paths for theories of constitutive justice.

In the remainder of the book, I begin to sketch out how constructive debate about constitutive justice might take place. In Chapter 6, after speculating about how particular contemporary schools of political thought might generate arguments about the normative structure of political communities, I outline what I take to be generic features of plausible conceptions of constitutive justice, concentrating on three elements in particular. Such theories, first, will necessarily rely on an account of moral agency that attempts to elucidate how people act, individually and in concert, to shape their social world and modify their own ethical understandings. Second, constitutive theories will need to employ both conceptual analysis and social theory to illuminate the dynamics of boundary-making: for example, both how "peoples" are conceptualized and how they are concretely shaped through state-building, nation-building, and other symbolic processes and exercises of power. Third, such accounts will be obliged to stake out some positions on the pragmatics of justice, concerning for instance how perceptions of injustice come to light and whether justice or injustice is epistemologically prior. These generic elements, I suggest, point us to some illuminating links between constitutive questions and related debates about historical and territorial justice.

Having already intimated – in the course of the foregoing critiques, analyses, and arguments – where I stand on a number of the key questions associated with constitutive justice, in Chapter 7 I conclude by filling in the broad outlines of my own constructive theory. I begin by specifying, through a comparison with just war theory, what sort of framework and criteria an account of constitutive justice properly aims to provide and how it combines descriptive and normative theories. I then introduce *responsibility*, *equilibrium* (as contrasted, for example, with an Aristotelian mean), and *non-domination* as the central themes in my own theory. These conceptions link just conditions for the constitution of communities of justice with recursive processes that seek

balancing points in relation to several sets of countervailing tendencies or forces: universalist as opposed to particularist (e.g., nationalist) scales of justice; historical instances of injustice versus new "facts on the ground"; competing territorial claims; and individual and communal appeals for recognition. The imperative to foster these basic values, I argue, directs us to a set of "middle axioms" – that is, principles or criteria of constitutive justice – including tried-and-true ethical conceptions such as solidarity, subsidiarity, and sustainability. These criteria find their place in a theory that is contextual, pluralistic, and attuned to the phenomenology of communal formation. In order to illustrate the implications of my theory, I close with brief discussions of how it might be applied in ongoing debates about territorial rights, secession, and immigration.

In the end, my case about the deficits that would be addressed and the advantages that would be brought by adopting the category of constitutive justice into the lexicon of political theory must stand or fall with the book as a whole: the proof, finally, is in the pudding. It may be, indeed, that this brief treatment is not nourishing enough to satisfy skeptics and that only a more substantial study can fully establish my case. All the same, if this book succeeds in making the notion of constitutive justice intriguing enough to elicit debate and disagreement, then its chief objective will have been met. After all, like communities, conceptions of justice are properly constituted through engaged conversation.

1
The Scope and Scale of Justice

"Justice is the first virtue of social institutions," declared John Rawls at the outset of his *Theory of Justice*, before adding, "as truth is of systems of thought."[1] Justice, in other words, is the most important evaluative feature of a society in much the same way that truth is the fundamental evaluative feature of a science or tradition.

This is a powerful way of locating a powerful ideal, and it reflects a strong tendency in contemporary ethical thought and philosophizing to link talk of justice to the social and political realm. Rawls was right to suggest that in modern parlance justice is first and foremost a master category for characterizing our evaluations of how social entities are structured and administered. But of course historically, justice has also had numerous usages beyond the sociopolitical sphere, denoting righteousness in relation to God, or fidelity in translation of texts, or fairness in dealings with neighbors, or right conduct in relation to property, or even, at times, human virtue in toto. It is likely for this reason that Rawls quickly specified that the type of justice with which he was concerned was "social justice." By this, he meant a type of justice relevant to and located in a *society*: "a more or less self-sufficient association of persons who in their relations to one another recognize certain rules of conduct as binding and who for the most part act in accordance with them."[2]

It is in reflecting on the proposition that justice in its preeminent modern sense is an attribute of societies that we encounter the question that animates this book. If *social* justice is a property of relations *within*

[1] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 3.

[2] Rawls, *Theory of Justice*, p. 4. Rawls goes on to insist (pp. 10–11) that his conception of social justice is assimilable to, or at least reconcilable with, Aristotle's understanding of justice as a personal virtue in the *Nicomachean Ethics*.

particular human associations, then what sort of justice can be said to bear on the moral features of how those associations are shaped in the first place?

Indeed, when we raise the question of who ought to be included or who might justifiably be excluded – or who ought to make such designations – in the human association presumed by Rawls's maxim, it is not clear that *social* justice is the sort of concept that might cover a response. It seems, rather, that questions of social justice implicitly assume that the question of how the membership or bounds of a society are defined has already been in essence settled.

A close look at how Rawls framed his theory enables us to see that he butted up against the same problem encountered by Walzer regarding membership. Rawls set out to root his argument concerning "justice as fairness" in an account of the choices that rational actors would make in a hypothetical, generalized situation of founding modeled on the classical notion of social contract. As Rawls posits,

> we are to imagine that those who engage in social cooperation choose together, in one joint act, the principles which are to assign basic rights and duties and to determine the division of social benefits. Men are to decide in advance how they are to regulate their claims against one another and what is to be the foundation charter of their society. Just as each person must decide by rational reflection what constitutes his good, ... so a group of persons must decide once and for all what is to count among them as just and unjust.[3]

Now, leaving aside the reference to the "men"[4] who do the deciding in this "original position," we may still ask who might be qualified to "engage in social cooperation" in advance of the adoption of any collective charter or constitution, and, more pointedly, how any disagreements about who belongs to the "group of persons" doing the deciding might be adjudicated prior to their adoption of principles of justice. For his part, Rawls stipulates that his doctrine of "justice as fairness" is premised on the agreement of "free and equal citizens who are born into

[3] Rawls, *Theory of Justice*, p. 12.

[4] I assume that Rawls did not intend this term to be understood in what we today call a "gender-specific" sense; nonetheless, for anyone with feminist sensibilities the criticism of Rawls's account as gendered is ready to hand.

the society in which they lead their lives."[5] We will have an opportunity to examine the implications of this proviso below.

It is true that Rawls is careful to say his thought experiment does not represent any actual society but corresponds, rather, to the state of nature theorized in classic accounts of social contract. Its actors, moreover, are generalized persons who operate behind a "veil of ignorance" and hence know nothing about their particular attributes, place in society, or conception of the good. These caveats, however, do not obviate the problem of criteria of inclusion for Rawls, since the notions he employs of "society" and "group" necessarily imply boundedness and cannot simply be universal or open.[6]

If this problem persists in Rawls's ideal theory, it is all the more unavoidable in theories of social justice that refer to actual historical conditions. One can readily imagine, indeed, circumstances in which the way that the association of persons constituting the object of social justice is defined might be contested. Should all persons – including women, slaves, residents of occupied areas, long-term visitors, pariahs, and members of minority religious or national groups – be acknowledged as having equal status and standing in a society? How broadly should membership be extended among contiguous populations? How should a society be demarcated in a territorial sense? One might simply respond that all such questions aside, societies, regardless of how they came into being, undeniably exist in a manner that supports the sort

[5] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 23.

[6] The "veil of ignorance" that is so important for Rawls's theory mandates that in the original position, "no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like" (*Theory of Justice*, p. 12). This appears to assume that all hypothetical participants do know that they have a place in society, even if they do not know what it is. But what if participants were radically unsure about whether they were to have a place in society or to be excluded? What if they knew of the possibility of living under conditions of alienage? Would that change the resultant principles of justice or focus attention on issues of inclusion? Rawls does not consider these eventualities. Amartya Sen, in similarly noting what he calls the "inclusionary incoherence" of the original position, presents a different criticism here, pointing out that Rawls provides no criteria for specifying *how many people*, including from future generations, should be included. In my view, however, Sen does not show convincingly that the mere *number* of people involved in the process of deliberation posited by Rawls would decisively affect what principles of justice emerge from that process. See Sen's *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009), pp. 139–48.

of analysis of justice that Rawls and others undertake and that as a result, questions regarding the justness of their constitution are moot. I will discuss this response more fully in Chapter 2, but suffice it to say here that it would be difficult to identify an actual large-scale society or polity that has developed without any ethical controversy or putative injustices in determining its boundaries and membership. For this reason, it would seem reasonable to expect that theories of justice should take on the matter of the conditions under which social entities are constituted.[7]

Justice and its types

If, as I have suggested, the idea of *social* justice does not squarely address this matter, then what conception of justice might? To approach this question, it will be useful to give some basic consideration to the idea of justice and some of the received wisdom or conventional theories regarding its different facets or types. In what follows, I will set about, first, distilling a working general concept of justice. Second, I will then turn to a brief survey of some different typologies of justice.

To begin with, then, as I just proposed, justice relates to social life and hence concerns relations with, or to, others.[8] It is essential to justice that it is a relational term, implying links or exchanges between or among multiple subjects, in addition to further components such as objects (e.g., goods or harms), evaluative criteria, and horizons of social meaning. It is only because of its reliance on shared meanings, however, that justice can be said *necessarily* to presuppose a community; otherwise, it merely

[7] Although Rawls suggested that questions of historical injustice and compensatory justice, while important, were properly matters for "partial compliance theory" and hence not directly relevant to his project of "ideal theory" (*Theory of Justice*, pp. 8–9), it is difficult to see how the possibility of boundary disputes might not have an impact on a theory of positive principles of social justice.

[8] Most philosophical accounts of justice presume that justice concerns relations among human persons, but it can certainly be questioned whether the implied exclusion of nonhuman animals is legitimate or justifiable. On this point, see especially Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Harvard University Press, 2006), pp. 325–407. In addition, there is no reason in principle why conceptions of justice might not include relations to divine persons, and indeed the language of justice in classical societies was readily extended to gods and other sacred powers. However, although in the great monotheisms justice was construed partly in terms of righteousness (Hebrew: *tzedakah*) – that is, being in line with the divine will – the gulf between humans and God was such that it made attributions of justice to God theologically problematic.

posits some relations among persons.[9] Justice involves determining *how those relations ought to be*, and it assumes that there are objective, ordered, and in some sense pre-ordained ways to which they should conform – or, put negatively, it assumes that how these relations take shape should not be merely arbitrary. As the reference here to *should* or *ought* denotes, justice has a *prescriptive* or *normative* character, in a manner that encompasses two broad contexts with which justice is often associated – namely, ethics and law.

Additionally, we can say that justice is *directive*, in two discrete senses. First, the term is inscribed with an energetic quality: justice is insistent and demanding; it compels a response. Second, it has a vectoral quality, directing us to act along certain trajectories. Justice, that is to say, recommends, impels, requires, or otherwise guides action in some ways and not others.[10] And if justice is not arbitrary, then we can further say it is characterized by regularity, consistency, or impartiality.[11] My point here does not go so far as to imply that justice necessarily assumes the

[9] I note that in making this point, I am stopping short of endorsing an idea that is common in the history of theories of justice: the idea that there are certain general "circumstances of justice" – fixed features of human nature and the human condition – that both make possible and require the idea of justice and moreover determine some if its features. Hume famously articulated this notion by arguing that it is only under the conditions of moderate scarcity, limited generosity, and rough human equality that questions of justice (at least distributive justice) arise and take on their familiar form. I demur here because I find that this idea is insufficiently historicized, and it overlooks the manner in which such circumstances, dependent as they are on technological and social variables, are subject to significant change over time. Take, for example, societies struggling with drought, famine, and epidemics; whereas these calamities might have been perceived as "natural disasters" in past centuries, we are more aware today of the patterns of maldistribution that make such events largely or even primarily products of human agency. I return to the topic of the "circumstances of justice" in Chapter 5.

[10] Some commentators have noted a broad divide, and perhaps a tension, between an aspect of justice that is "conservative" or focused on maintaining or repairing the status quo and an aspect of justice that is "reformative" or concerned with bringing an ideal state of affairs into being (see, e.g., D. D. Raphael, *Concepts of Justice* (Oxford: Oxford University Press, 2001), p. 4; and Izhak Englard, *Corrective and Distributive Justice: From Aristotle to Modern Times* (Oxford: Oxford University Press, 2009), p. xi). I do not mean to take up this distinction here; my reference to the prescriptive character of justice is designed to apply to both.

[11] As David Schmidtz adds, an idea that closely follows is treating like cases alike. See his *Elements of Justice* (Cambridge: Cambridge University Press, 2006), p. 7.

equality of all persons, as some have claimed, although there is something to this view. Of course, for the ancients, in certain contexts justice required treating people differently on the assumption that people inherently differ with respect to their merit or worth: what was important was treating them *in equal proportion to* their desert. My point is perhaps better formulated negatively: justice forbids treating similar cases differently, or applying varying standards to a single group of persons, or giving preferential treatment to the few.

Beyond these very generic features, we can go a bit further to adopt the classic formulation of *suum cuique* and state that justice is about what people are *due*. Even if what people are due varies from case to case and person to person, we can add that justice involves proportion. A related dimension of justice that has recently received attention from philosophers is the degree to which there is a comparative element to justice. Even though some have emphasized that there is a distinction between judgments of justice focused on how goods are distributed among persons vis-à-vis one another and judgments of justice related to non-comparative factors bearing on individual persons – such as their desert or merit or contractual acts in which they have engaged – on examination it is apparent that there is frequently a comparative aspect as well to even the latter type of judgment.[12] The implication of this, for my purposes, is that at one level or another justice can always be related to a holistic, social, or interpersonal context.

To sum up the sketch so far, justice is an idea involving norms or prescriptions that, in peremptory fashion, lead us to assess comparatively and to provide what is due to others, on a consistent and disinterested basis. In this account, what we might call "dueness" is the most distinctive feature. To give people their due is to render to them what is their own, what they deserve, what they have coming to them; and dueness thus encompasses a set of interlocking meanings concerning desert, debts or owing, and ownership. How to construe and judge dueness becomes the central preoccupation and challenge for theories of justice.

Having identified some generic features of justice, we now have a basis from which we can turn to the issue of varieties of justice. It is a staple of the history of theorizing about justice that justice has different faces: differing types of justice are engaged or arise in response to different

[12] On this point, see the essays in Serena Olsaretti, ed., *Desert and Justice* (Oxford: Clarendon Press, 2003), several of which critique the distinction between comparative and non-comparative justice as originally articulated by Joel Feinberg.

kinds of relationships, situations, or problems. Here again, though, consensus does not reign on what the basic kinds of justice are or how many types there are. For example, a debate continues to simmer on whether retributive justice – the justice of punishments – is a derivative part of distributive justice or a part of commutative justice; whether it is a discrete, third type of its own; whether it falls under general justice; or whether it is a misnomer to call it justice at all.[13] Indeed, we can even distinguish among different kinds of typologies of justice or different levels of specificity at which differences can be pointed out. At the highest level of abstraction, we find Aristotle's distinction between general (or universal or legal) and particular justice, in which he distinguishes an overarching sense of justice that identifies it with all virtue in general related to social interactions, from more specific and closely delimited types related to specific spheres of human affairs respectively. At the lowest level, by contrast, we find facets of justice concerned with individual problems of social and political life: transitional justice, criminal justice, transformative justice, intergenerational justice, ecological justice, and so on. These are often subgenres of basic types of justice. What I am concerned with in this study is an intermediate level at which basic types of what Aristotle called particular justice are distinguished.

Let us remain with Aristotle for the moment. For him, there were two basic forms of (particular) justice: corrective (or rectificatory) and distributive. His distinction of these two types attributed to them, among other characteristics, an arithmetic proportion and a geometric proportion respectively as their "measures" and a private as opposed to public character. Distributive justice was concerned, for Aristotle, with the distribution of honor, wealth, and other communal assets, in proportion to the merits of the members of the community. Corrective justice, meanwhile, was concerned with ensuring equality in transactions, and it addressed two kinds of issues: "voluntary" ones, for the most part commercial exchanges, and "involuntary" ones, consisting primarily in crimes or harms such as robbery, theft, and assault. It is on account of this latter category that a debate has ensued over the years about retributive justice and where it fits into Aristotle's division.[14] Aristotle's distinctions were taken up by a long line of commentators,

[13] See Englard, *Corrective and Distributive Justice*, pp. 9–10.

[14] For an argument that retributive justice is assimilable neither to distributive justice nor rectificatory justice, see Ronen Perry, "The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory," *Tennessee Law Review* 73.2 (2006): 177–236.

including most influentially Thomas Aquinas, who affirmed the partition of justice into distributive and "commutative" justice – the justice of exchanges – noting that the latter governed the relation of persons to one another, whereas the former regulated the relation of the community to its members.[15]

Later Scholastic tradition developed this idea into a triad, adding a conception of legal justice to characterize what members owe the state, as opposed to what the state owes members and what they owe each other.[16] Similarly, Leibniz employed a tripartite conception of justice, drawing what Aristotle had characterized as universal justice into a sort of parity with commutative and distributive justice.[17]

A significant modification to categories of justice was occasioned by the rise, amid the social and political upheaval of mid nineteenth-century Europe, of the idea of "social justice." The term initially emerged with a sense associated mainly with advancing the rights of the poor. However, with the advancing modernization of Western societies, it gradually took on the more complex sense of arriving at social structures conducive to the promotion of human dignity and flourishing.[18] In more recent tripartite philosophical schemata of justice, social justice often replaces legal justice. A representative contemporary formulation is that of the US Catholic bishops, who, in their influential public treatise *Economic Justice for All*, state that "Catholic social teaching, like

[15] *Summa Theologiae* I, Q. 21; II–II, Q. 61. On this point he departed from Aristotle's notion of distributive justice as arising within any group of at least four persons. Hugo Grotius likewise stands out in this tradition for having styled commutative justice as *iustitia expletrix*, "expletive justice," and opposing it to attributive, rather than distributive, justice; see his *De jure belli ac pacis* (Clark: The Lawbook Exchange, 2005), Lib. 1, Cap.1, VIII, p. 24. Grotius's notion of attributive justice is distinctive and fertile, as Oliver O'Donovan has shown, and it bears the potential to be linked to constitutive issues. See O'Donovan, *The Ways of Judgment* (Grand Rapids, MI: Eerdmans, 2005), pp. 38–40.

[16] See, e.g., Josef Pieper, *The Four Cardinal Virtues* (Notre Dame, IN: University of Notre Dame Press, 1966), pp. 70–103. Beyond his discussion of "the three basic forms of justice," Pieper raises the question of justice with respect to God as a special case, showing that although humans owe sacrifice, piety, and respect to God, they can never wholly repay this debt (pp. 104–10).

[17] Gottfried Wilhelm Leibniz, *Political Writings*, ed. Patrick Riley (Cambridge: Cambridge University Press, 1996), pp. 60, 171–72.

[18] For a brief sketch of how the notion of "social justice" arose with the response of Christian social ethics to the "social question" in the nineteenth century and then migrated into political debates and finally to philosophical discourse, see Otfried Höffe, *Vernunft und Recht: Bausteine zu einem interkulturellen Rechtsdiskurs* (Frankfurt: Suhrkamp, 1996), pp. 202–04.

much philosophical reflection, distinguishes three dimensions of basic justice: commutative justice, distributive justice, and social justice."[19] It is social justice in this sense, bearing on the overall organization of social, political, and economic institutions within a society, with which, as we have seen, Rawls understands himself to be concerned.

My point in tracing this history is twofold. One sees, first, that mid-level typologies of justice are not static but have evolved or unfolded in response to changing understandings of human communities or societies. Secondly, however, it remains the case – the rise of "social justice" notwithstanding – that these typologies have not yet thematized the fundamental matter of the constitution, formation, or coming into being of what Aquinas called the *communitas perfecta*, the social context in which designations of justice become relevant. It is my contention that, especially under our present conditions of ongoing political and economic restructuring under the sign of globalization, this lacuna demands the modification of our conceptualization of justice to include an additional type: constitutive justice.

The limits of justice: Aristotle

We can see with this issue an important limit to classical conceptions of justice. If Plato assumed that the substance of "doing one's own"[20] was conformity to a natural (and aristocratic) social order, and Aristotle by

---

[19] United States Conference of Catholic Bishops, *Economic Justice for All* (Washington, DC: United States Catholic Conference, 1986), #68. In spelling out this typology, the bishops stated:

> *Commutative justice calls for fundamental fairness in all agreements or exchanges between individuals or private social groups. ... Distributive justice requires that the allocation of income, wealth, and power in society be evaluated in light of its effects on persons whose basic material needs are unmet. ...* Justice also has implications for the way the larger social, economic, and political institutions of society are organized. *Social justice implies that persons have an obligation to be active and productive participants in the life of society and that society has a duty to enable them to participate in this way*. This form of justice can also be called "contributive," for it stresses the duty of all who are able to help create the goods, services, and other nonmaterial or spiritual values necessary for the welfare of the whole community. ... The meaning of social justice also includes a duty to organize economic and social institutions so that people can contribute to society in ways that respect their freedom and the dignity of their labor (#69–72, emphasis in original).

[20] Plato, *Republic*, ed. G. R. F. Ferrari, trans. Tom Griffith (Cambridge: Cambridge University Press, 2000), Book IV, 433b.

contrast acknowledged that the substance of merit might vary depending on the sort of government that characterized a state, still neither conceived specifically of the task of evaluating the justice of a particular kind of state – not to mention assessing the justice of the grounds for assigning or acknowledging membership in one community as opposed to another. Classical reasoning about justice operated in a world in which memberships were given, essential, ordained by nature or by the gods.

Let us consider, for example, how Aristotle dealt with the question of the boundaries of the political community and the related question of who might appropriately be considered a citizen. In the *Ethics*, after presenting an account of justice in which he considers both its universal and particular (that is, distributive and rectificatory) faces, he goes on to provide a characterization of *political* justice, noting that it

> is found among men who share their life with a view to self-sufficiency, men who are free and either proportionately or arithmetically equal, so that between those who do not fulfill this condition there is no political justice but justice in a special sense and by analogy. For justice exists only between men whose mutual relations are governed by law; and law exists for men between whom there is injustice.[21]

Aristotle's meaning is that political justice – the justice of the *polis* – is justice between full-fledged citizens only, and it does not apply to relations between masters and slaves, or between fathers and children, in the same way that one cannot be unjust with respect to one's own possessions. Wives, he goes on to explain, occupy an intermediate status here in that justice may be exercised toward them, but only in the form of "household justice," a special sort inferior to political justice. Since Aristotle has already spelled out in his treatise how the life of virtue depends on the order provided by the *polis*, his statement makes clear that justice – in the senses related to both the virtuous man and the well-ordered political community – is the affair of only a relatively small group, namely "those who have a share in the constitution."[22] Even in Athens, the most democratic of city-states, this group comprised at most perhaps 15% of the population.[23]

---

[21] Aristotle, *The Nicomachean Ethics*, trans. David Ross (Oxford: Oxford University Press, 1980), 1134b26–31.

[22] Aristotle, *Nicomachean Ethics*, 1130b33–34.

[23] According to R. K. Sinclair, it is estimated that between 14% and 17% of Athenians had full political rights; many, however, were not living in Attike at any given time, so the percentage in practice would have been lower. R. K. Sinclair, *Democracy and Participation in Athens* (Cambridge: Cambridge University Press, 1988), p. 200.

For a fuller account of his understanding of the character of the *polis* and its membership, we have to turn to the *Politics*. There Aristotle begins with a description of how the *polis* – which he approaches as, in essence, a *partnership* – originates, in his view, in the first place. Humans, by nature, are marked by certain basic interdependencies: between male and female and between master and slave. These two relationships serve as the foundation, first, of the family; then the family, in turn, provides the basis for the rudimentary social form of the village; and finally, villages unite to form the *polis*. Although the *polis* comes last in this natural sequence, it emerges as the primary natural human setting for Aristotle in a teleological sense – through its status as a necessary condition for true human flourishing. As he notes, if family and village exist "for the sake of living, [the *polis*] exists for the sake of living well," adding, "[h]e who is without a city through nature rather than chance is either a mean sort or superior to man."[24] And yet very few people truly qualify for membership in this partnership for the good life, as Aristotle drives home in Book III when he takes up the question of who ought to be called a citizen. Citizenship is not to be attributed simply to those who live in a certain place, to those who possess the legal right to sue and be sued there, or even to those born of citizens; rather, the defining mark of the citizen is "sharing in decision and office."[25] The citizen must have the requisite powers of reason and speech, the status, the leisure, and the will to take part in affairs of state. This conception thus perforce excludes not only barbarians and foreigners but also many residents of the community, including slaves, resident aliens, exiles and "deprived citizens," workers (the "vulgar"), women, children, and the elderly – indeed, all who are not those male citizens who are free and "similar in stock."[26]

These secondary, non-citizen groups – denizens, we can call them[27] – retain various degrees of involvement in the life of the city. Aristotle acknowledges that they even aspire to their own specific, if inferior, sorts of virtues. But because they are not full members of the *polis*,

[24] Aristotle, *Politics*, trans. Carnes Lord, 2nd ed. (Chicago: University of Chicago Press, 2013), 1252b30, 1253a3.
[25] Aristotle, *Politics*, 1275a22.
[26] Ibid., 1277b9.
[27] Following Tomas Hammar, *Democracy and the Nation State: Aliens, Denizens, and Citizens in a World of International Migration* (Aldershot: Avebury, 1990).

they are not, in the final analysis, candidates for living a fully virtuous and happy life. Nor – and this is crucial for my purposes – are they included within the scope of political justice. This, for Aristotle, is a matter of nature: in the end, it is nature that underwrites that differentiation of functions in the *polis* which allots only to some the task of sharing in the nexus of justice and renders only those few fit for the activities of adjudication and legislation that are constitutive of the good life.

Aristotle adds that the formation of a *polis* is impossible for animals and slaves because they are not candidates for the good life, since "they have no share in happiness or in a life of free choice."[28] *Political* community can be established among only those people who (1) live in the same place; (2) licitly intermarry, thus founding "family connexions, brotherhoods, common sacrifices, amusements which draw men together"; and (3) are joined by friendship, the "will to live together."[29] For Aristotle, in sum, justice is circumscribed in such a way that the question of whether it is just to exclude slaves from the schema of justice does not – indeed cannot – even arise. That is an outlook that, in modern societies that are infused with conceptions of equality and human rights, can no longer be sustained. Exclusions from the domain of justice call insistently for justification.

Scope and scale

As I noted above, even conceptions of justice focused on exchanges among persons – *commutative* or *retributive* justice, for example – imply participation in some community in virtue of their reliance on shared meanings and evaluations. The notions of *social* and *distributive* justice go further than this, directly invoking a bounded community that is coextensive with either schemes of institutional organization or systems of exchange within which distributions are made. It follows that any specific arguments about justice must take a stance, explicitly or implicitly, on the shape of the community to which they apply – on, that is, the question of who the *addressees* of justice are. I use this term to refer to two largely distinct dimensions of the issue of social

[28] Aristotle, *Politics*, 1280a34.
[29] Ibid., 1280b35–39.

context that we may distinguish as concerning the *scope* and *scale* of justice.[30]

With respect to the former, at issue is *which entities have an address* with respect to conceptions of justice, in the sense of occupying a place of eligibility for the distribution of goods and burdens or falling within the purview of structures of social organization. The *scope of justice* concerns both the boundaries of the domain within which justice is to be delivered or administered and the character of the subjects deemed worthy of consideration in judgments of justice.[31] We could say, in other words, that it relates both to territorial boundaries – or borders – and to social boundaries. The scope of justice is thus in basic respects a matter of jurisdictions and memberships, of institutional belonging and socio-political incorporation. As by now numerous critics have pointed out,[32] most influential recent theories of distributive justice – including those of Rawls and Jürgen Habermas – have simply assumed that the modern

---

[30] Onora O'Neill uses the term "scope of justice" in her *Bounds of Justice* (Cambridge: Cambridge University Press, 2000), in a manner, however, that is closer to the sense I attach below to "scale." See also her *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge: Cambridge University, 1996), pp. 91–121. Nancy Fraser, meanwhile, in her *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2009), links the idea of "scales of justice" to a process of mapping or framing political space, in a manner comparable to my use of "scope." Kok-Chor Tan employs a tripartite conceptual framework distinguishing, in ways that partially overlap with my categories, among the site, ground, and scope of justice in his *Justice, Institutions, and Luck* (Oxford: Oxford University Press, 2012).

[31] Consider, by way of illustration, three competing conceptions of the scope of justice linked to the city of Nuremberg. (1) In a well-known discussion of historical memory and the symbolic foundations of human groups, the sociologist Anselm Strauss emphasized how attempts to industrialize Nuremberg in the mid 1950s were constrained to respect the requirements of a *civic identity* defined first and foremost with reference to the city's artistic achievements in the sixteenth century. See his *Mirrors and Masks: The Search for Identity* (Glencoe, Ill.: Free Press, 1959). (2) Only a few years earlier, the Nuremberg Trials established, by way of their articulation of the notion of "crimes against humanity," the conception of *global standards of justice* on which much of contemporary human rights law is founded. (3) In contrast, the infamous Nuremberg Laws of 1935, by limiting full political rights to persons "of German or kindred blood" and specifically excluding Jews from citizenship, posited a *community of justice bounded by race*.

[32] E.g., Margaret Canovan, *Nationhood and Political Theory* (Brookfield, Vt.: Edward Elgar, 1996); Jean Cohen, "Changing Paradigms of Citizenship and the Exclusiveness of the *Demos*," *International Sociology* 14 (1999): 245–68; Craig Calhoun, "Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere," *Public Culture* 14 (2002): 147–73.

(nation-)state and its associated element of citizenship provide the jurisdictional setting within which the bounded logic of just distributions properly applies.[33] This assumption is rooted in the modern dominance of a particular form of statist thinking, called by some the "nationalist" or "Westphalian imaginary," that has aimed, broadly, at making physical borders and social boundaries coextensive in an overall system of nation-states.

Rawls's work affirms this dominance at two levels. In his original theory of justice, the context of his argument is a society in which citizens face the task of adopting a just constitution – of fixing appropriate institutions constituting the basic structure of society. Although Rawls initially left open the question of whether his argument applied generally, to all reasonable people, his mature theory took as its explicit focus the requirements of justice in contemporary liberal democratic states, granting little regard to matters outside of that domain. That changed when Rawls shifted his concern to a higher level – "the law of peoples" – in his later work. Here, Rawls explicitly chose to speak not of states, but of "peoples," in part because he wished to depart from assumptions about sovereignty that are normally associated with states. What he meant, though, by "people" was a citizenry with a government, "common sympathies" (a turn of phrase from Mill), and a "moral" or reasonable nature vis-à-vis other peoples.[34] Peoples, he further noted, were for his purposes closed societies that could be entered into only by birth.[35] The theory that Rawls developed ultimately encompassed democratic peoples incorporating political justice, as well as what he termed "decent" hierarchical peoples guided by a "common good idea of justice."[36] Although he takes up, on the one hand, the question of a just law that regulates the relations of peoples, his theory is, on the other hand, nonetheless premised on an account of peoples with their internal regimes of justice. Rawls is therefore at pains to point out that his account is not a cosmopolitan account of justice rooted in individual

[33] One sees this trend even in as circumspect a text as David Johnston's *A Brief History of Justice* (Oxford: Wiley-Blackwell, 2011). Although, to its credit, Johnston's history briefly alludes to the problems of justifying (a) initial hierarchies built into the founding of societies (p. 35) and (b) injustices with respect to "outsiders" (pp. 230–31), on the whole it endorses the assumption that a "society" is the appropriate unit within which to address the topic of justice.

[34] John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), pp. 23–25.

[35] Rawls, *Law of Peoples*, p. 26.

[36] Ibid., p. 71.

claims to well-being within a global context;[37] it is instead premised on bounded communities with sharply delimited redistributive obligations to one another. Whether he writes of states or peoples, the scope of social and distributive justice, for Rawls, is cut to the size of nations.

Beyond the question of who *has* an address is the question of *which entities might be addressed* by conceptions of justice, in virtue of their participation in the moral community whose standards regulate discussions of justice or their initiation into the cultural nexus within which particular idioms of justice are meaningful. The scale of justice refers to the context – the normative setting or ideational backdrop – within which conceptions of justice are framed and the grounds for judgment become intelligible and compelling. It involves, in other words, a set of (putatively shared) assumptions about who understands, is bound by, and possesses moral standing with reference to the discourse of justice. Scales of justice in this sense imply several components. These include, first, a shared set of ideas relating to what justice is and how it works and, second, a context comprising a set of assumptions about their implied audience and the set of persons to whom these ideas apply: perhaps, for example, barbarians are excluded. One reason barbarians may be excluded – apart from the fact that they are uncivilized – is that they lack context in a third sense, involving conversance with the language or concepts through which justice is applied. Or they may lack a fourth element of context: formation in the cultural narrative in which any scale of justice will be ensconced.[38]

The contexts invoked by scales of justice are pluriform and may be layered. In grasping what I mean by scales of justice, it will be helpful to consider some different candidates for conceptualizing and comparing these contexts. One common notion here is the idea of traditions. Alasdair MacIntyre, for example, has developed one influential account that links not just conceptions of justice but also the entire modes of practical rationality associated with them to ongoing arguments and systems of thought – "traditions" – that unfold historically in particular cultures and social institutions.[39] Similarly, the Ethikon series in comparative ethics explores how views of justice and boundaries are rooted in traditions of religious thought and practice

[37] Ibid., p. 119.
[38] I address the narrative context of justice in Chapter 7 below.
[39] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988).

(Christianity, Islam, Judaism, and Confucianism) or bodies of secular theory and institutions (international law, classical liberalism, liberal egalitarianism, and natural law).[40] The idea of ethical traditions is useful, heuristically, inasmuch as it links ideas about justice to modes of reasoning that are culturally specific. Both approaches coincide, for example, in portraying liberalism as a tradition emerging from a particular political and intellectual configuration, in a way that reveals its professed universalism as, on balance, somewhat parochial. A similar, if somewhat grander, notion of how conceptions of justice are rooted in cultural traditions could be derived from the description of "civilizations" advanced by Samuel Huntington. His famous "Clash of Civilizations" thesis is premised on a regionalized portrait of cultural blocs rooted, finally, in different religious traditions.[41] The notion of traditions or civilizations as furnishing scales of justice needs to be tempered with an awareness of the way in which asymmetries and differentials of power may foreground and even naturalize some perspectives at the expense of others.

Another way of explicating the contexts indexed by scales of justice is via the notion of "clusters of care" proposed by Peter French and Mitchell Haney. They use this notion, adapted from Heidegger, in an effort to fill out the broad term "worldview" in a way that goes beyond an emphasis on theory or systems of thought to get at the deeper patterns of valuing that mark and motivate the actions of national or other comparable groups or peoples.[42] A similar approach is that of Luc Boltanski and Laurent Thévenot, who excavate a series of models of justification and order, regimes that, they argue, shape actions and experiences in modern societies.[43]

---

[40] David Miller and Sohail H. Hashmi, eds, *Boundaries and Justice: Diverse Ethical Perspectives* (Princeton, NJ: Princeton University Press, 2001); Allen Buchanan and Margaret Moore, eds, *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003. See also William M. Sullivan and Will Kymlicka, eds, *The Globalization of Ethics: Religious and Secular Perspectives* (Cambridge: Cambridge University Press, 2007).

[41] Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York, Grove, 1996).

[42] Peter A. French and Mitchell Haney, "Changes in Latitudes, Changes in Attitudes," in Peter A. French and Jason A. Short, eds, *War and Border Crossings* (Lanham, MD: Rowman and Littlefield, 2005), pp. 121–41.

[43] Luc Boltanski and Laurent Thévenot, *On Justification: Economies of Worth*, trans. Catherine Porter (Princeton, NJ: Princeton University Press, 2006).

Most germane for my purposes, though, is the notion of a "social imaginary,"[44] a way of envisaging the field of social relations in a manner that informs perceptions and reasoning about morality, politics, and other normative pursuits. Prescriptive views of justice, irrespective of their conclusions about the scope of justice, necessarily draw on roots in presuppositions about the shape of the social world that help establish a horizon for thinking about justice. It is worth pointing out that a given social imaginary, as a shared cultural envisioning of the scale of justice, is distinct from the particular community, or constituency, or public that might subscribe to a theory of justice. To see this, one need only note the contrast between the aspirational ideal of universally valid conceptions of justice that are coextensive with humanity and the comparatively small number of people who actually subscribe to such cosmopolitan views of justice.[45] The scale of justice, overall, embraces several different strata of ideational groundings for institutions of

[44] I use the term in the sense from Charles Taylor, *Modern Social Imaginaries* (Durham, NC: Duke University Press, 2004). Taylor's use echoes discussions of "the imaginary" by Jacques Lacan and Cornelius Castoriadis, but it is most closely influenced, as Ruth Abbey has pointed out (in "Back to Baczko" (review of Charles Taylor, *Modern Social Imaginaries*), *European Journal of Political Theory* 5.3 (July 2006): 355–64), by the work of Bronislaw Baczko; I owe this reference to German McKenzie. See also John Gerard Ruggie's discussion of "social epistemes" in his "Territoriality and Beyond: Problematizing Modernity in International Religions," *International Organization* 47 (1993): 139–74. For an attempt to investigate empirically how the boundaries of community imaginatively constructed by Americans influence their beliefs about who should benefit from redistributivist policies, see Cara J. Wong, *Boundaries of Obligation in American Politics: Geographic, National, and Racial Communities* (Cambridge: Cambridge University Press, 2010); see also Elizabeth Theiss-Morse, *Who Counts as an American? The Boundaries of National Identity* (Cambridge: Cambridge University Press, 2009).

[45] See, however, the essays by Seyla Benhabib and others in Heather Gautney et al., *Democracy, States, and the Struggle for Social Justice* (New York: Routledge, 2008), charting how cosmopolitan norms have spread rapidly in recent years. In regard to the scale of justice there is a broad tendency among commentators to divide theorists into communitarians and cosmopolitans. For communitarians, it is membership in a historical tradition or community that enables one to be "addressed" by accounts of justice; for cosmopolitans, simply being human suffices. Communitarians, it follows, tend to embrace ethical pluralism, if not relativism, while cosmopolitanism is frequently correlated with universalism. This distinction is somewhat deceptive, though, because more sophisticated conceptions of either type tend to conceive of justice in terms of a dual scale, which may give pride of place to insiders in a moral community yet acknowledges additional, if more diffuse, ethical relations with outsiders. I return to these competing conceptions in Chapter 4 below.

justice, directing our attention to links between those who share a set of ethical understandings about justice (i.e. traditions), those to whom specific sorts of arguments about justice (i.e. justificatory regimes) are intelligible and potentially persuasive, and those who have in common deep presuppositions about how justice intersects with human cultures, communities, and associations (i.e. social imaginaries).

On the relationship between the scope and scale of justice

The scale and scope of justice as I have outlined them are interrelated in complex ways. Over the course of human history, they have often been perceived to be coextensive, perhaps especially in religious traditions that have located the grounds of justice in sacred realities. Thus, for example, the *mitzvoth* – the obligations – at the core of Jewish jurisprudence have been rooted in the divine commands accepted by the Chosen People; the requirements and privileges of Sanatana Dharma were historically inseparable from the Hindu system of caste and rebirth; and the early Muslim conception of the territorial division of the world into Dar al-Islam, the domain of law, peace, and religious freedom, and Dar al-Harb, the abode of unbelief and war, marked jurisdictional lines defined by submission to Allah.

But this conformity is by no means necessary or universal, as some other historical examples show. In many cases, the scale of justice is understood to exceed its scope. That is evidenced not only by contemporary accounts of cosmopolitan pluralism that understand a global scale of justice to be consonant with scopes defined nationally, but also by long-standing practices in particular cultures of principled exclusion such as ostracism, excommunication, and other forms of shunning. The ancient Athenians, for example, had a set of developed norms that guided a democratic regime of ostracism. The ostracized person was effectively excluded from the social and political community and hence from the scope of justice. This status, however, was only temporary, and the person remained decidedly within the scale of justice, identifiable as a member defined precisely by his or her exclusion from the normal functions of justice.[46] This can be contrasted with the lot of slaves (or,

[46] Additionally, of course, most members of Athenian society, including women, children, and slaves, were not eligible for political membership in the first place. On Athenian practices, see Eugene Vanderpool, *Ostracism at Athens* (Cincinnati: University of Cincinnati Press, 1970); John Thorley, *Athenian Democracy* (New York: Routledge, 1996), pp. 42–43; and Sara L. Forsdyke, "Exile, Ostracism and the Athenian Democracy," *Classical Antiquity* 9 (2000): 232–63. Likewise, shunning

to a lesser extent, wives of citizens), who, lacking as they did in legal personality, could not testify in court and were subject to torture to extract information about the conduct of citizens.[47] Between master and slave, as between craftsman and tool, there was, as Aristotle put it, "no friendship nor justice."[48] In short, the slave was included neither in the scope nor in the scale of justice.

The exclusivity of classical Athenian citizenship can also be contrasted, in an opposing manner, with the new *cosmopolis*, the citizenry of all rational humans, as conceived by the Cynics and Stoics. For their part, they not only originated a conception of a universal scale of justice but proposed a scope of membership to match it.

Augustine's subsequent meditations on justice in his *City of God* invoked several influential conceptions of scope and scale. In provocatively arguing that the Roman Republic never truly existed, he rooted his view in the claim that a commonwealth, a people bound together by mutual recognition of rights and cooperation for the common good, exists only where there is "true justice" in the form of a common acknowledgment of the overlordship of God, reflected in a right order of loves within members of the community. Because all have the potential to be truly just in this way, the order of creation makes possible a society of all rational beings with a universal common good. In the world, though, he held, the scale of justice is linked to the spread of Christendom.[49]

In early modern times, the European controversy regarding the rights of the Indians in the New World manifested a comparable shift in perceptions and practices of justice, as figures such as Francisco de Vitoria and Bartolomé de las Casas helped articulate a conception of *jus gentium* that partially included the "savages" in a schema of rights, even while continuing to exclude them – as pagans and non-rational beings – from the context of justification for those rights. In this case, the Indians won a place in the scope of a dawning jurisprudential order

---

in Amish communities or among Jehovah's Witnesses relies on the subscription of the excluded. Excommunication in Catholicism and the practice of disinheritance in Judaism – including the tradition of sitting *shiva* to mourn the symbolic death of the disinherited – share in these features.

[47] Hauke Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community*, trans. Jeffrey Flynn (Cambridge, MA: MIT Press, 2005), p. 16.

[48] Aristotle, *Nicomachean Ethics*, Ross trans., Book VIII, chap. 11, 1161a–b.

[49] Augustine, *The City of God*, XIX, 21, cf. 24.

of human rights, without, however, gaining recognition with respect to the scale of justice.

From the distinction between scope and scale, it follows, in short, that theories of justice may be interrogated as to what political community they encompass institutionally and what moral community they presuppose in their normative assumptions, grammar, and logic. I will refer to both sorts of community as *communities of justice* in what follows. And in regard to each type, *logically prior questions of justice then arise*: What criteria help identify comparatively just or unjust boundaries for political communities and other schemes for administering justice? And what criteria of justice bear on the definition – or conceptualization – of the appropriate moral communities taken to provide the frame of reference in such matters? What can justice tell us about its own foundations?

A coherent response to these questions – a theory addressing the rights and wrongs of how the communities assumed by talk of justice are constituted, or in short, a theory of constitutive justice – can be expected to take up an interlocking set of characteristic tasks. Fully fledged theories of justice are both descriptive – tracing what sorts of judgments of justice *are* made and how – and normative, proposing what judgments *ought to be* made and how. With regard to constitutive questions, such a theory must first and most obviously formulate and defend some conception of how determinations might be made regarding who rightfully belongs to the community within which justice is formally administered. If it is the purpose of theories of social or distributive justice to help ascertain what is due to our fellows, then the question of constitutive justice is, accordingly, who is duly considered to be our fellow in the first place – and by whom. This question of scope is integrally related to the question of scale; accordingly, a secondary purpose is to defend an account of the community of justice with respect to which constitutive criteria might be justified. A tertiary purpose, finally, is the hermeneutical task of identifying bounds within which interpretations of criteria of justice might be said to "do justice" to their objects.[50]

Constitutive debates

These issues of constitutive justice are by no means merely academic concerns. To the contrary, they have powerful implications for a panoply

[50] On this point, see Georgia Warnke, *Justice and Interpretation* (Cambridge, MA: MIT Press, 1993); and Mark Kingwell, *A Civil Tongue: Justice, Dialogue, and the Politics of Pluralism* (University Park, PA: Pennsylvania State University Press, 1995).

of contemporary practical disputes. Processes of national unification and regional integration, international migration and the emergence of large "guestworker" and undocumented populations, and a host of ethnic separatist and irredentist movements all present instances in which the claims of the excluded have called into question prevailing assumptions about who properly belongs to the political community. The resulting policy debates – over naturalization requirements, dual citizenship, headscarves in public schools, bilingual education, aboriginal property rights, and a wealth of comparable concerns – commonly turn on competing political anthropologies and normative accounts of the grounds of societal membership.[51] Attempts to settle on a defensible constitutional process in Afghanistan, Iraq, or Europe have highlighted the difficulties in determining who should be represented in acts of political founding. Meanwhile – and sometimes working at cross-purposes to one another – the human rights movement, the right-to-life movement, the animal rights movement, and ecological movements of varying casts have all sought to challenge the received notions about the scale and scope of the moral community that inform the judgments of policymakers about the equitable distribution of various benefits and (more often[52]) harms.

The contestation of boundaries in the realm of policy has been reflected and refracted in a corresponding set of theoretical debates that touch on fundamental questions of political and moral inclusion and exclusion. Recent literatures have emerged around the morality of self-determination, of revolution, and of secession.[53] Philosophers have devoted a good deal of ink to the question of whether – and, if so, how – closed

---

[51] Political anthropologies, I have proposed elsewhere, include assumptions about the individual and social aspects of people and the character of human agency. See my *Ethics of Citizenship: Immigration and Group Rights in Germany* (Durham, NC: Duke University Press, 1998), chap. 3.

[52] This asymmetry is pointed out in Frederick G. Whelan, "Prologue: Democratic Theory and the Boundary Problem," in J. Roland Pennock and John W. Chapman, eds, *Liberal Democracy* (Nomos XXV) (New York: New York University Press, 1983), pp. 13–47.

[53] Useful contributions include Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, CO: Westview Press, 1991); Daniel Philpott, "In Defense of Self-Determination," *Ethics* 105 (1995), 352–85; Percy B. Lehning, ed., *Theories of Secession* (London: Routledge, 1998); Margaret Moore, ed., *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998); and Stephen Macedo and Allen Buchanan, eds., *Secession and Self-Determination: Nomos XLV* (New York: New York University, 2003). I examine this debate more closely in Chapter 7.

borders and restrictions on immigration might be justified.[54] The question of the just internal structuring of liberal states has given rise to debates about multiculturalism and the ethics of recognition.[55] Another increasingly popular topic for political theorists has been the morality of nationalism and patriotism and, more broadly, the ethics of special relations (as opposed to universal obligations) as a whole.[56] However great their differences, these discussions have in common that they all butt up against limitations to existing discourses of justice, chief among them the predominant idiom of distributive justice.[57] Because of these limits, these debates have, on the whole, failed clearly to conceptualize the question of how justice might be brought to bear on its own

---

[54] Among the more influential works on this topic are Peter G. Brown and Henry Shue, eds, *Boundaries: National Autonomy and Its Limits* (Totowa, NJ: Rowman and Littlefield, 1981); Peter H. Schuck and Rogers Smith, *Citizenship without Consent: Illegal Aliens in the American Polity* (New Haven, CT: Yale University Press, 1985); Mark Gibney, ed., *Open Borders? Closed Societies? The Ethical and Political Issues* (New York: Greenwood Press, 1988); and Brian Barry and Robert E. Goodin, eds, *Free Movement: Ethical Issues in the Transnational Migration of People and of Money* (University Park, PA: Pennsylvania State University Press, 1992). I return to this issue in Chapter 7 below.

[55] See Charles Taylor et al., *Multiculturalism and "The Politics of Recognition"* (Princeton, NJ: Princeton University Press, 1992); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995); Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge, MA: MIT Press, 1996); Joseph Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000); Richard Shapcott, *Justice, Community, and Dialogue in International Relations* (Cambridge: Cambridge University Press, 2001); and Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ: Princeton University Press, 2002).

[56] Representative texts are Michael Ignatieff, *Blood and Belonging: Journeys into the New Nationalism* (New York: Farrar, Straus, Giroux, 1994); David Miller, *On Nationality* (Oxford: Clarendon Press, 1995); Martha C. Nussbaum et al., *For Love of Country: Debating the Limits of Patriotism* (Boston, MA: Beacon, 1996); Robert McKim and Jeff McMahan, eds, *The Morality of Nationalism* (Oxford: Oxford University Press, 1997); Charles R. Beitz, "International Liberalism and Distributive Justice: A Survey of Recent Thought," *World Politics* 51 (1999): 269–96; and Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001).

[57] See, however, Nancy Fraser's intriguing claim that in recent years the "hegemonic distributivist imaginary" shaping discourse about justice internationally has faced increasing competition from alternative frameworks, and indeed ontologies, conceiving of justice in terms of *recognition* and *representation*. Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2009), p. 3.

foundations with respect to the various communities concerned. In this respect, they press for an examination and illumination of the question of constitutive justice.

Constitutive justice: why now?

It inevitably appears brash to propose the introduction of a new category of justice into our centuries-old ethical vocabulary. Social philosophers of the Western tradition have by and large been content to work within their inherited classical division of distributive and corrective justice, subdividing this schema where needed into further familiar types, such as commutative and retributive justice. Yet there are certainly precedents for revising and widening the vocabulary of justice, and it should perhaps not surprise us that these sorts of changes can accompany broad shifts in human technologies, knowledge, and experience. At issue here is the historicity of conceptions of justice.[58]

To illustrate the point, we can look once more at the career of *social justice*. Although, as I noted, the term itself is of fairly recent coinage, the basic idea of social justice has roots in an ancient discussion, carried out in both Jewish and Christian sources, regarding the relation between the virtues of justice and charity and focused on the question of whether helping the poor should be viewed as obligatory – that is, as a requirement of justice – or merely as a manifestation of benevolence.[59] Medieval canon law, although it did not deploy the language of justice in this respect, also asserted that under certain conditions, property must be thought of as common in a way that superseded claims to private property in order to provide for the necessities of all.[60] It took, however, some additional steps for this idea to be integrated with systematic thinking about the ethical properties of social institutions or orders. David Johnston identifies some of the roots of these developments,

[58] David Miller's influential book *Social Justice* (Oxford: Oxford University Press, 1979) is particularly attentive to this relation, demonstrating links between different substantive principles of distributive justice (desert, rights, and need) and divergent types of social orders (primitive, hierarchical, and market based).

[59] Aquinas, for example, allowed that almsgiving was a strict duty of justice for the rich but that for people to give of their own necessities was an act of mercy. See Stephen J. Pope, "Aquinas on Almsgiving, Justice, and Charity: An Interpretation and Reassessment," *The Heythrop Journal* 32.2 (1991): 167–91.

[60] Raphael, *Concepts of Justice*, pp. 59–61. The idea of the universal destination of the earth's goods can be found, for example, in the third-century church father Cyprian's statement, "For whatever is of God is common in our use."

pointing out that modernity has transformed thinking about justice by disseminating (1) the idea that human societies can be recast in line with rational norms regarding social relations; (2) the value of human equality of worth; and (3) a recognition that the wealth of modern societies is a social product, as opposed to the aggregation of the products of individuals. Taken together, these Enlightenment modes of thought opened up the distinctive concept of *social* justice, accompanied by an ethic of critique that called into question existent inequalities and social hierarchies.[61]

Once we acknowledge the historicized character of conceptions of justice, it becomes easier to take note of a number of factors that help account for why a constitutive conception is emerging only at this late date. Some of these are politico-structural developments, as we might expect given the link I have pointed to between changing social structures and shifts in perspectives on justice. One set of such changes has to do with increasing international interdependence and various advancing processes of globalization. The globalization of information technology, for instance, replaces older, localized, face-to-face communities with constellations of citizens who are "networked" – in the sense of being integrated into webs of interaction that extend all around the globe and make people candidates for membership in alternative communities. Another significant development is the emergence of local, regional, and transnational competitors to state sovereignty, as emblematized most prominently by the rise of the European Union, with its attendant recalibration of local, national, and supranational identities. A third process with large ramifications for inherited conceptions of justice is what we might call the progress of rights. The progression of the human rights movement and the emergent legacy of progressive extensions of the civil rights paradigm have each in various ways undermined the conventional linkage between schemes of justice and the state.

The changing culture of rights, in particular, points to underlying intellectual shifts that are in play in the evolution of perspectives on justice. While some of these shifts have dealt with the eclipse of God

[61] Johnston, *Brief History of* Justice, pp. 167–95. A similar thesis is presented by Samuel Fleischacker, who argues in *A Short History of Distributive Justice* (Cambridge: Harvard University Press, 2004) that a certain understanding of distributive justice as rooted in the idea that, means permitted, all persons have a right not to be poor, emerged only through new shifts in human thought identifiable in Adam Smith and subsequent Enlightenment thinkers. By distributive justice Fleischacker means what is perhaps more commonly known as economic justice – or, as I term is here, social justice.

and the rise of humanism, others have to do with the emergence of the modern philosophical-anthropological understanding of people as "persons," or as "individuals," in a moral sense – as entities possessing a certain inviolability, which readily translates into the attribution of rights. The rise of this brand of personalism or individualism is a complex story that involves theological strands – nominalist as well as Thomistic; epistemological shifts – in Descartes and his followers; and new political imaginings – as in Hobbes's *Leviathan* and other early accounts of the social contract, for example.[62] But even without tracing this story in detail, we can make two relevant observations for our account. First, classical conceptions of justice did not revolve around or even incorporate conceptions of the individual on the order of those that inform liberal theories of justice today. Second, it was with the emergence of debates about utilitarianism in the eighteenth and nineteenth centuries that appeals to the rights of individuals became ensconced in theories of justice.[63] Critics of utilitarianism were obliged to argue that the general interest must not be thought to run roughshod over the value of individual persons. Their stand, reinforced by Kantian ideas about morality and human dignity, was a crucial step in the emergence of the idea of "the Rights of Man," a conception of rights as rooted in human personhood in a way that is separable from and in some sense prior to society or the political orders. This way of thinking helped establish the criterion of *need* (as opposed, say, to *desert*) as a central factor in thinking about the requirements of justice in a manner bound up with emergence of social justice. Equally germane to my purposes, it also established a sort of critical lever, an external perspective from which the bounds of a given moral or political community might be called into question.

An additional chapter in the unfolding of the history I am describing here is marked by the events following the Second World War from which legal innovations such as the notion of "crimes against humanity" emerged. In this watershed period, the rights of states were contextualized in a way that reinforced their subordination in certain crucial respects to norms that transcended positivistic systems of justice – norms, that

[62] For an insightful account of this transition, see Louis Dupré, *Passage to Modernity: An Essay in the Hermeneutics of Nature and Culture* (New Haven, CT: Yale University Press, 1993); and Louis Dupré, *The Enlightenment and the Intellectual Foundations of Modern Culture* (New Haven, CT: Yale University Press, 2004).

[63] D. D. Raphael, in his erudite study *Concepts of Justice*, cites Adam Smith as the first influential thinker to have linked justice with the value of the individual in this way. He then traces this link through Mill, Sidgwick, and the early twentieth-century thinker Hastings Rashdall.

is, of natural law. This development raised the prospect that *customary* regimes of justice might be subjected to the counterweight of criteria of justice such as "the conscience of mankind" invoked in the UN General Assembly's 1946 resolution against the crime of genocide. At the same time, Hannah Arendt famously drew attention to the problem of statelessness and to the "right to have rights," effectively directing political theorists to focus on the injustices associated with practices of exclusion from modern states and the protections they afforded.[64]

The questioning of custom modeled in these developments has been amplified in one more broad movement that has helped set the stage for the emergence of constitutive justice: the recent proliferation of insights into ways in which various aspects of human society and culture are socially constructed. Historians of nationalism in particular have exposed the means and modes of the construction of "imagined communities" such as the nation.[65] In addition, the "hermeneutical turn" in the human sciences has served to draw attention to how communities of interpretation are constituted.[66] To this development, we can add the emergence of telling "hermeneutics of suspicion" that have challenged some long-held views about justice, including the largely unexamined

---

[64] "We become aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerge who had lost and could not regain these rights because of the new global political situation," notes Arendt in *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich, 1968 [1951]), p. 177. In indicating how this situation might be transcended, she adds, "[o]ur political life rests on the assumption that we can produce equality through organization, because man can act and change and build a common world, together with his equals and only with his equals ... We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights" (p. 181). We see here in this attempt at a solution the same problem encountered by Walzer: what or who defines the third-person plural in the first place, and how are disagreements, discriminations, and exclusions to be dealt with?

[65] Benedict Anderson's *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London: Verso, 1983) is only the most influential of a spate of texts in this vein. A more recent interdisciplinary approach is Joel S. Migdal, ed., *Boundaries and Belonging: States and Societies in the Struggle to Shape Identities and Local Practices* (Cambridge: Cambridge University Press, 2004). I engage in a fuller discussion of the formation of national identities in Chapter 6 below.

[66] For representative work along these lines, see Heidrun Friese, ed., *Identities: Time, Difference, and Boundaries* (New York: Berghahn, 2002); and Warnke, *Justice and Interpretation*.

assumption that it is a male affair.[67] The cumulative insights of these varying perspectives unite behind one crucial conclusion: to point to the constructed character of boundaries is to open them up to ethical analysis. After all, once more or less[68] purposive action is acknowledged to be at work in the establishment of what might formerly have appeared to have been natural or contingent social groupings, new questions of responsibility and justice come to the fore.

[67] Signal texts on this topic are Carol Gilligan, *In a Different Voice* (Cambridge, MA: Harvard University Press, 1982); and Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989).

[68] Scholars of nationalism disagree fundamentally on the question of the extent to which nations are "constructed"; a representative typology of views on this issue is Mary Fulbrook's distinction between essentialists and constructionists in *German National Identity After the Holocaust* (Cambridge: Polity Press, 1999), pp. 1–24. The very presence of this debate is enough, however, to sharpen the question of agency and accountability for the boundaries not only of state membership (citizenship) but of national, ethnic, racial, and gender identity.

2
Reservations about Constitutive Justice

For reasons discussed in the last chapter, we should not be surprised that Aristotle did not address the issue of constitutive justice – any more, perhaps, than we should be surprised that he did not question the morality of slavery.[1] But since, in the meantime, an expanded understanding of the various sorts of agency involved in the construction of communities has laid to rest the perception that communal boundaries are primordial, predestined, or otherwise prior to ethical consideration, we might well inquire why today's leading theorists have devoted so little sustained attention to what I am calling the questions of constitutive justice. We might ask why, as William James Booth puts it, "what ought to have been eminently questionable has scarcely achieved the status of a question."[2] The reticence of thinkers such as Kant, Locke, and Mill – not to mention their current heirs – to reflect on membership and borders is all the more difficult to account for when one acknowledges, with Booth, that given its universalist language and stake in impartiality, liberal political philosophy in particular militates toward a consideration of the justice of boundaries. And yet, this lacuna cannot be a matter of simple oversight, and indeed, upon examination we can find a variety of more or less principled grounds for contesting whether it makes sense to pose the question of constitutive justice at all. In this and the following chapter (Chapter 3), I will consider five sorts of reservations about the trenchancy of the notion, reservations that need to be cleared away if we are to establish a place for constitutive justice on the agenda of social

[1] On this point, see Jeffrey Stout's discussion of the historicity of moral judgments regarding slavery in *Ethics after Babel* (Boston, MA: Beacon Press, 1988), pp. 21–31.
[2] William James Booth, "Insiders, Outsiders, and the Ethics of Membership," *The Review of Politics* 59.2 (Spring 1997): 259–92, at 265.

ethics and political theory. The views I will contest aver that it makes little sense to speak about constitutive justice: (1) because borders and boundaries are contingent and prior to considerations of justice; (2) because borders and boundaries are matters for political contestation, not ethical deliberation; (3) because constitutive questions can be properly resolved in traditional terms of distributive justice, reconceived on a global scale; (4) because constitutive questions are ultimately assimilable to problems of commutative justice; or (5) because the very idea of constitutive justice rests on an intractable paradox.

The contingency objection

A first objection to the cogency of constitutive justice stems from the view that the bounds of communities of justice are, in practice, so arbitrary as to be, in the end, ethically trivial. John Rawls has taken this position, arguing that although the boundaries of societies may strike us as arbitrary in individual cases, this circumstance pales in comparison to a crucial fact: "In the absence of a world-state, there *must* be boundaries of some kind."[3] Strikingly, Rawls enlists his communitarian critic Walzer in support of his view, recalling the latter's cautionary aphorism: "To tear down the walls of the state is not ... to create a world without walls, but rather to create a thousand petty fortresses."[4] For Rawls, how particular boundaries arise is too irremediably historical and contingent to be fruitfully submitted to philosophical scrutiny; what matters, ethically, is simply that there exist effective borders of some sort. Consequently, Rawls's account of the Law of Peoples does not include any recourse for guiding or reconsidering the structuring of the borders and boundaries that parse people into political communities. Rather, he accepts state boundaries as *faits accomplis*, preconditions for the ethical enterprises of determining internal criteria of distributive justice and regulating the external relations of states in a lawful manner. How the lines that separate "internal" from "external" come to be located is outside of the purview of justice. Dealing with the inequalities that predictably result from the division of the world into state societies simply becomes the concern of a modest scheme of distributive justice among peoples,

[3] John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), p. 39, emphasis in original. Ronald Dworkin makes a similar point in his *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), pp. 207–8.
[4] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), p. 39, quoted in Rawls, *Law of Peoples*, p. 39.

aimed ultimately not at any sort of equality but at assisting all societies to become minimally just in themselves.

As Rawls's invocation of Walzer displays, this is a point on which liberals and communitarian critics of liberalism can make common cause. Communitarianism supports a view of justice that builds on Rawls's in two respects. First, it counters the individualist suppositions of liberalism – including its cosmopolitanism and egalitarian commitment to impartiality – by emphasizing the ethical importance of shared traditions, communal bonds, and a common history, social features that all require a regime of closure and exclusion in order to flourish. Second, it endorses the meta-ethical claim that schemes of justice presuppose a communal foundation and, moreover, properly find their validity only within that community. As a result, only members are fully subject to the obligations and duties springing from justice. Outsiders, if they are eligible to invoke any mode of ethical treatment, can appeal to only other values, such as charity, or hospitality – or, perhaps, divine justice, since, as Alasdair MacIntyre notes in tracing the roots of this delimited view in classical conceptions of political community, "[w]hen in the ancient world justice was extended beyond the boundaries of the *polis*, it was always as a requirement of theology."[5] On this view, in short, boundaries of territory and membership are not susceptible to queries regarding their justice – at least in human terms – because they constitute presuppositions for the discourse of justice itself (as opposed, perhaps, to other less stringent ethical relations).[6]

The notion that boundaries are exempt from concerns of justice finds some additional resonance, moreover, in the standpoint of libertarian theorists of justice. From their point of view, there can be no question of boundaries or borders violating canons of distributive justice, since arrangements of the burdens and benefits of belonging are not products of a distributive process: indeed, there is no initial, general distribution that might serve as the basis for a viable institution of (re-)distributive

[5] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988), p. 146.

[6] This Rawlsian view is endorsed by Thomas Nagel as well, who holds that justice can exist only within states and that it is always in essence "political justice." Thomas Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs* 33.2 (2005): 113–47; see also the critical response by A. J. Julius, "Nagel's Atlas," *Philosophy and Public Affairs* 34.2 (2006): 176–92.

justice.[7] Justice applies, rather, only to individual actions and exchanges, and attempts to regulate patterns of outcomes corrode individual liberties.[8] "Whatever arises from a just situation by just steps is itself just," writes Robert Nozick, in describing the libertarian view that the justice of any given set of goods and statuses can be determined only with reference to a chain of just initial acquisition of property by individuals, just transfer among individuals, and just rectification of any flaws in the first two processes.[9] This view, although it denies any cogency to what is traditionally called distributive justice, does, it must be admitted, leave open the possibility that territorial boundaries and state memberships might violate justice in the different sense that Nozick calls "justice in holdings." But how, according to Nozick, do holdings come about in the first place? Here he relies on a version of Locke's theory of acquisition, under which people acquire title to things by mixing their labor with them, provided they do so in a manner that does not leave others worse off. This stance, in spite of the proviso it includes, is hardly able to counter the way in which accidents of endowment or opportunity can produce deeply unequal holdings and concentrations of property, in a manner that then readily translates into imbalances of military might, commercial power, political prospects, and membership divisions. Nozick avoids grappling with this difficulty by presenting what he calls an "invisible-hand explanation," positing that various social forces – such as the division of labor, market pressures, economies of scale, and rational self-interest – interact with the consent of individuals to spontaneously foster the emergence of a system of "dominant protective agencies," or ultra-minimal states, in which nearly all the persons in a given geographical area are integrated.[10] This explanation allows him to rest content with

---

[7] Friedrich A. Hayek, *Law, Legislation, and Liberty, Volume II: The Mirage of Social Justice* (Chicago, IL: University of Chicago Press, 1976), pp. 62–100; see also Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 149.

[8] Nozick (*Anarchy, State, and Utopia*, pp. 57–59) revealingly uses the language of boundaries and borders to refer primarily to *individuals*, whom he portrays as being circumscribed in "moral space" by lines which may be crossed by another only with their consent.

[9] Nozick, *Anarchy, State, and Utopia*, p. 151.

[10] Ibid., pp. 16–17. To his credit, Nozick does consider a number of problems associated with constitutive questions. He argues, for example, that animals possess a moral status that imposes "moral side constraints" on arrangements of schemes of protection for human rights and practices (pp. 35–42). He displays a sensitivity to the problem of how to respond to historical injustices and acknowledges a critical lacuna in the literature on this topic (p. 152). He notes, persuasively, that collective claims of states or other entities to own property or other

the supposition that state boundaries result naturally from a state of nature, instead of exploiting the more critical potential for questioning boundaries presented by some of the other elements of his theory.

The thesis, presented most prominently by Rawls, that boundaries are contingent factors exempt from moral scrutiny prompts several criticisms. One is simply to note its evident callousness – its seeming acceptance of the maxim that might makes right. If borders that are themselves the product of injustices are simply left in place until the "realistic utopia" of peaceful interstate relations that Rawls envisions is brought into being, then one might well say, with Gladstone, that justice delayed is justice denied. Alternatively, one could invoke the endemic conflicts in international relations between states that are contesting common boundaries, conflicts which can and do flare into armed confrontations that bear serious ramifications for domestic affairs, including issues of justice. The contentious relations between Eritrea, Ethiopia, and Djibouti; the Kashmir conflict; the dispute between South Africa and Swaziland over KaNgwane; and the Falkland Islands War are emblematic of how competing border claims can escalate into significant security threats. A further criticism may be elaborated by questioning the degree to which Rawls's picture of international society actually reflects the present, rapidly changing global landscape. His assumption that peoples function within relatively closed states is increasingly distant from the current world of layered memberships, large-scale migration, and freely flowing capital. Beyond these deficits in Rawls's perspective, though, lies a more fundamental flaw. Rawls fails to acknowledge that the prospects for obtaining justice *within* respective peoples are affected by the ways in which those peoples are constituted in the first place: one need only think of the boundaries and ethnic divisions between Hutus and Tutsis cultivated by colonial Belgium in Rwanda[11] or, for

---

resources are every bit as needy of justification as are individual claims (p. 178). And he takes note of and addresses the problem of people – "individual anarchists" – who contest the right of the state to exercise redistributive powers or the monopoly of force it claims (pp. 51–53).

[11] The distinction between Hutus and Tutsis, two groups with a common language and ethnic background, owes its character largely to a system of identity cards distributed by the Belgian colonial authorities on the basis of class as measured by cattle ownership. See Timothy Longman, "Identity Cards, Ethnic Self-Perception, and Genocide in Rwanda," in Jane Caplan and John Torpey, eds, *Documenting Individual Identity: The Development of State Practices in the Modern World* (Princeton, NJ: Princeton University Press, 2001), pp. 345–58. I consider this case further in Chapter 6 below.

that matter, the invention of modern Iraq by the British following World War I.[12] One must bear in mind, too, how it is characteristic of new hierarchical orders that they attempt to normalize themselves through ideological campaigns designed to make the status quo seem entrenched, natural, and even necessary. This is just the sort of crucial relation that illustrates why considerations of justice are relevant to those historical events – the conquests and wars, persecutions and genocides, propaganda campaigns and *Kulturkämpfe*, and migrations and refugee flows – through which borders and memberships emerge. We must note, however, that there are many ways in which boundaries are set, ranging from unilateral government decisions to build walls (as in Berlin and the West Bank[13]) to popular nationalist movements (e.g., in Taiwan[14]), and that these boundaries may vary widely in character with respect, for example, to how sharply drawn or porous they are. Both the methods and character of boundary-making carry, as I show below in Chapter 6, varying valences with regard to their ethical significance.

Excursus: historical justice

As we can see, any judgments we might make about the justness of boundaries would seem to be ineluctably bound up with the histories through which the outlines of social and political communities are shaped. For this reason, the set of debates about "historical justice" that has emerged over the past several decades seems at first glance well suited to address the concerns of constitutive justice at this

[12] Christopher Catherwood, *Churchill's Folly: How Winston Churchill Created Modern Iraq* (New York: Carroll & Graf, 2004).

[13] On this tendency, see Wendy Brown, *Walled States, Waning Sovereignty* (New York: Zone Books, 2010).

[14] In 1989, 52 per cent of those surveyed in Taiwan identified themselves as Chinese and 16 per cent identified themselves as Taiwanese; in a striking reversal, in 2003 the numbers were 19 per cent Chinese and 62 per cent Taiwanese. See Philip P. Pan, "New National Identity Emerges in Taiwan," *Washington Post*, January 2, 2004, A13, A18. See also, however, Ian Buruma's discussion of the irony attending Beijing's attempt to limit electronic links between its citizens and Chinese in Hong Kong and Taiwan even as it proclaims that there is but one China: "China in Cyberspace," *New York Review of Books*, November 4, 1999. On the role of global information technologies in shaping nationalist senses of belonging, see Uriya Shavit, *The New Imagined Community: Global Media and the Construction of National and Muslim Identities of Migrants* (Brighton: Sussex Academic, 2009).

juncture.[15] Questions of historical justice focus on, and are shaped by, the distinctive oddities and problems that emerge from the linkage of relations of justice with the passage of time. Does time blunt the force or diminish the gravity of past injustices, as we might understand the acknowledgment of statutes of limitations to suggest? Which sorts of historical injustices require our attention now, and how might or should they be redressed? Can the children, and children's children, of perpetrators of injustice carry guilt and accountability for their forebears? Can we have obligations or duties to as-yet nonexistent members of generations hence? These sorts of questions arise when justice is viewed within a diachronic context.

In connection with those broad questions, representative topics that crop up include, in the first place, retrospective concerns revolving around accountability for past sins. Should reparations be demanded and awarded for past acts of aggression or conquest? For genocide? For stolen art or other artifacts of cultural heritage? For exploitative institutions such as slavery or apartheid or colonization? How are conflicting claims, built up over centuries, to land ownership or the right to occupy particular territories to be adjudicated? One prominent subcategory of historical justice, "transitional justice," focuses on the question of the legal, political, and moral reckonings with the past that tend to accompany regime changes or major shifts in power and control.[16] A related approach, sometimes associated with the term "*jus post bellum*," concentrates on the tasks of punishment, reparations, healing, reconciliation, and conflict prevention that arise in the wake of war.[17] In their respective concerns with responding in justice to legacies of injustice and

---

[15] See, e.g., Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Justice* (London: Polity, 2002); John Torpey, ed., *Politics and the Past: On Repairing Historical Injustices* (Lanham, MD: Rowman and Littlefield, 2003); Lukas Meyer, *Historische Gerechtigkeit* (Berlin: Walter de Gruyter, 2005); Manfred Berg and Bernd Schaefer, eds, *Historical Justice in International Perspective: How Societies Are Trying to Right the Wrongs of the Past* (Cambridge: Cambridge University Press, 2009); Richard Vernon, *Historical Redress: Must We Pay for the Past?* (London: Continuum, 2012).

[16] Ruti Teitel, *Transitional Justice* (New York: Oxford University Press, 2000); Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations After Wrongdoing* (Cambridge: Cambridge University Press, 2006).

[17] Linda Radzik, *Making Amends: Atonement in Morality, Law, and Politics* (Oxford: Oxford University Press, 2009); Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation* (New York: Oxford University Press, 2012); Carsten Stahn et al., eds, *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: Oxford University Press, 2014).

violence, these approaches weigh how to deploy a tool kit of measures, including war crimes tribunals, truth commissions, reparations, restitution, compensation, and public apologies.

While these approaches concern themselves largely with the endeavor of assessing and rectifying past injustices, they also reveal that there is a complex chronological superstructure attached to considerations of justice. The theme of historical justice is retrospective in the sense that it explores and evaluates claims about the justness of bygone actions and events, but it also focuses on the here and now, inquiring into how present people might inherit or incur current obligations stemming from past events – and even whether they might be constrained in how they treat persons no longer alive (e.g., by carrying out their wishes or sullying their good names). Additionally, historical justice is prospective – future-regarding – inasmuch as it extends questions of intergenerational justice to future cohorts. Thus, a staple of ecological ethics, in its concern with environmental justice, is argument about the requirements of the notion of sustainability with respect to generations in the proximal and distant future.[18] These topics are rife with epistemological uncertainty that is exacerbated by historical distance: How can we gauge the intentions of those long dead or measure the effects of their acts?[19] How might we judge our responsibilities to an unknown number of future persons or gauge the resources they will have for responding to harms that we may bequeath to them? Yet these difficulties do not exonerate us from the task of attempting to take the measure and meet the demands of historical justice.

The burgeoning body of work on historical justice seems tailor-made to counter the primary assumption of Rawls, Walzer, Nozick, and other theorists who exclude the genesis of national boundaries from their treatments of justice. Historical justice would appear to offer a framework within which the conditions under which borders are created and communities are defined are brought within the purview of the discourse of justice. Yet by and large, this is not yet the case, and theorists in this field have for the most part ignored constitutive questions. Instead, the lion's share of the literature on historical justice tends to

[18] Environmental justice, of course, also concerns accountability for past discrimination and requires consideration of present-day concerns, such as the need to counteract environmental racism.

[19] For a creative investigation into this problem, see Edith Wyschogrod, *An Ethics of Remembering: History, Heterology, and the Nameless Others* (Chicago, IL: University of Chicago Press, 1998).

operate within what I referred to above as a "Westphalian imaginary," a nationalist framework that assumes, rather than questioning, established modern political divisions as the context within which responses to historical injustices appropriately take place.

Thus, one sees, for example, in Janna Thompson's influential treatment of historical justice the development of a conception of "intergenerational community" that ensures that ethical debts incurred by one generation continue to be sustained by future members of their community. Thompson specifies that her theory applies specifically to relationships in a polity, adding that "A *polity* is a political society that persists through time and across generations: an organised entity capable of acting as an agent and taking responsibility for its actions. The predominant polities of this world are nation-states." [20] (author's emphasis) What her approach fails to address is both the crucial problem of how such a model of community is constituted in the first place, and the related difficulty of how to treat those who are excluded from the lines of continuity and inheritance that ensure the diachronic bonds of justice in her account of historical justice. This same general shortcoming is exhibited by the work collected in John Torpey's survey that canvasses methods of suing for historical justice.[21] For the most part, these measures – apologies, restitution of artifacts, and so on – address injustices within nations or arising from relations among nations, without interrogating the processes through which those nations are constructed in the first place. Even where potential constitutive questions such as the rights of indigenous peoples or the practice of genocide are raised, the discussion remains primarily within the context of the histories of established nations. In the literature on historical justice at large, additional questions bound up with constitutive concerns, such as irredentas and claims for secession, are likewise largely ignored. In sum, rather than providing effective tools for exploring questions about the justice of borders, memberships, and other elements of the construction of communities, most of the extant work on historical justice simply proceeds on the basis of unquestioned assumptions regarding questions of constitutive justice.

What would it mean to investigate questions of historical justice in a manner that might reciprocally contribute to work on constitutive justice? One constructive path forward, essayed in some recent treatments of the legacy of colonialism, involves exploring and tracing links

[20] Janna Thompson, *Intergenerational Justice: Rights and Responsibilities in an Intergenerational Polity* (London: Routledge, 2009), p. 1. Author's emphasis.
[21] Torpey, *Politics and the Past*.

between past unjust applications of boundary-making power and current structural inequalities affecting historically disadvantaged groups. This work proposes that past injustices related to colonialism might require symbolic responses such as apologies; however, it has yet to show how such injustices might be taken into account in proposals for more concrete structural changes to redress persistent inequities.[22] In my closing chapter (Chapter 7), I will return to this topic to consider two further questions: how to evaluate the idea that historical injustices can nonetheless create moral "facts on the ground" and how to weigh historical considerations against other ethical factors in a process aimed at producing "reflective equilibrium" in judgments of constitutive justice.

The political objection

A second objection to the idea of constitutive justice likewise attempts to set the matter of boundaries outside the sphere of legitimate ethical concern, but on different grounds. Who belongs to the *demos* – the people, the polity, or the relevant community of justice – is, some would claim, a matter that eludes the grasp of moral principle and instead properly falls within the separate and distinctive realm of political deliberation. It is, that is to say, a matter to be submitted to the open-ended play of interests and the unpredictable negotiation of compromises that characterizes the political dimension of life, a realm that enjoys autonomy from the ethical. Boundaries may be understood to be beyond the purview of ethics because there are no moral principles that generate sufficiently specific mandates in their regard, or because questions of closure circumscribe and are hence separable from the entire domain of morality. In either event, they fall outside of the meta-ethical boundaries of justice.[23]

---

[22] See, e.g., Duncan Ivison, "Political Community and Historical Injustice," *Australasian Journal of Philosophy* 78.3 (2000): 360–73. Ivison's work is in response to Jeremy Waldron's influential essay "Superseding Historic Injustice," *Ethics* 103.1 (1992): 4–28. See also Catherine Lu, "Colonialism as Structural Injustice: Historical Responsibility and Contemporary Redress," *The Journal of Political Philosophy* 19.3 (2011): 261–81; and Robert Meister, *After Evil: A Politics of Human Rights* (New York: Columbia University Press, 2010).

[23] Hannah Arendt espouses something like this view in *The Human Condition* (2nd ed. (Chicago, IL: University of Chicago Press, 1998), pp. 205–6) when she claims that the sort of action involved, for example, in bringing political communities into being "can be judged only by the criterion of greatness" associated with the art of politics, and not by the "moral standards" that otherwise apply to human behavior.

Jürgen Habermas espouses one variant of this sort of claim.[24] In his theory of communicative action and law, he sets about countering what he takes to be the mistaken notion, found in Kant and rooted ultimately in Platonic thought, that the democratic formation of systems of justice is subordinate to moral (or natural) law. He posits instead that democratic polities arise out of an act of will formation that gives rise simultaneously to the moral entities of individual rights, rather than being founded on them. There is an extensive background here: his view is rooted in his perception of how the history of modernity has wrought deep changes in the character of ethics. If, for Aristotle and Aquinas, the domain of the ethical encompassed notions of natural law and virtue in a coherent overarching worldview within which the political was thoroughly integrated, the dialectics of the Enlightenment have undermined religious and metaphysical warrants and subjected normative thought to a process of reflection and self-consciousness. At the same time they have given rise to a distinctive moral point of view that emphasizes impartiality and equal respect for persons. The result, for Habermas, is a bifurcation of the moral and the ethical. In the perspective he presents, ethical discourse is tradition-based deliberation drawing on collective conceptions of the good life in the service of a practice of self-realization; politically, it is bound up with conceptions of popular sovereignty and civic republicanism. Moral discourse, by contrast, consists in justificatory reasoning that links universalist ideals of impartiality and personhood to the aim of self-determination. The politics historically inspired by this approach revolves around liberalism and human rights, and for Habermas, it is with reference to morality – and not in regard to ethical discourse – that talk of justice properly fits.[25] In addition, for Habermas, it is, in a sense, between the *ethical* and the *moral* that a third sphere of *law and democratic principle* emerges in modernity. For him, legal norms and moral norms are quite distinct "co-original" modes of

[24] Habermas, for example, has pressed this case in *Between Facts and Norms*, William Rehg, trans. (Cambridge, MA: MIT Press, 1996) and *Justification and Application* (Cambridge, MA: MIT Press, 1993). His theory of justice is complicated on this point by his (in my view ultimately unsustainable) insistence on a strict distinction between morality and ethics (pp. 94–99): see also his *The Inclusion of the Other: Studies in Political Theory* (Cambridge, MA: MIT Press, 1998). Others have pointed out that his emphasis on the singularity of the bourgeois public sphere weakens access to and participation in divergent publics and counterpublics that might serve the excluded: see, e.g., Michael Warner, *Publics and Counterpublics* (New York: Zone Books, 2002).

[25] Habermas, *Between Facts and Norms*, pp. 82–104.

practical reason, which are shaped by the respective sorts of questions they address.[26] The resulting picture is one in which issues associated with the ways in which a democratic polity forms within a system of impartial laws are analytically separated from moral concerns, on the one hand, and ethical concerns, on the other.

On closer examination, however, Habermas's conception of the distinctness of the legal-political realm is difficult to sustain. For one thing, it relies on an unduly narrow conception of morality. Morality, for Habermas, focuses almost entirely on the notion of the universalizability of maxims, and it is located solely in the realm of "knowledge," lacking the concomitant dimensions concerned with motivation and sanctions that might orient it to "action," which for Habermas, instead becomes the preserve of legal norms. Beyond this manifestly artificial distinction, he goes on to acknowledge that the systems of morality, law, and ethics are all built on a common fundamental principle of discourse that provides their constituent action norms with rational justifications.[27] It is difficult to maintain, otherwise than by definitional fiat, that this underlying principle, which Habermas proposes is an abstract requirement of practical reason, does not place his overall theory within an *ethical* context, specifically that which he elsewhere calls discourse ethics. One could argue further that Habermas's underlying discourse principle depends implicitly on the idea of impartial and equal respect for persons that he otherwise assigns only to moral discourse.[28] Even more tellingly, Habermas concedes that the arena of deliberation about law and democracy appropriately blends together moral, ethical, and pragmatic reasons.[29] These types of reasons, it is true, embody different perspectives: moral reasons invoke as a point of reference a "humanity or a presupposed republic of world citizens"; ethical reasons take as their standard the traditions and form of life of a (preexisting) political community to which "we" belong; and pragmatic reasons presuppose a process of negotiation and compromise constrained by requirements of "fair bargaining conditions" and "rational balancing." But all of these perspectives impose what we would call, in English, ethical criteria of some sort.

---

[26] Ibid., p. 105.

[27] This principle of discourse, which Habermas calls "D," states: "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses" (*Between Facts and Norms*, p. 107).

[28] This is the criticism from Charles Larmore, *The Autonomy of Morality* (Cambridge: Cambridge University Press, 2008), pp. 148–63.

[29] Habermas, *Between Facts and Norms*, p. 108.

The assumption that boundaries has not just an ethical but also, in his terms, a *moral* character, is further reflected in Habermas's comments about membership and immigration.[30] A democratic legal order, he argues, is generated through the definition of a few basic categories of rights that define the status of legal persons. In addition to rights to equal liberty, legal protections, political participation, and minimal conditions of socioeconomic well-being, these include a category of "[b]asic rights that result from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law."[31] Let us pause to consider Habermas's language for characterizing membership rights. These are legal norms about individual membership that are articulated collectively (i.e. as an expression of political, rather than personal, autonomy) by a group of people – individuals – who must will or choose (hence the term "voluntary") to associate themselves with one another to constitute a legal order. On the one hand, this reads like a sociological description, and Habermas goes on to add that legal norms arise, in practice, only in specific, "*determinate*," concrete societies[32] – with historical decision-making bodies, specific territories, identifiable participants, and thus, particular jurisdictional boundaries. On the other hand, his account of membership rights, relying as it does on conceptions such as autonomy, will, and association, clearly has at least a few built-in ethical qualifications that lend it a normative and not just a descriptive cast. In any case, this account leaves open a crucial moral question: what of those who are excluded?

Some light is shed on this question once Habermas excavates the internal normative architecture of membership status as he understands it:

> From the application of the discourse principle, it follows that each person must be protected from a unilateral deprivation of membership rights but must in turn have the right to renounce the status of a member. The right to emigrate implies that membership must rest on an (at least tacit) act of agreement on the member's part. At the same time, immigration, that is, the expansion of the legal community through the inclusion of aliens who seek rights of membership, requires a regulation in the equal interest of members and applicants.[33]

---

[30] Ibid., pp. 122–25, 507–514.
[31] Ibid., p. 122, author's emphasis.
[32] Ibid.
[33] Ibid., pp. 124–25.

There is, in short, a moral constraint on policies about who may associate themselves with the political community, under which the interests of all affected must be taken into account. Note, though, that this constraint appears to apply only in regard to the expansion of society, and not in regard to its original constitution. We will return below to Habermas's account of the constitution of the polity. My purpose here is simply to show that his treatment of the formation of boundaries, membership, and the democratic polity is decisively informed by ethical factors, including moral considerations of justice – his claims about the separateness of these modes notwithstanding.

Another variant of the separation of spheres view found in Habermas, stemming from the opposite side of the German political spectrum, is rooted in the political theory of Carl Schmitt. Schmitt influentially proposed that the legal orders that define communities of justice are founded on assertions of sovereignty by dictators or like powers in a position to impose their decisions about the limits and boundaries of the law through the declaration of emergencies or "states of exception." His account is built on an understanding of how peoples – prior to the creation of constitutional orders – are forged in the crucible of "the political," a mode of interaction revolving around group-based distinctions between friend and enemy.[34] For him, the political is a realm distinct from the ethical, aesthetic, or economical, defined primarily by the will to engage, if necessary, in violent conflict and killing. It thus revolves around collective perceptions of antagonism and existential danger at the hands of others, who become *outsiders*. The inherently political identification of demarcations of friend and enemy should, Schmitt claimed, serve as the basis for citizenship and belonging in modern states, and these designations, bound up as they are with the radical prospect of war for survival, transcend any considerations of right, wrong, or justice.[35] The exigency of cultivating the friend-enemy distinction further calls for the sovereign dictator to impose homogeneity on the political community and to eliminate any potential internal enemies, in a manner unfettered by any humanistic, liberal, or cosmopolitan constraints.

That Schmitt's picture of a world in which political communities and frameworks of justice are limited by and rooted in underlying political dynamics continues to be influential today is attributable, in part, to his

[34] Carl Schmitt, *The Concept of the Political: Expanded Edition*, George Schwab, trans. (Chicago, IL: University of Chicago Press, 2007), esp. pp. 19–49.
[35] Schmitt, *Concept of the Political*, p. 49.

sensitivity to the link between politics and religious morality, as reflected in his famous statement: "All significant concepts of the modern theory of the state are secularized theological concepts."[36] It is thus ironic that he appears relatively unattuned to the interpenetrations of ethics and politics on which his political theory depends. There is, to begin with, the logic of violence on which his notion of the political depends: Schmitt recognizes that Christian charity can hardly guide the efforts of nations to survive, but he fails to appreciate that there is nonetheless a moral structure to the claim of collective self-defense that justifies the friend-enemy distinction. Moreover, his position relies on the view that political communities must be prepared to fight to protect not just "bare life," but ways of life embodying distinctive values that set them apart from others. Finally, in fleshing out his critique of liberal alternatives to his view, Schmitt employs the additional argument that the martial orientation associated with the condition of political antagonism is a necessary source of transcendent meaning and purpose in what would otherwise be a wan and materialistic existence.[37] Quite irrespective of how one evaluates these arguments, if we take them together, they clearly undermine Schmitt's contention about the distinctness of the political sphere from considerations of justice and morality.

In a sense, Schmitt's view harks back to an older conception, often associated with Machiavelli, of how, in modernity, the ancient and Scholastic conception of politics as a branch of ethics crumbled and was replaced by a sense of the autonomy of the political realm from morals. Machiavelli explicated a picture in which public morality had come unmoored from its setting in the natural law-based medieval synthesis and drifted apart from private – personal and interpersonal – morality, and as a result, politics began a search for new norms. Machiavellian pragmatism, positivism, and doctrines of *raison d'état*, as influential attempts to identify a normative basis for politics, share a penchant for dispensing with the prescriptions of private morality, and hence reinforce the sense that the business of politics is quite distinct from ethics. And yet, while rejecting the idea – endorsed by many other moderns from Kant to Rawls – that politics might be appropriately subordinated to individualist deontologies, Machiavelli still endorsed certain values and normative standards: most famously, the quality of *virtù* requisite

[36] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, George Schwab, trans. (Chicago, IL: University of Chicago Press, 2005 (1922)), p. 36.
[37] Schmitt, *Concept of the Political*, p. 35.

for successful rulers. *Virtù*, of course, is not to be confused with conventional moral virtues; indeed, it implies a certain flexibility in the interest of maximizing one's power that at times demands viciousness. And yet it nonetheless manifests an ethic, one governed not by personal standards but by the needs of society. It represents, that is, a theory about the moral exigencies of flourishing modern political communities, even as it recognizes that these requirements are distinct from "private" conceptions of morality. And thus, irrespective of its merits or deficits, it is premised not on the claim that politics is an anti-ethical realm but instead on the recognition of social-structural ethics as a field distinct from (though ultimately related to) personal morality. This insight is, if anything, buttressed by Machiavelli's subsequent endorsement of the complex form of the republic over that of monarchy in his *Discourses on Livy*. From the perspective embodied by his work, questions about the boundaries and shape of communities in particular, and of social justice in general, are taken to be matters of structural ethics, understood as a branch of morals addressing the social dimension of human beings and their actions and the changing and evolving institutions in which our common life takes place.[38]

Now, there certainly are limits – reluctant though ethicists may be to recognize them – to what falls within the domain of morality. Nonetheless, the view we have traced in Habermas and Schmitt rests on a view of morality so narrow as to be hardly tenable. The conception of morality as a matter of rules and principles that are ultimately distinct both from the customs and mores that constitute ethics and from the pragmatic concerns of politics does not, in my view, stand up to sustained scrutiny. The notion that group values and conventions, political deliberation, and moral principles constitute distinct spheres of human endeavor and practice rests on reductionistic conceptions of each mode and of morality in particular. Yet moral discourse is also not a monolithic system of external checks that imposes constraints on but remains essentially separate from the distinctive practices of custom or politics. Rather, it is a mode of value-related reasoning that informs structured political activity and is intimately bound up with its conditions of legitimacy.[39]

---

[38] On this distinction, see Louis Dupré and William O'Neill, S.J., "Social Structures and Structural Ethics," *The Review of Politics* 51.3 (1989): 327–44.

[39] For a nuanced argument for the proposition that considerations of morality permeate other modes of normative discourse, such as law and religion, see Barbara Herman, "Morality Unbounded," *Philosophy and Public Affairs* 36.4 (2008): 326–58.

Even in cases in which political discourse seems far from ethical considerations – when, say, choices among disparate budgetary commitments are being made or when the placement of a stop sign is being debated – ethical concerns are always present in the background.[40] The sense of freedom implicit in political activity need not supersede considerations of norms and values. Even the readiness to dirty one's hands called for by the vocation of the politician was recognized by Max Weber to constitute part of an ethic of responsibility.[41] That very difficult dilemmas can arise in the topsy-turvy climate of political life – situations in which inherited moral norms appear to offer no or insufficient guidance – does not mean that an abdication of ethics has taken place. Rather, such situations trace the growing edge of our efforts to descry the moral demands produced by changing conditions and emergent challenges in modern societies.[42]

To point to the ever-present link between politics and ethics admittedly does not show that the ethical character of boundaries is a matter of justice. But this view is at least intuitively plausible: as when it is claimed that the divisions created by a new border, or the coercive incorporation of a population, or the "ethnic cleansing" of a given region, or the failure to recognize the distinctiveness of a well-defined community (in, say, Kurdistan or Somaliland[43]) are unjust (or undue).[44]

The global distributive justice objection

If one accepts that determinations of the boundaries of communities fall broadly under at least some criteria of justice, then a third potential objection to the notion of constitutive justice must be considered.

---

[40] For an argument that a liberal ethos properly embraces more than simply conventional questions of political justice, see John Tomasi, *Liberalism Beyond Justice: Citizens, Society, and the Boundaries of Political Theory* (Princeton, NJ: Princeton University Press, 2001).

[41] Max Weber, "Politics as a Vocation," in H.H. Gerth and C. Wright Mills, ed. and trans., *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1946), pp. 77–128.

[42] Herman, "Morality Unbounded," pp. 348–51.

[43] On the case of Somaliland, see Jeffrey Herbst, "In Africa, What Does It Take to Be a Country?" *Washington Post*, January 2, 2004, A21.

[44] Susan Moller Okin gives us ample reason to question contentions that certain activities fall outside of considerations of justice. Her question, "How just is gender?" is in its own right a fundamental question of constitutive justice. See her *Justice, Gender, and the Family* (New York: Basic Books, 1989).

Perhaps the scope of justice for specific communities is indeed best understood as a consideration regulated with reference to a scale of justice coextensive with humanity as a whole, and borders and boundaries are elements of social organization appropriately distributed in line with overarching universal principles. The sorts of questions I have termed constitutive are, on that view, subsumable under a global conception of distributive justice after all. The bounds to inclusion in the schema of distribution are simply fixed by membership in the human race, and internal boundaries are to be viewed as illicit or unjust inasmuch as they are used to buttress systemic or arbitrary inequalities. In this picture, the basic question of constitutive justice is obviated because all potential addressees of justice are automatically included, and included equally, in an all-encompassing framework of distributive justice.

This is a perspective linked with what we might call the cosmopolitan thesis, an outlook that has propelled the growth of the prominent literature on global justice over the last 30 years.[45] Cosmopolitanism is a normative stance bound up with the notion of world citizenship, and one of its central features is a critique of any limitations or exclusions that a political theory might invoke to delimit the scope of justice. If a global political community is thought to be the proper framework for discussions and policies regarding distributive justice, then the notion that there is a logically prior question about the boundaries of communities of justice seems to go by the wayside.

It is worth noting that historically, cosmopolitan thinking has not necessarily led to this conclusion. For the Cynics and early Stoics among whom cosmopolitan thinking emerged, being a citizen of the world meant primarily not being exclusively bound in allegiance to their respective local *poleis*, but it did not extend to the conclusion that the boundaries and divisions separating communities were artificial or illicit. If the later Stoics did reach this conclusion, it must still be said that the world community they envisioned was a fellowship embodied in reason or natural law, rather than a concrete political entity that could replace, or

[45] For examples of this line of reasoning, see Stefan Gosepath, "The Global Scope of Justice," *Metaphilosophy* 32.1–2 (January 2001): 135–59; Darrel Moellendorf, *Cosmopolitan Justice* (Boulder, CO: Westview Press, 2002); Robert E. Goodin, "Globalizing Justice," in David Held and Mathias Koenig-Archibugi, eds, *Taming Globalization: Frontiers of Governance* (London: Polity Press, 2003), pp. 68–92; and Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism* (Cambridge: Cambridge University Press, 2004). In the usage I am employing here, cosmopolitan accounts of justice encompass arguments for both the global scope and the universal scale (a notion considered below) of justice.

displace, the *polis*. Over the centuries, as more socially defined conceptions of world citizenship took root, they frequently stopped short of encompassing all of humanity, acknowledging limitations imposed, for example, by the economy of faith and grace, in Augustine's *City of God*; or by religion in Erasmus's humanism when confronted with Islam; or by civilization in the budding *jus gentium* as it encountered indigenous pagan peoples; or by literacy and culture in the case of the "Republic of Letters" of the Enlightenment era.

It took the spirit of the Enlightenment and the modern envisioning of people as self-sufficient, perfectible, rights-bearing, individual actors to generate thoroughgoing proposals for political cosmopolitanism. Yet even thinkers who articulated a vision of a world republic, such as the Jacobin Anacharsis Cloots and Immanuel Kant, did not see such a state as a viable possibility for their times.[46] With Kant, however – particularly in his essay on "Perpetual Peace" – a powerful synthesis emerged around a different notion that is today often called "weak cosmopolitanism," melding a less ambitious, confederated global order with an underlying philosophical conception of the dignity, worth, and equality of all persons. It is Kant's amalgam of moral cosmopolitanism with a layered scheme of justice that has set the template for much of the discussion of global justice today.[47]

On the one hand, the Kantian framework has established both the anthropology of individuality and freedom and the conception of morality in terms of impartiality and universalizability that animate liberalism and place it in a certain tension with nationalism. That is, Kant's moral anthropology underwrites the perception that all people everywhere are entitled to equal moral regard and that they therefore form a global moral community that transcends the boundaries of states. The question for our purposes becomes this: must such a community be thought of as a community of justice? That would seem to be the thrust of the arguments of proponents of cosmopolitan justice. If that is the case, then an additional question lurks in the background: would the existence of such a community resolve questions of boundaries and constitutive justice?

---

[46] See Pauline Kleingeld, *Kant and Cosmopolitanism: The Philosophical Idea of World Citizenship* (Cambridge: Cambridge University Press, 2012), pp. 40–71.

[47] See the rich collection of essays on Kant's contribution in James Bohman and Matthias Lutz-Bachmann, *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge, MA: MIT Press, 1997).

Some might argue that the case made by moral cosmopolitans for a global community of justice has been buttressed in recent years by the ongoing dynamics of globalization in its various guises.[48] It is certainly the case that networks of economic relations, communications technology, and transportation have knit the globe together into a deeply interconnected entity and that globalizing cultural and political forces have in numerous respects undermined or cut across the borders between communities, producing not only hybridized identities and multiple citizenships but also burgeoning international organizations and, arguably, a global civil society.[49] Perhaps most tellingly for our purposes here, the propagation of a human rights regime and the rise of humanitarian intervention or the international "right to protect" over the last half-century bespeak widespread acknowledgment of a global moral community.

These developments certainly support the proposition that relations of justice, including distributive justice, in many respects span national borders and citizenries: as a corollary, they also support the proposition that agents in one jurisdiction can commit injustices against persons in another. But do these changes herald the advent of a truly global scope for distributive justice? It is not clear, to begin with, that the conceptions of harms, claims, and remedies on which human rights institutions are based dovetail with the idea of distributive justice. Beyond this, in practice there remain many ways in which people are marginalized within or excluded entirely from national and international distributive networks. The "extreme poor" occupy this position in an economic sense, while the millions of stateless persons lacking what Hannah Arendt called the "right to have rights" represent a political limit to inclusion.[50] It only

[48] Some observers of debates on global distributive justice (e.g., Andrea Sangiovanni, "Global Justice, Reciprocity, and the State," *Philosophy and Public Affairs* 35.1 (2007): 3–39; and Chris Armstrong, *Global Distributive Justice: An Introduction* (Cambridge: Cambridge University Press, 2012), pp. 25–34) distinguish between non-relational understandings of justice that link it to fixed features of the human moral makeup and relational approaches that see relations of justice as functions of various sorts of relationships, interactions, or practices. In these terms, my point is that relational approaches can be seen to support non-relational perspectives up to a point.

[49] John Keane, *Global Civil Society?* (Cambridge: Cambridge University Press, 2003).

[50] Bashshar Haydar, "Extreme Poverty and Global Responsibility," *Metaphilosophy* 36.1–2 (2005): 240–53; and Kristy Belton, "The Neglected Non-Citizen: Statelessness and Liberal Political Theory," *Journal of Global Ethics* 7.1 (2011), 59–71.

complicates matters further that little agreement exists among global justice theorists on what distributive principles might best serve as the basis for a global regime of justice. As a consequence, it is at best premature to claim that there is presently in place a unified worldwide distributive network that governs relations among all persons equally.

Of course, this circumstance cannot, in itself, vitiate the normative claims of cosmopolitan theorists regarding the scope of justice. Yet, additional philosophical reasons may be adduced for resisting the notion that a global distributive regime would resolve all questions of rightful boundaries and membership. An initial challenge to this thesis is provided if one simply extends the logic of cosmopolitanism in its challenge of delimitations of membership. As Samuel Scheffler notes, "[c]osmopolitanism about justice is opposed to any view that posits principled restrictions on the scope of an adequate conception of justice."[51] If that is indeed the case, why should the *cosmos* not then be seen to extend beyond the human race? It is not beyond the pale to speak in this vein of the rights of sentient animals.[52] And if "environmental justice" as a moniker has traditionally designated inequities among humans with respect to environmental harms, "ecological justice," by contrast, evokes the notion, investigated in the emergent field of "green criminology," that crimes may also be perpetrated against animals and environments.[53] Even if these challenges are not insuperable, they still highlight the need for a principled defense of why the scope of cosmopolitan justice should be thought to be limited to the human species. This, in the terms I have proposed, is a constitutive, not a distributive, question.

To the challenge of the rationale for boundaries, we can add several additional problems for the cosmopolitan thesis. We have already noted the hurdle involved in showing that global relations of justice extend beyond matters of rights to more properly distributive questions. Additionally, one might well invoke the familiar communitarian criticism of cosmopolitan theory as resting on a conception of persons that

---

[51] Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001), p. 112.

[52] See Ingmar Persson, "A Basis for (Interspecies) Equality," in Paola Cavalieri and Peter Singer, eds, *The Great Ape Project: Equality Beyond Humanity* (New York: St. Martin's, 1993), 183–93; and Robert Garner, *A Theory of Justice for Animals: Animal Rights in a Nonideal World* (Oxford: Oxford University Press, 2013).

[53] See, e.g., Rob White, *Crimes Against Nature: Environmental Criminology and Ecological Justice* (Portland, OR: Willan Publishing, 2008).

is too "thin" either to constitute the basis of an active identification with a global community or to generate detailed responses to actual disagreements over competing principles of distribution – or, for that matter, disputes over boundaries. The methodological individualism and foundational focus on the rights of persons at the heart of most cosmopolitan conceptions work against the sort of appreciation of social values and dynamics that is requisite for grasping how boundaries work and for properly evaluating their normative significance. Taken together, these points raise serious doubts as to how – and at what cost – the totalizing view of a global community of justice might be upheld in the face of the real, rooted differences regarding what constitutes membership in political communities around the world.

The most salient point, for my purposes, regarding the relation between global justice and constitutive justice, however, concerns the issue that has been at the center of recent debates about cosmopolitanism: the significance of national and other sub-global allegiances for accounts of justice. A focal point of cosmopolitan discourse has come to concern the relation between global and local allegiances and obligations. Some endorse the priority of one identity; some the other; some argue for their compatibility and rough parity, but nearly all global justice theorists place this issue at the center of concern. As Gillian Brock and Harry Brighouse put it, at present "[t]he particular focus of cosmopolitan thinking is on the content and weight of obligations beyond national (or, sometimes, state) boundaries, relative to the content and weight of those obligations to which national and state boundaries give rise."[54] That is, most cosmopolitans accept, without necessarily confronting, the necessity of internal divisions in the global population: of borders and of boundaries. And that acceptance leads directly to normative questions about which prospective boundaries ought to be acceptable, why some should be preferred to others, under which conditions they might need to be changed, and so on – issues of justice which are, however, rarely directly acknowledged. Let us look at how a couple of representative cosmopolitan thinkers handle these sorts of constitutive matters.

---

[54] Gillian Brock and Harry Brighouse, eds, *The Political Philosophy of Cosmopolitanism* (Cambridge: Cambridge University Press, 2005), p. 3. Richard Vernon concurs in his *Cosmopolitan Regard* (Cambridge: Cambridge University Press, 2010), noting that cosmopolitans and their critics have come to share a "weak cosmopolitan plateau" where disputes turn chiefly on the recommended balance of equal regard for all and respect for special national or civic obligations (p. 2).

One recent book on global justice, Gillian Brock's *Global Justice*, takes as its goal to "develop a viable cosmopolitan model of global justice that takes seriously the equal moral worth of persons, yet leaves scope for a defensible form of nationalism along with other legitimate identifications and affiliations."[55] In articulating her positive principles of global justice, Brock adopts the Rawlsian strategy of devising a "reconstructed cosmopolitan original position." She argues that this device would produce neither the globalized difference principle nor the universal standard of equality of opportunity argued for, respectively, by her fellow Rawlsians Darrel Moellendorf and Simon Caney. Instead, it would produce a "needs-based minimum floor principle" that entails a general obligation to ensure that all people's basic needs are met and that their basic liberties are protected. According to her theory, "once people have discharged their obligations to support the background global institutional structure [required to protect basic needs], persons may defensibly favour the interests of their compatriots (or co-national, or other more particular groups), so long as such partiality does not conflict with their other obligations."[56] These local preferences may include redistributive demands beyond the requirements of the "minimum floor." However, what determines how these local obligations are formed, within which boundaries they take shape, and whether they are just or not? Those questions are not addressed by Brock's principles of global justice.[57] Instead, it turns out that the existence of political communities – states – is already built into Brock's version of the original position: she imagines the original position as a global conference, in which one participates as a delegate of an unspecified political community.[58] Brock allows that such communities may be diverse, overlapping, and heterogeneous, in a manner designed to reflect the real world. But by building them into the basis for her contractarian theory of justice as a premise, she exempts them from the possibility of being objects of justice themselves.

When she then turns to the question of the legitimacy of partiality to compatriots, a similar situation holds. Brock argues that nationalism

---

[55] Gillian Brock, *Global Justice: A Cosmopolitan Account* (Oxford: Oxford University Press, 2009), p. 4.

[56] Brock, *Global Justice*, p. 15.

[57] Brock, *Global Justice*. She does include as an additional principle emerging from the cosmopolitan original position the notion of "fair terms in cooperative endeavours" (p. 73) or "fair reciprocity," (p. 53), but she develops this primarily as a notion of economic justice and does not link it to questions of boundaries.

[58] Brock, *Global Justice*, pp. 48–52.

is legitimate only if it is practiced in a manner consonant with the framework of cosmopolitan principles that she has proposed. But this constraint requires only that nations do not run afoul of their obligations regarding the basic needs and liberties of others: it is a limitation on political and economic policies, but not on membership policy. The notion that nations have external responsibilities that precede their internal responsibilities does not in itself question how the lines separating them might appropriately be drawn.[59] It is illustrative of this blind spot that Brock's chapter on immigration and global justice makes no mention of naturalization policy or criteria for citizenship.

Mathias Risse's *On Global Justice* provides another example of how treatises on global distributive justice encounter difficulties in thematizing constitutive questions.[60] Risse contrasts his approach with simple "relationist" (of both global and statist varieties) and "nonrelationist" views, arguing instead for a hybrid approach he calls "pluralist internationalism,"[61] which recognizes that strongly egalitarian regimes of distributive justice within states may coexist with stringent but less demanding requirements of justice in global contexts. A distinctive feature of Risse's theory, importantly, is his central concern with what he calls "grounds" of justice (his usage is related to what I have called "scale"):

> Principles of justice have *grounds*. The grounds are those considerations or conditions based on which individuals are in the scope of principles. We may think of this in two (roughly equivalent) ways. First, these are the features of the population (exclusively held) that make it the case that the principle of justice holds. Second, these are a set of premises that entail the principle of justice. These premises can be partly normative. Grounds can support more than one principle, but these will have the same population. Grounds are features of populations, and a vague ground may correspond to a vague population. Different grounds can support principles that apply to the same population. The same principle could be supported by different grounds. Principles of justice trivially entail stringent claims. Every

[59] Ibid., pp. 290–94, 324.

[60] Mathias Risse, *On Global Justice* (Princeton, NJ: Princeton University Press, 2012).

[61] On the distinction between relational and nonrelational views, see note 40 above. Risse explicitly rejects using the term "cosmopolitanism" in setting up his argument, insisting that the entire liberal debate about justice is now carried out on a "cosmopolitan plateau." *On Global Justice*, pp. 9–10.

> member of the relevant population has a stringent claim to whatever its share of the relevant good would be if the distribution was just. Principles, distribuenda, grounds, and scopes must form a coherent theory. I will say that they are respectively *associated* with each other. (emphasis in original)[62]

Risse proceeds to identify five distinct grounds of justice (common humanity, membership in a state, common ownership of the earth, subjection to the global order, and subjection to the global trading system); these in turn generate five different sets of principles of justice. For his "grounds-of-justice approach," the state retains a central, "normatively peculiar" status, but the other global grounds he has identified exert normative pressure on it.

Risse's theory would seem to offer resources for focusing on questions of justice related to boundaries and the constitution of communities. But upon examination, his promising discussion of grounds turns out to involve features of populations that are assumed to be preexistent: in particular, his grounds-of-justice approach takes boundaries as its premise rather than assessing or critiquing them. But what determines what is a relevant population in the first place? And how might disputes about membership in such a population be resolved fairly?

When, late in his treatment, Risse acknowledges that the system of states is contingent and subject to normative critique, he opens up a discussion of alternatives to the state, especially in the form of different complex variations of world government, that would seem to lead to the question of constitutive justice. However, in arguing that despite their flaws, states should not be abandoned now nor in the foreseeable future,[63] Risse gives only a cursory treatment to the problem of how judgments might be defended about how states are constructed and their membership fixed. He bases his conclusion that non-members cannot have claims to enfranchisement in a state on the premise that the *demos* emerges from a preexisting set of "coercive and cooperative structures," without raising the issue of how these structures are formed in the first place;[64] and this would seem in turn to undermine his thesis about the relation of different grounds of justice.

Even though Risse does not directly problematize the creation of boundaries, identity, and membership, his theory does, to its credit,

---

[62] Risse, *On Global Justice*, p. 11.
[63] Ibid., chap. 15–16.
[64] Ibid., pp. 287–90.

contain resources that could fruitfully be applied to this task. A striking feature of his theory is its endorsement of the idea, taken from Grotius and secularized, of humanity's collective ownership of the earth.[65] Risse takes this notion to establish a ground of justice that places constraints on how individual nations use the resources and spaces they control. Moreover, the implications of this ground extend to immigration and give would-be immigrants a right to settle in places where the earth is being under-utilized.[66] Hence, Risse concludes, "immigration is not exclusively a matter for any state to regulate according to its own interest." "Relative over- and under-use of original resources" becomes a criterion for judgments of justice when we recognize that "once the earth falls into separate units, we can ask what those units must be like and what they must do for each other, so that co-owners can be expected to comply with exclusion from units to which they do not belong."[67] Note that the question of how units are defined in the first place, however, is not raised here. There is no reason in principle, however, why it might not be.

Even if we were to accept the admittedly powerful central claim of cosmopolitans about the global scope of (at least some principles of) distributive justice, abundant questions of constitutive justice would remain regarding the sort of internal divisions and subdivisions that might be consonant with such a scheme. What sort of borders might justly separate jurisdictions or administrative entities? Might nations and nationalism be defended as a basis for boundaries? If so, nations and nationalism of what sort? How should the competencies of higher and lower levels of organization be divided? Are some basic aspects of justice (e.g., basic human rights) global in scope and others not, and if so, why? Should, as tends to be the case for global justice advocates, "individuals" be understood to be the primary units for distributive purposes, or should groups of certain types be accorded status as well? As representatives of cosmopolitan theorizing about global justice, Brock and Risse are able to give only partial responses to these sorts of concerns. Indeed, it is difficult to see how an account of justice might respond consistently

[65] Risse presents this theme as having been absent from recent philosophical discourse, but he overlooks the central role that the "universal destination of goods," a biblical notion commented on by church fathers such as the third-century figure Cyprian, has played in the modern development of Catholic social teaching.

[66] Risse, *On Global Justice*, pp. 89–107, 152–66.

[67] Ibid., p. 153.

and coherently to such constitutive questions while remaining within the logical rubric of distribution.

The commutative justice objection

At this point, we encounter a fourth objection to my argument about the need to develop an account of constitutive justice. One might hold that while the logic of distributive justice is indeed inadequate for coping with problems regarding the rights and wrongs of communal boundaries, there are other resources in the existing tradition of thinking about justice that do suffice. Along these lines, we are thus obliged to consider the eminent Kant scholar Otfried Höffe's argument that *commutative* justice provides a set of terms that can clarify the confusions and address the limitations surrounding the notion of distributive justice in contemporary discussions.[68] Höffe's contention is that the "dogma of the justice debate" today – the presumption that justice concerns primarily distributive questions – overlooks the more fundamental character of questions about the justice of exchanges.[69] He notes, fairly enough, that in contrast to the interminable disputes among competing principles of distributive justice, there is broad agreement that commutative justice consists in simply the equal value of what is given and received. In addition, he argues that the distributivist paradigm tends to neglect the fact that the goods that a society distributes do not materialize from nowhere, but rather, they must be created – a circumstance which raises a prior question regarding fair conditions of production. Höffe appends the observation that inasmuch as it is thought to be an affair of the state and governance, distributive justice is enacted at a secondary level

[68] Otfried Höffe develops his theory of justice in *Political Justice: Foundations for a Critical Philosophy of Law and the State*, J.C. Cohen, trans. (London: Polity, 1994); *Vernunft und Recht: Bausteine zu einem interkulturellen Rechtsdiskurs* (Frankfurt: Suhrkamp, 1996), pp. 202–219; "Erwiderung," in Wolfgang von Kersting, ed., *Gerechtigkeit als Tausch? Auseinandersetzung mit der politischen Philosophie Otfried Höffes* (Frankfurt: Suhrkamp, 1997), pp. 331–56; *Democracy in an Age of Globalisation*, Dirk Haubrich and Michael Ludwig, trans. (Dordrecht: Springer, 2007); and *Gerechtigkeit: Eine philosophische Einführung* (Munich: C.H. Beck 2001), pp. 61–78.

[69] For a different view, see Paul Turpin's argument that thinkers such as Adam Smith and Milton Friedman have successfully applied tools of rhetoric to effect a shift from a focus on distributive justice to one on commutative justice. Paul Turpin, *The Moral Rhetoric of Political Economy: Justice and Modern Economic Thought* (London: Routledge, 2011).

that is parasitic upon the primary actions of citizens who operate on a common plane of reciprocity guided by commutative justice.

In making the case for a paradigm shift in discussions of justice in favor of the justice of exchanges, Höffe naturally comes to focus on the notion of social contract. He argues that justice, properly understood, must be seen as rooted in a foundational exchange that ultimately serves as the basis of the state and the institution of law. The sort of exchange that he envisions is not merely of material goods; it also involves services and less tangible commodities such as security, power, and recognition. Nor is it an actual, historical event; rather, like Rawls, he posits a fundamental accord as a thought-experiment ordered to the legitimation of political community. He describes the basic contract (*Urvertrag*) as both negative and transcendental. It is negative in that in the first instance, it involves a reciprocal agreement among persons *not* to do something: to renounce, that is, the use of violence against one another. It is transcendental in that its purpose is to ensure not only bare survival but the minimal "conditions of agency" required to ensure that the very capacity for rational action that is constitutive of human being is retained. For this reason, Höffe asserts that the basic contract is what establishes what we have come to call human rights. In the idea of contract, reciprocity is crucial: basic human rights, of both positive and negative sorts, are what we owe to each other in exchange for relinquishing our freedom to violate others. Because everyone receives goods equal in value to what is given up, the exchange is just. Höffe then builds on this idea, in a fashion reminiscent of Locke, to show how the problem of free riders – those who accept the benefits of solidarity without themselves contributing to its maintenance – results in a second exchange or contract, in which participants give up the right to exact private justice, in exchange for protection through the public organs of states and legal systems.

Höffe's thesis does in some respects cast the assumptions of theories of distributive justice in a telling light. He does not succeed in showing, however, that commutative justice provides an effective vantage from which to resolve those shortcomings of the distributivist paradigm that are specifically associated with membership, boundaries, and the constitution of communities. His account of the social contract oscillates between references to all people and references to those who are joined under the law (*Rechtsgenossen*), but although his conception clearly concerns the formation of individual states, he does not comment on how to determine who from the first group might become party to the second group. The idea of the (national) polity or commonwealth

(*Gemeinwesen*) plays an important role for him, and he clearly envisions such an entity as defined, ideally, through democratic means, but the lack of further development of his argument here leaves unclear how he might, for example, respond to the core problem in democratic theory of how to justly determine the boundaries of the *demos*.

The difficulties with constitutive questions extend to two additional topics that Höffe takes on: the problems of intergenerational justice and global justice. He recognizes that it seems difficult to speak of a just exchange between present and future generations, but he argues capably that we may nonetheless translate the notion of sustainability into terms of commutative justice if we accept the premise that the natural world is a joint possession of humanity. According to this view, we should see ourselves as parties to a generational contract under which we are obligated to replace any resources we exhaust with goods of equal value, so that our legacy to those who come after matches any debts we leave them. One notable flaw in this argument has to do with constitutive matters: it overlooks the circumstance that future generations – their numbers, their composition, and even their character – are deeply influenced, indeed produced by us, in a manner that undermines the conceit of a fair exchange between equals. Our constitutive power with respect to the other party to such a contract renders the terms of the exchange so malleable that it becomes difficult to establish how it might be just, at least in commutative terms.

When Höffe turns to the question of global justice, a different problem arises. Here, based on the premise that states act in ways comparable to individuals, he proposes, in a Kantian vein, that justice at the global level be seen as founded on a contract among states (rather than among individuals), aimed at resolving problems attending globalization which exceed the powers of individual states to manage. These problems, however – which include wars of various sorts, migration flows, and underdevelopment and inequality – tend to be bound up with boundary questions of a sort that explode his analogy between state actors and individual agency. It is not clear in his account how a society of states might appropriately deal with questions about how states are to be defined or about whether states should even be preferred as models of social and political organization. Nor does his proposal address how judgments about boundaries, borders, and citizenship might be enforced against unwilling or recalcitrant parties. As a result, the world republic that Höffe proposes – not a world-state, but a world federation characterized by "soft law" – lacks both the normative and the political wherewithal to cope with constitutive injustices.

In Höffe's theory, ultimately, the justice of exchanges is not able to address what happens when people, or groups, are unjustly left out of the contractual arrangements – real or ideal – taken as the foundation of social, political, and legal institutions. That is, the recourse to a commutative approach still encounters its limit when confronted with constitutive questions because it is not able to account for why one set of bounds within which exchanges are undertaken might be preferable to another. This, indeed, is a central difficulty encountered by contractarian theories of justice in general: what criteria determine who is eligible to be a party to the contract in the first place, given the implausibility of supposing that eligibility is simply open to all?

One effort to adapt a contractarian approach to cope with this sort of issue is Richard Vernon's book *Cosmopolitan Regard*.[70] In his sophisticated attempt to meld a model of contract to the frame of global justice, he directly engages with the problem of justifying the exclusion of "outsiders" who are not included in a social contract. Under the "Iteration Proviso" that he proposes, groups can legitimately agree to preferential arrangements among themselves provided that (1) others enjoy the same opportunity to form their own groups, (2) a duty to aid others is recognized when that opportunity does not exist (in, say, failed or criminal states), and (3) a duty is acknowledged not to hinder the "society-building work" of others.[71] Vernon's aim is to link the efficacy of obligations held toward fellow members of political society with robust transnational obligations to outsiders – responsibilities to protect victims of humanitarian crimes and to engage in fair, non-exploitative economic practices. His argument still neglects, however, to address the kernel of the problem faced by contract models of how to cope with disagreements about who is included as an insider in the first place, assuming, rather sanguinely, that in cases in which the desire to belong is not mutual, alternative memberships can readily be found or formed. Instead, as he acknowledges, his account – like that of Rawls – accepts as its premise a picture "of a world made up of parallel social projects," namely states – an assumption that bypasses key constitutive questions.[72]

---

[70] Richard Vernon, *Cosmopolitan Regard* (Cambridge: Cambridge University Press, 2010).
[71] Vernon, *Cosmopolitan Regard*, pp. 103–110.
[72] Ibid., p. 114.

The difficulty of contractarian accounts of justice in coping with constitutive questions is compounded by some other characteristic shortcomings of this approach. The penchant of classic and modern contract theories alike to employ individualistic assumptions about pre-social, highly voluntaristic actors[73] undermines their relevance to judgments about the processes through which communities of justice are actually constituted, inasmuch as these processes involve various forms (collective and corporate) of social agency, power relations, and communal horizons of meaning. I will explore some of these factors below in discussions of boundary-making and social agency (Chapter 6), as well as the significance of ties of solidarity and responsibility with respect to the scope of justice (Chapter 7). At present, suffice it to say that whatever their other merits may be, contractarian theories do not of themselves obviate the need for developing an account of constitutive justice.

[73] A still influential critique of the assumptions employed in Rawls's version of contractarianism in particular is Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

3
Constitutive Justice – A Paradox?

In this chapter, I consider a final objection to the project of developing criteria of constitutive justice, posed by the paradoxical character of the endeavor of, as I have called it, bringing justice to bear on its own foundations. Ultimately, it may be the case that the entire conception of constitutive justice founders because the problem it addresses is simply insoluble, either logically or practically.

The difficulty here begins with the circumstance that justice itself is, in general, a bounded concept. I refer here not only to the bounds of meaning that set justice apart from other related ethical concepts (such as generosity or love) but also to the specific interpersonal contexts in which justice is conventionally invoked. Distributive justice, as we have already noted, always implies a given set of persons within which goods are distributed, but much the same sort of thing can be said for other varieties of justice. Social justice, of course, carries an implicit reference to a society or social entity: a set of institutions that are judged to be comparatively just or unjust, or a collective within which the poor or disadvantaged are defined as such and stake their claim to equitable treatment. Commutative (or corrective or rectificatory) justice concerns, and arises within, interpersonal relations marked by exchanges of various kinds. Inasmuch as these exchanges rely on shared meanings and established criteria regarding the character and meaning of what is exchanged (What is the value of a service? What constitutes a gift? What counts as a crime and what determines its gravity?), commutative justice can be enacted only within shared cultural horizons, networks of economic relations, and systems of, if not law, then at least shared moral principle.[1] These

[1] Small children become capable at some point of invoking the language of justice: "That's not fair!" – often without being able to articulate what "fairness"

bounds are presupposed not only by these particular forms of justice but by justice in general, and justice does not operate without them.

So what happens when we try to ask, from within the frame of a particular conception of justice, about whether the political or communal bounds that delimit the conception are themselves just? We saw in Chapter 1, for example, how for Aristotle, animals and slaves were conceived to lack the capacity for agency or the drive for happiness required to bring them within the bounds within which justice applies. To have attempted to question the justness of these exclusions from within the horizon of Aristotelian thought, however, would have entailed invoking a bounded idea of justice to query its own bounds. To have questioned those boundaries from a different scale (say, Western traditions of thought about justice or universally shared conceptions of the requirements of justice), however, would in turn entail defending the justness of *those* implied boundaries, and so on.[2] How can we establish what count as just boundaries for justice? Any such endeavor, it appears, whether in Aristotle's time or our own, is akin to *trying to see one's own eyeballs*. The seeming impossibility of this feat directs us to a paradox lodged in the character of justice, and this paradox serves as the source of the stiffest of the obstacles I have traced to developing a cogent theory of constitutive justice. The challenge has two sides to it. One is conceptual: is constitutive justice a conception that entails a logical conflict that renders it nonsensical? The other is pragmatic: does it require a form of critique that cannot be realized in practice? In this chapter, I will set about defending the idea of constitutive justice against these objections by focusing in particular on the set of paradoxes built into the constitution of political communities of justice.

---

might mean. But prior to that threshold they are not capable of the type of judgments associated with acting justly or engaging in just exchanges – although they may, certainly, be victims of injustice. On moral development and the notion of an "ethic of justice," see Carol Gilligan, *In a Different Voice* (Cambridge, MA: Harvard University Press, 1982).

[2] There is a sense in which the problem I am describing reflects modern, secularized assumptions about justice in human institutions, and one could argue that in traditional religious frameworks – for instance, those that associate justice with the apodictic commandments of a transcendent God – the need to justify the bounds of justice is "*aufgehoben*" or sublated. And yet Christian theology, at least, remains saddled with the paradoxical theological task of theodicy – of, that is, justifying the ways of God.

The course of my argument will take us on a tour of assorted paradoxes associated with the task, central to the notion of constitutiveness, of conceptualizing and evaluating the boundaries of communities and institutions. Over the last decade or so, philosophers and political theorists have engaged in a rash of reflections about paradoxes, antinomies, and aporias built into foundational features of political life, including (but not limited to): the establishment of sovereignty, the definition of "the people," the cultivation of civic virtue, the legitimation of democratic practice, the justification of authority, the structuring of constitutions, and the foundation and interpretation of law. In addition to analyzing the different sorts of paradoxes involved in these processes, they have proposed various solutions or coping strategies for the contradictions involved. This literature, I argue, has foreshadowed and implicitly thematized the problem of constitutive justice, and it is worth pointing out that the various aspects of the foundations of political community it addresses all conceptually precede the matter of *distributive* justice, which as noted, presupposes an established domain of distribution. I will draw on this literature in this chapter, discussing its relation to the theory of justice and evaluating how it might contribute to thinking about and resolving constitutive questions. In what follows I comment first on the character of what I will call constitutive paradoxes, identifying some relevant distinctions among them. I then engage with some of the prominent thinkers who have wrestled with these difficulties and assess the implications of their treatments for matters of justice. I will conclude by returning to the question of whether its paradoxical character undermines the prospects for developing a theory of constitutive justice.

Constitutive paradoxes I: founding

Constitutive paradoxes touch in various ways on the general problem mentioned above – that is, of applying criteria to evaluate the object that constitutes them in the first place. Placed in connection with communities, the problem takes the form of how the contours of a particular constellation of persons or set of institutions might be normatively defended. Constitutive paradoxes therefore involve questions of justification, or legitimation, or rationalization; and they deal not so much with the actual historical creation of communities (although this may certainly be considered) as with the ethical support on which they rest or with reference to which they evolve.

For our purposes, we can distinguish between two broad classes of constitutive paradoxes, addressing respectively issues of *founding* or *genesis* and issues of *maintenance* or *revision*.[3]

The first set of paradoxes revolves around the conditions and circumstances under which political communities are originally organized. Often, an act of founding provides the context for a community's narrative regarding its beginnings, and it thereby serves an important function by marking out a clear temporal boundary and point of closure. How do political communities come into being? Logically, they must set themselves off from something that comes before: in Western political discourse, this role has frequently been taken by the notion of a "state of nature." The idea of an originary contract, or series of contracts, is a powerful metaphor that has shaped much of Western political theory.[4] The contract idea characteristically imagines a field within which people, conceived of as individual agents, band together by exercising an innate freedom of association. Moreover, it places a premium on the value of consent or voluntariness. The idea of contract blends usefully with the practice of adopting constitutions that has been so central to the modern nation-state system, even if constitutions can be and often are more imposed than they are

[3] I have in mind here something like the distinction Walter Benjamin makes in his study of the relationship of violence and law, between extralegal founding violence and violence that preserves law. As Benjamin observes, there is a relation between the two moments but also an opposition: Founding violence is validated by only the ongoing success of preserving violence, which in turn is obliged to uphold the violently founded order. Walter Benjamin, "Critique of Violence," in *Reflections: Essays, Aphorisms, Autobiographical Writings*, Peter Demetz, ed., Edmund Jephcott, trans. (New York: Schocken, 1986), pp. 277–300, at 287–89 (cf. Robert Gibbs, "Philosophy and Law: Questioning Justice," in Edith Wyschogrod and Gerald P. McKenny, eds, *The Ethical* (Oxford: Blackwell, 2003), pp. 101–16). Bonnie Honig attempts to undermine this distinction between genesis and revision in her own otherwise incisive survey of discussions of paradox among political theorists by arguing that problems of founding continue to play out in the ongoing struggles of constitutional democracies to legitimate themselves; see her *Emergency Politics: Paradox, Law, Democracy* (Princeton, NJ: Princeton University Press, 2009), pp. 15–16. Her argument, premised mainly on the fact that actual citizenries undergo constant change through death, birth, and migration and therefore constantly encounter problems of democratic legitimation anew, is not ultimately convincing, but it is instructive as to why: it is the paradox of the ship of Theseus that allows us to conclude that the people remains the same even as its component persons are all replaced.

[4] Indeed, Charles Taylor has argued that it plays an indispensable role in what he calls the modern social imaginary.

consented to.[5] In contrast to the notion of a founding contract, the mythos of the nation-state posits the existence of communities of destiny – nations – the origins of which appear to be shrouded in the mists of prehistory and which likewise assume the mantle of "nature."

Strictly speaking, of course, neither of these two images of the origins of states is particularly realistic. In actuality, it is somewhere between these poles of voluntarism and destiny that modern communities of justice form, ideationally, out of a combination of factors, including consent, shared culture, ties of consanguinity, principled commitments, territorial proximity, and historical contingency. In focusing on the normative elements involved, ideas of founding screen out many other factors in order to invoke and heighten a structure of rationalization or justification for the use of power, authority, or coercive force within the bounds established for the community: these are then staked out with such markers as citizenship, law, borders, and suffrage. The structures and procedures associated with founding must, however, cope with a series of paradoxical complications.

The paradox of civic virtue

For example, in Rousseau's meditations on the social contract, he famously noted a paradox related to the originary or founding moment of an emerging polity:

> For a newly formed people to be able to appreciate the sane maxims of politics and to follow the fundamental rules of statecraft, it would be necessary that the effect could become the cause; that the social spirit, which ought to be the accomplishment of the institution, would preside over the institution itself; and that men be already, prior to the laws, that which they should become by means of them.[6]

---

[5] One thinks here, for example, of the post-war constitutions in Germany, Japan, and, more recently, Iraq.

[6] Jean-Jacques Rousseau, *Of the Social Contract*, Book II, 7, Charles M. Sherover, trans., in Steven M. Cahn, ed., *Classics of Modern Political Theory* (New York: Oxford University Press, 1997), p. 437; William Connolly terms this the "paradox of sovereignty" in his *The Ethos of Pluralization* (Minneapolis, MN: University of Minnesota Press, 1995), p. 138. Bonnie Honig, in *Democracy and the Foreigner* (Princeton, NJ: Princeton University Press, 2001), takes Rousseau's solution to the problem, which involves the intervention of the external figure of a "legislator," to illustrate the paradoxical manner in which democratic agency depends upon the intervention of a foreign founder: in a democracy – a society of equals – for the members to remain equal with each other, they must receive their laws not from some of their own but from an outsider.

The problem alluded to here concerning the source of civic virtue extended, for Rousseau, to the very foundations of justice. In his account of politics, a just order, although ultimately divine in its origins, depended for its realization on the establishment of the general will, manifested in the form of a collectivity of adults who overcome their propensity to act as a mere multitude of self-interested persons in order to form together a properly civic-minded sovereign body. Rousseau endorsed some basic assumptions about the sort of conditions under which such a polity could arise: it had to be small, at best marked by face-to-face relations, with some "unity of origin, interest or convention."[7] But something more than this was needed in order for the polity to be able to manifest the general will to provide the basis of just legislation: the proper virtue. Hence, we arrive at the paradox: How are people to establish a just order if they have not already been made just by their own laws?

The paradox of precommitment

Another perspective on the curious character of the logic of founding, and how it might be that people might be understood actively to constitute themselves as a community, can be found in Stephen Holmes's discussion of the "paradox of precommitment." Here, at issue is the character of the will of the people, which, in modern democratic theory at least, is thought to be the *pouvoir constituent* through which sovereignty is exercised and a state founded. Holmes refers to the "paradoxical dependence of the sovereignty of the present on the precommitments of the past."[8] "Citizens," he posits, "can increase their power by tying their own hands"; indeed, "to preserve voluntariness, voluntariness itself must be restricted."[9] As Jason Frank puts it, "democratic will, to be capable of voluntary action, *cannot exist* outside its constitutional organization" – the self-binding mechanisms that enable democratic power to be consolidated in the first place.[10] The issue is a matter of moral theory: without such mechanisms, the people are scattered and cannot take on the characteristics requisite for coherent action. Only with a certain degree of self-constraint can

[7] Rousseau, *Social Contract*, Book II, 10.

[8] Stephen Holmes, "Precommitment and the Paradox of Democracy," in Jon Elster and Rune Slagstad, eds, *Constitutionalism and Democracy*, (Cambridge: Cambridge University Press, 1988), pp. 195–240, at 222.

[9] Holmes, "Precommitment," pp. 232, 239.

[10] Jason Frank, *Constituent Moments: Enacting the People in Postrevolutionary America* (Durham, NC: Duke University Press, 2010), p. 29.

a people be said to acquire and exercise sovereignty in a manner that might produce a just, or at least a justifiable, state. This view points to the manner in which collective political agency, in order to be effective, relies on a structure which a people in some autogenetic way wills for itself.

The paradox of revolutionary authority

In a different vein Jacques Derrida, reflecting on what Seyla Benhabib elsewhere terms the paradox of the constitution of revolutionary authority, comments on the manner in which the distinctive genre of public declarations can be understood to establish modern democratic orders in the name of those very orders.[11] Invited to provide a textual analysis of the *Declaration of Independence*, Derrida pursues the question, "who signs, and with what so-called proper name, the declarative act which founds an institution?" As he notes, the "signer," the "declarer," is ultimately (through the mediation of a drafter – Jefferson – and delegates, representatives, who append their names to the document) *the people*, and yet this people, which authorizes the statement founding a new state, comes into existence – and therefore acquires its authority – only through the act of declaration. Is independence *stated* or *produced* by the document? The text, despite its appeals to "self-evident" constitutional principles, appears to be at once constative and performative.[12] In Frank's words, the people becomes "at once a constituent and a constituted power."[13] The paradox suggested here is akin to Escher's "*Drawing Hands*," in which images of hands sketch themselves into being. In the act of signature, the people gives birth to itself as a source of authority. It is on the legitimacy of this authority that the justness of the resulting polity and its constitution is predicated.

---

[11] Jacques Derrida, "Declarations of Independence," *New Political Science* 7.1 (1986): 7–15; Seyla Benhabib, "Democracy and Difference: Reflections on the Metapolitics of Lyotard and Derrida," *Journal of Political Philosophy* 2.1 (1994): 1–23. On the general problem of constituent power, see the essays in Martin Loughlin and Neil Walker, eds, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007).

[12] Derrida, "Declarations," p. 8. Interestingly, Derrida pursues the issue of authorization further, suggesting ultimately that it is the reference to the Creator in the document that identifies the "last instance" serving as guarantor for the signature sealing the Declaration (pp. 10–13).

[13] Frank, *Constituent Moments*, p. 8.

The *demos* paradox

But who belongs to this people? Here we encounter a prominent paradox that is commonly known as the "*demos* problem" in democratic theory. There are several dimensions to this problem, as Claus Offe has influentially formulated it. First of all, "the democratic form of government cannot be brought into being by democratic means," since however inspired their founders might be by democratic ideals, it is a "birth defect" of democracies that they all have non-democratic roots, be they in the form of revolutions, regime changes, or great-power negotiations. In addition, "[i]t is democratically impossible for the people to decide or (re)define who belongs to the people"; moreover, "territorial borders cannot be changed in obviously democratic ways."[14] If one adopts the premise that political communities should be just in the sense of being democratically legitimate, then whether or not a state is just depends on the prior question of whether the people making this determination is itself legitimate. But if the legitimacy of the people is understood to depend on a democratic designation – in line with the "will of the people" – then the question of how the people is defined is simply posed anew. Any effort to determine a legitimate set of boundaries already presupposes those boundaries. We find ourselves in an infinite regress. As Sofia Näsström puts it, "[t]he persons who are supposed to confer legitimacy upon the people are trapped in an infinite circle of self-definition. They cannot themselves decide on their own composition."[15] The paradox here is that of the *chicken or the egg*.

---

[14] Claus Offe, "'Homogeneity' and Constitutional Democracy: Coping with Identity Conflicts through Group Rights," *Journal of Political Philosophy* 6 (1998): 115–18. For influential statements of the problem, see also Frederick G. Whelan, "Prologue: Democratic Theory and the Boundary Problem," in R.J. Pennock and J.W. Chapman, eds, *Liberal Democracy* (New York: New York University Press, 1983), p. 16; Robert Dahl, *Democracy and Its Critics* (New Haven, CT: Yale University Press, 1989), pp. 119–31, 193–209; and Ian Shapiro and Casiano Hacker-Cordón, eds, *Democracy's Edges* (Cambridge: Cambridge University Press, 1999), pp. 1–3. As noted above, Amartya Sen identifies a similar problem linked to Rawls's theory of justice, pointing out that with respect to the justness of population policies, determining the number of people to include in the original position would seem to be dependent on the decision reached. See his "Justice Across Borders" in Pablo de Greiff and Ciaran Cronin, eds, *Global Justice and Transnational Politics* (Cambridge: Cambridge University Press, 2002), pp. 37–52.

[15] Sofia Näsström, "The Legitimacy of the People," *Political Theory* 35.5 (2007): 624–58, at 625.

The constitutional paradox

A final constitutive paradox associated with origins or foundings is bound up with the propriety of the process by which a people establishes a constitution. The central issue here is the role of formal rules and norms in the process of delineating the people's powers of self-determination: how, in other words, democracy and constitutionalism can fit together in the founding of a modern political order. For a democratic constitutional order to be just, it needs to rely on the legitimation provided by popular decision-making and to be shaped in accordance with the rule of law. But which step comes first? To write a constitution, democratic decision-making is required, but that must follow constitutional rules, which must be established democratically, and so on. As Kevin Olson states the conundrum, "[a]ny democratic attempt to create a constitution requires a previous constitution that has already established democratic procedures."[16] The problem is one of *bootstrapping* – of somehow arranging for two sequentially related processes to come into being at one time.[17]

The five "founding" paradoxes I have cited do not constitute an exhaustive list. But in a sense, these paradoxes describe a coherent sequence of moments through which a modern (democratic) state can be thought to come into existence: (1) persons acquire the civic virtue characteristically produced by but also needed to ground a state; (2) they constitute themselves as a unified agent capable of exerting a collective will; (3) they formally declare themselves into the status of a nascent state, in the case of democracies; (4) they delimit the bounds of the *demos* that exercises self-determination; and finally, (5) they bind themselves by and to procedures establishing a constitutional order. Each of these steps bears on the issue

[16] Kevin Olson, "Paradoxes of Constitutional Democracy," *American Journal of Political Science* 51.2 (2007): 330–43. See also Frank Michelman, *Brennan and Democracy* (Princeton, NJ: Princeton University Press, 1999), pp. 4–11; Jürgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" William Rehg, trans., *Political Theory* 29 (2001): 766–81; Christopher S. Zurn, "The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy," *Legal Theory* 16 (2010): 191–227.

[17] This problem can be generalized so as to apply on an ongoing basis to the relationship between the force of law and the democratic will or legitimacy stemming from a people. On that point, see Christoph Menke, "The Self-Reflection of Law and the Politics of Rights," *Constellations* 18.2 (2011): 124–34. It is in response to this entire set of paradoxical relationships in a democracy that Habermas has proposed as a solution the idea that legal codes and democratic political power are "*co-originally* constituted." *Between Facts and Norms*, William Rehg, trans. (Cambridge, MA: MIT Press, 1996), pp. 122, 133, 141–42.

of how we might think of a political community as having been founded justly. More specifically, each has continuing relevance for judgments about the constitutive outlines of nascent societies: their borders, their membership, and their distinctive value commitments. This is because a principal commonality exhibited by the five paradoxes that I have described – Rousseau's problem of civic virtue, the problem of precommitment, the problem of revolutionary authority, the *demos* problem, and the problem of constitutional procedures – is that they all mark moments where boundaries defining a community of justice are set.

Constitutive paradoxes II: revisions

As Offe noted in his description of the *demos* problem, a paradox of founding can spill over into long-term difficulties involved in redefining a polity in light of changing realities. This point directs us to a second group of constitutive paradoxes that revolve around the *maintenance and revision* of communities over time. These conundrums do not deal specifically with the problem of the genesis of political communities or moral institutions. However, they may have roots in them, and their dynamics may be shaped by the playing out of unresolved originary paradoxes. As with founding paradoxes, revision paradoxes are often screened out or obscured by the pieties of patriotism or belonging.

The semiotic paradox of peoplehood

One example of a constitutive paradox that deals with maintenance and revision involves the character of the people, but it deals not so much with how a people emerges in the first place as it does with how a people evolves thereafter. The anthropologist Virginia Domínguez, in the context of an ethnographic investigation of the contemporary structuring of Israeli identity, has drawn attention to the "semiotic paradox of peoplehood," whereby "through dialogue and discourse we may assume, or at least come to believe in, the existence of something whose very existence is, in fact, continually 'created' by discursive acts of signification in which we participate."[18] After examining how the Israeli sense of

[18] Virginia R. Domínguez, *People as Subject, People as Object: Selfhood and Peoplehood in Contemporary Israel* (Madison, WI: University of Wisconsin Press, 1989), p. 21. Danielle Allen makes a similar point about modern polities, noting that, "'[t]he people' exists finally only in the imaginations of democratic citizens who must think themselves into this body in order to believe that they act through it. Democratic politics cannot take shape until 'the people' is imaginable." *Talking to Strangers: Anxieties of Citizenship Since* Brown vs. Board of Education (Chicago, IL: University of Chicago Press, 2004), p. 69.

constituting a distinct people has emerged and continues to evolve over time, she concludes: "Social representations are dually constituted. They are simultaneously descriptive and prescriptive, presupposing and creative. They both describe a particular state of affairs and index the hopes, goals, wishes, and beliefs of the people generating the representation."[19] This occurs, moreover, against a backdrop in which belonging in the collective sense of self is constructed simultaneously with, and inextricably from, acts of exclusion and othering. And as Domínguez points out, "the presupposition of the existence of an object precludes recognition of the discursive act of creating the object, even in the midst of the act of creation itself."[20] It is, arguably, essential to the ongoing functioning of the semiotic paradox that the processes of boundary-making that it entails, including the dynamics of exclusion, efface themselves in this way.[21]

An additional wrinkle to the problem of maintaining a sense of peoplehood is pointed out by Giorgio Agamben, who comments on a deep ambiguity in the term "people," which in Italian, Spanish, French, or English can refer not only to the entirety of a citizenry or community but more specifically to the poor or disenfranchised, those marginalized from political power or held to belong to an inferior class (in German, too, *Pöbel*, the term for riffraff or rabble, derives from the root "populus"). "People" thus contains within itself a distinction of grade.[22] When inserted into the notion of popular sovereignty, it already carries a double reference, to both inclusion and exclusion. This inward duality of the *demos* is balanced, in a sense, by an external duality identified by Linda Bosniak in contemporary conceptions of citizenship. As she recognizes, modern democratic societies have come to question the "second-class citizenship" experienced by permanent non-citizen residents to the point where they come to be understood as worthy of enjoying "substantive" (as opposed to formal) citizenship, with the result that a democratic people may be thought to include "non-citizen" or "alien citizens."[23] Jason Frank, too, following a cue from Jacques Rancière,

---

[19] Domínguez, *People as Subject*, p. 190.

[20] Ibid., p. 68.

[21] In Chapter 6 below, I return to the topic of boundary-making and its invisibility.

[22] Giorgio Agamben, "What Is a People?" in *Means Without Ends: Notes on Politics*, Vincenzo Binetti and Cesare Casarino, trans. (Minneapolis, MN: University of Minnesota Press, 2000), pp. 29–36.

[23] Linda Bosniak, *The Alien and the Citizen: Dilemmas of Contemporary Membership* (Princeton, NJ: Princeton University Press, 2006), p. 81.

highlights the notion that the people exceed or escape the political bounds that they themselves enact, so that they might retain the ability to function as an outside ["out of doors"] critical and disruptive force, a "remainder," that calls government to account.[24] As a result, as Rancière puts it, "the people are always more or less than the people."[25]

The democratic paradox

Another set of revision paradoxes pertains especially to democratic societies and is generated by the intersection of democracy with the ideas of rights and liberty embedded in liberalism. Chantal Mouffe shows, for example, that liberal democracies confront an irremediable tension between their need, as democracies, to draw frontiers between "us" and "them" and the liberal requirement that they place constraints on democratic processes in the interest of protecting human rights.[26] As societies experience immigration and other changes, the *demos*, the seat of sovereign authority, must be continually adjusted in line with the very requirements of liberalism that it undertakes to specify and realize. This relation is built on the juxtaposition of two contradictory logics: a democratic one that attempts to rein in the abstract universalism of liberal discourse, and a liberal one that invokes human rights to challenge the penchant of democracies for adopting overly exclusionary particularistic practices. Mouffe insists that this is a paradox but not a contradiction and that once the tension between democracy and liberalism is freed from recent "third way" political strategies to cover it up, the continual dialectic it produces – of establishing frontiers within which equal rights are built up while continually challenging the relations of inclusion and exclusion involved – can serve as a constructive, if inherently unstable and precarious, force in modern politics.

Seyla Benhabib has similarly addressed the paradox of "democratic legitimacy" that she sees as arising through the confluence of democracy and liberalism in the structuring of modern states, both individually and in the form of a global order. She notes, like Mouffe, that these forces produce a tension between, on the one hand, universal norms that protect individual rights, and on the other hand the autonomy of collectivities expressed in democratic decision making. At the global level, the powers associated with individual state sovereignty serve as the basis of international law,

---

[24] Frank, *Constituent Moments*, pp. 3–31.

[25] Jacques Rancière, *Dis-Agreement: Politics and Philosophy*, trans. Julie Rose (Minneapolis, MN: University of Minnesota Press, 1999), p. 10.

[26] Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000), p. 4.

yet self-determining states somehow find themselves obliged to accede to cosmopolitan norms of justice in ways that limit their own autonomy: in the process, says Benhabib, "the state is both sublated and reinforced in its authority."[27] This contradiction is also enacted at the national level:

> The democratic sovereign draws its legitimacy not merely from its act of constitution, but equally significantly, from the conformity of this act to universal principles of human rights, which are in some sense said to precede and antedate the will of the sovereign and in accordance with which the sovereign undertakes to bind itself. "We, the people" refers to a particular human community, circumscribed in space and time, sharing a particular culture, history, and legacy; yet this people establishes itself as a democratic body by acting in the name of the "universal." The tension between universal human rights claims and particularistic cultural and national identities is constitutive of democratic legitimacy.[28]

The conflict between autonomy and universal principles exacerbates a built-in limitation in democracies: in Benhabib's succinct formulation, "democracies require borders" (91) since human rights can be realized only within concrete, cohesive, territorially bounded communities. But this raises an acute further paradox associated with the notion of democratic legitimacy: "the necessary and inevitable limitation of democratic forms of representation and accountability in terms of the formal distinction between members and non-members."[29] How can "we, the people" be delineated in a way that meets the demand of democratic legitimacy? Benhabib must confront the problem that "the people" is bounded in ways that unjustly exclude members of the "*populus*" (but not the "*demos*"). It is this recognition that leads her to argue that democracies must over time revise their boundaries through what she calls a "jurisgenerative politics" of "democratic iterations" – "reflexive acts of self-constitution, whereby the boundaries of the *demos* can be readjusted."[30] Accordingly, she amends her previous assessment to note that "[d]emocracies require *porous* boundaries."[31]

---

[27] Seyla Benhabib, "On the Alleged Conflict between Democracy and International Law," *Ethics and International Affairs* 19.1 (2005): 85–100, at 90.
[28] Benhabib, "On the Alleged Conflict," p. 91.
[29] Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006), pp. 17–18.
[30] Benhabib, "On the Alleged Conflict," p. 92.
[31] Ibid., p. 96, emphasis added.

The paradox of democratic justification

There are additional paradoxes that accompany the sort of jurisgenerative politics that this model implies, however. One of these, characterized by Robert Talisse as the "paradox of democratic justification," turns on the problem of legitimating democratic governance under conditions of moral pluralism. Constitutional democracies that are marked by significant diversity face a dilemma:

> The core democratic idea that the legitimacy of the democratic state rests upon the consent of those governed by it requires us to articulate principles that supply the justification for our government; however, the fact that citizens are deeply divided over fundamental commitments renders any such principles essentially contestable and, therefore, unlikely objects of widespread agreement. It seems, then, that the very liberties that constitute the core of democracy render the democracy's own conception of legitimacy unsatisfiable.[32]

This negative paradox is not ameliorated by the additional democratic paradox whereby a citizen who opposes a measure approved by the majority may also be said at once to support it in virtue of her commitment to democracy.[33] Instead, it plays out in practice in deeply divisive debates about moral and religious questions, such as abortion, gay marriage, science education, and the role of religious symbols in public life. Democracy, from this perspective, far from being self-justifying, appears to foster paralysis in regard to criteria for its own justification.

The paradox of legal interpretation

An additional problem along these lines deals with constitutional interpretation. Citing Hobbes' observation that "all laws, written and unwritten, have need of interpretation,"[34] Fred Frohock, for example, has pointed out how all systems of authority based on law generate interpretations that, when contested, require reference to higher authorities, whose interpretations can then be appealed on up a potentially

---

[32] Robert B. Talisse, *Democracy and Moral Conflict* (Cambridge: Cambridge University Press, 2011), pp. 14–15.

[33] On the democratic voter paradox, see Michael Clark, *Paradoxes from A to Z*, 2nd ed. (London: Routledge, 2007), pp. 48–51.

[34] Thomas Hobbes, *Leviathan,* chapter 26 ("Of Civil Laws"), cited in Fred M. Frohock, *Bounded Divinities: Sacred Discourses in Pluralism Democracies* (London: Palgrave Macmillan, 2006), p. 117.

infinite chain of interpretation, at least to the point where some sort of halting device (for Hobbes, the sovereign; for Plato, the form of the Good) is imposed to assert closure in questions of authority. As William Connolly notes, moments of legal-constitutional uncertainty (such as that involved in the 2000 US presidential election) invoke as a halting device "a sovereign power both inside and above the law" in a manner that lays bare the "lawlessness upon which the rule of law depends," which is "often obscured or hidden from public view."[35] Perhaps the most critical difficulty raised by the paradox of authoritative interpretation is how a society can apply law, and revise law when necessary, in a way that does not result in a recurrence of the violence at its foundations.

The political paradox

The last revision paradox I will mention arises in connection with the problem of the emerging plurality of centers of juridical authority in modern differentiated societies. In this context, Paul Ricoeur outlines what he calls "the political paradox," namely, that politics is at once not only one domain among others subject to criteria of justice but also a self-constituting agency regulating the very boundaries of distributive schemas and conceptions of right.[36] Ricoeur raises this point in a discussion of Michael Walzer's pluralist account, in his theory of justice, of how democracy aspires to "complex equality" characterized by distinct patterns of equitable distributions governed by criteria of justice that vary from sphere to sphere within an overall society.[37] As Ricoeur observes, among these spheres, politics alone stands as a realm in which not only are goods such as political offices distributed but also actions are taken that can and do have the effect of reconstituting the very boundaries that define spheres of justice in the first place.

> [I]nsofar as [political power] is not just one good among others, insofar as it is what regulates other distributions, including those

[35] Connolly, "The Ethos of Sovereignty," in Austin Sarat et al., eds, *Law and the Sacred* (Stanford, CA: Stanford University Press, 2007), p. 137. See also Wendy Brown, "Sovereignty and the Return of the Repressed," in David Campbell and Morton Schoolman, eds, *The New Pluralism: William Connolly and the Contemporary Global Condition* (Durham, NC: Duke University Press, 2008), pp. 250–72.

[36] Paul Ricoeur, "The Plurality of Instances of Justice," in David Pellauer, trans. *The Just* (Chicago, IL: University of Chicago Press, 2000), pp. 76–93.

[37] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), esp. pp. 3–30, 281–311.

> having to do with such incorporeal commodities as affective, mythical, and ethico-juridical goods, political power seems to overflow the framework of distributive justice and to propose the specific problem of its self-constitution and, correlative to this, its self-limitation.[38]

As we see, within a contemporary democratic society the political sphere is endowed with the power to redistribute and redistrict in a manner that can make it self-justifying. Gerrymandering is just one concrete example of the sort of power involved here. At a deeper level – as the politics of the European Union illustrate – it is within the compass of the political agency to reconstitute populations, the citizenry, the scope of the economic sphere, and the outlines of the state in ways that, over time, reshape underlying forms of life and imaginaries in ways that inform both the scope and scale of justice.

What, if anything, do (what I have termed) revision paradoxes have in common? The five "revision paradoxes" I have mentioned – involving, respectively, (1) the ongoing discursive re-creation of the people, (2) the dialectic of democracy and human rights, (3) the legitimation of democracy under conditions of moral pluralism, (4) the interpretation and revision of constitution and law, and (5) the self-constituting power of political organs – are spurred by changing conditions that produce, or heighten, instabilities in politico-moral communities. The effects of temporal change produce efforts to achieve or restore equilibrium or equipoise between the contradictory forces that define the paradox in each case, whether they be the normative powers of rights and popular sovereignty that constitute the nexus of liberal democracy or the descriptive and performative dimensions that mesh in redefinitions of peoplehood. I will revisit this point about equilibrium in Chapter 7 below. For now, however, the important point is that these relations are unstable. An additional noteworthy feature of these paradoxes, as we have seen, is the manner in which they tend to conceal and obscure both themselves and the agency involved in the respective fields of activity they concern.

There are several defining features that link the various contradictory relations I have described here and characterize them as constitutive paradoxes, whether of the founding or revision variety. A first connection is that they all describe *normative* relations: they are concerned with ethical quandaries about justification, rightful authority, and the

[38] Ricoeur, "The Plurality of Instances of Justice," p. 89.

articulation of shared mores as they arise in modern societies. This concern distinguishes them from the related species of epistemic paradoxes, which revolve around the oddities of knowledge, and from alethiological paradoxes, which hinge on the quirkiness of truth concepts.[39] Second, and more specifically, we can say they all address questions of justice. Even more specifically, we can note that they surround and delimit *distributive* matters of justice such as who administers justice, within which contexts, in accordance with which criteria, and under what legal parameters. This feature is related to a third point: the paradoxes I have explicated all touch in some way on the establishment of lines of demarcation or memberships or boundaries of ethico-political communities. That, after all, is why I have termed them constitutive paradoxes. And finally, these paradoxes, divergent though they may be in their precise forms, nonetheless commonly exhibit a structure in which two normative theses mutually presuppose, or mutually constitute, or mutually delimit one another in a reflexive manner. That is, they are recursive paradoxes.

Constitutive paradoxes are daunting because they threaten to produce vicious circles or infinite regressions that undermine the prospects for identifying stable, independent criteria for evaluating the justness of boundaries, inclusions and exclusions, democratic practices, and structures of authority. The specter they thus raise is that the abundance of ways in which the normative bases of communities of justice are mired in paradox renders the entire enterprise of constitutive justice infeasible. They seem to suggest, in short, the impossibility of bringing justice to bear on its own foundations.

Does this paradoxical foundation vitiate the notion of constitutive justice? I see two avenues for dealing with this objection: one theoretical and one practical. The theoretical approach begins by noting that there are actually three broadly different types of logical relations called paradoxes – which is to say, apparent contradictions arising from individually acceptable premises. One type consists of *fallacies*: relations in which an apparent contradiction arises only because of flaws in their premises, reasoning, or conclusions. A second type is more often called, following Kant, an *antinomy*. This is an apparent contradiction produced by two

[39] On varieties of paradoxes, see Saul Smilansky, *Ten Moral Paradoxes* (Oxford: Clarendon, 2007); R.M. Sainsbury, *Paradoxes*, 3rd ed. (Cambridge: Cambridge University Press, 2009), pp. 22–39; and Roy Sorensen, "Epistemic Paradoxes," *The Stanford Encyclopedia of Philosophy (Spring 2012 Edition)*, Edward N. Zalta, ed. <http://plato.stanford.edu/archives/spr2012/entries/epistemic-paradoxes/>.

contrary theses – such as freedom and determinism – which, however, upon reflection can be apportioned "among two different universes of discourse" (i.e. moral and physical), thus dissolving their clash.[40] It is only the third type, then – let us call it a *real paradox* – that signifies a genuine conflict of opposing theses.[41] Real paradoxes cannot simply be dispelled; they require us to adapt to them by adjusting our beliefs and assumptions or devising pragmatic strategies to enable us to cope with them.

In light of this threefold schema, it is possible to argue that some of the constitutive paradoxes I have cited are not real paradoxes and that their apparent contradictions can hence be resolved. Thus, I would suggest that the legal interpretation paradox, which trades on ambiguities built into the crucial term of authority, and the civic virtue paradox, which unnecessarily conflates moral virtues and wisdom, rely for their effect on fallacies. I would make the case, further, that the precommitment and political paradoxes are best thought of as antinomies that invoke countervailing notions (in the case of precommitment, limiting the powers of a group to expand its power; and in the case of politics, positing political power as a good distributed among others *but also* as that agency which regulates distributions) that span discrete "universes of discourse" instead of marking direct contradictions.

However, these sorts of speculative solutions are not available for the other constitutive paradoxes, which seem to me to be rooted in genuine conundrums involving chicken-and-egg relationships, infinite regresses, or autogenesis. For these dimensions of the constitution and revision of communities of justice, a couple of additional responses remain at our disposal. First, insofar as the problem presented by constitutive paradoxes has to do with the impossibility of basing judgments about the justice of boundaries on criteria that are independent of the structures being evaluated, we might fruitfully contest the conventional notion that justifications (in this case, of boundaries) require an

---

[40] Paul Ricoeur, *Reflections on the Just*, David Pellauer, trans. (Chicago, IL: University of Chicago Press, 2007), pp. 19, 73. Cf. Ricoeur, "Autonomie et Vulnérabilité," in Antoine Garapon and Denis Salas, eds, *La Justice et le Mal* (Paris: Odile Jacobs, 1997). See also Nicolas Rescher, *Paradoxes: Their Roots, Range, and Resolution* (Chicago, IL: Open Court, 2001), pp. 147–51.

[41] W.V.O. Quine rather idiosyncratically departs from Kant's usage and calls this latter class antinomies, but as far as I can tell, few have joined him in this. See W.V.O. Quine, *The Ways of Paradox and Other Essays* (New York: Random House, 1966), pp. 3–23.

appeal to criteria that are independent of, rather than contingent on, the objects of justification.[42] I will consider below, in Chapter 5, an example of how the paradoxical character of constitutive justice might be interpreted in this vein in connection with the *demos* problem and democratic theory.

A second, pragmatic response is made possible by the gap between the *formal* character of the paradoxes I have enumerated and the actual relations involved in the constitution of communities of justice, a gap which introduces instabilities or leeway in the paradoxes that make possible creative ways of negotiating them in *practice*. One way to think of this gap is in terms of the distinction between normative justification and practical justification, which can be invoked to show that theoretical claims about the indeterminate legitimacy of communal boundaries can in fact coexist with popular acceptance of boundaries attained practically, through argument and rhetoric.[43] Another approach focuses on the ambiguous meanings of some of the key terms in the formal paradoxes, such as "constitution" or "authority," which open up avenues of political contestation through which given communal formations can be reinterpreted, challenged, and modified.[44] Particularly fruitful in this regard is the term "people," which, as we have seen, is semantically receptive to varying lines of development. Jason Frank and Paulina Ochoa Espejo, through investigations of post-revolutionary America and nineteenth-century Spanish America respectively, have provided perceptive accounts of how varying enactments of "the people," "*el pueblo*," or "*los pueblos*" have been used to negotiate what I have called constitutive

[42] Christopher Zurn makes a suggestion along similar lines in "The Logic of Legitimacy," proposing that if legal and political theorists were to recognize that legitimacy is governed by a "regulative ideal" logic rather than the "threshold" conception of logic that they generally uncritically assume, the bootstrapping problem posed by the constitutional paradox would be overcome. This is the sort of question on which the movement of comparative political theory, as developed by Fred Dallmayr and others, might be expected to offer useful perspectives by engaging non-Western theoretical models. Daoist thought, for example, is particularly receptive to autogenetic accounts of complex systems.

[43] On this strategy, see Volker Schmidt, "The Politics of Justice and the Paradox of Justification," *Social Justice Research* 11.1 (1998): 3–19.

[44] William Connolly argues something like this when he insists that what he calls the "paradox of sovereignty" – the same paradox identified by Rousseau – should neither be repressed nor subjected to attempts to transcend it; it should rather stand as the topic of ongoing negotiations and renegotiations of how sovereignty defines itself. See his "The Ethos of Sovereignty," pp. 135–54.

paradoxes.[45] These sorts of methods support the proposition that we can cope with such paradoxes through a pragmatic response that, as Ricoeur puts it, "rests on a practice of mediations."[46] These mediations, in turn, remain susceptible to ethical judgment regarding their justness.

Indeed, in the end formal paradoxes – whether encountered in political philosophy, the law, or other codes of conduct – do not in practice prevent people from acting, and therefore, they do not abolish the question of whether those people behave in better or worse ways.[47] To attempt to assess ethically how people act in constituting communities of justice does not, it follows, depend on adducing a paradox-free theoretical account of the concept of constitutive justice itself. The paradoxical elements associated in particular with the formation of political communities, I conclude, should in no way be taken to detract from the need to formulate a constructive account of constitutive justice.

---

[45] Frank, *Constituent Moments*, pp. 19, 33–34, 43; Paulina Ochoa Espejo, "Paradoxes of Popular Sovereignty: A View from Spanish America," *Journal of Politics* 74.4 (October 2012): 1053–65.

[46] Ricoeur, *Reflections on the Just*, p. 90.

[47] Cf. Peter Suber, *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change* (New York: Peter Lang, 1990).

4
Justice between Communitarianism and Cosmopolitanism

If we accept the proposition of the preceding chapters that constitutive justice is not only a coherent and distinctive category but also one much needed in contemporary ethical discourse, then it will be useful to indicate what shape plausible accounts of it might take. In this respect, it is instructive to reconsider Michael Walzer's attempt, in his landmark book *Spheres of Justice*, to integrate the problem of membership into his theory of justice – an effort that, as I noted in the introduction, served more than any other work to place the ethics of boundaries and inclusion on the agenda of political theory and ethics.

In a manner befitting a theory widely characterized as pluralistic, anti-foundationalist, and particularistic, Walzer set out to show that who belongs to a given political community is a matter properly determined by the community itself in line with its own internal normative standards rather than with reference to impartial, universal canons of justice. This is a position in keeping with his broader political and philosophical outlook, which emphasizes cultural pluralism, the sovereign rights of states, and the importance of political self-determination. As a careful reading of his argument shows, however, in the course of his discussion, he finds himself compelled to recognize a series of more broadly based, extrinsic criteria that exert normative pressure on the choices that a community might make about whom it admits. The result is a considerably more complex picture of the interaction of "internal" and "external" criteria of inclusion that, as we will see, directs us to view the ethics of membership as a fundamentally transcommunal, as opposed to intra-communal, affair. In this chapter, I consider whether constitutive justice, in exceeding the bounds of nations, ultimately becomes a subject for cosmopolitan universalism or whether – as I will argue – it

more properly occupies a sort of middle ground between community and cosmopolis.

Spheres of justice

If, when I say that Walzer's book is *justly* considered a modern classic in the literature surrounding the theory of justice, I mean that such a judgment is in accordance with criteria broadly shared within a community of scholars competent to judge the quality and lasting impact of philosophical arguments, then I invoke a conception of justness fully in accord with Walzer's own account. As an entrant in the contest of interpretations of distributive justice touched off by John Rawls's magisterial *Theory of Justice*, Walzer aligned himself with critics of the abstract and hypothetical method of "ideal theory" from which Rawls derived his cardinal principles of justice. In lieu of this approach, Walzer maintained that "the particularism of history, culture, and membership"[1] inevitably shapes actual judgments of justice, and as a result, we must look for the roots of normative requirements in the shared understandings of the concrete communities which generate them. The core of his book was revealed in his claims that "[t]he principles of justice are themselves pluralistic in form; that different social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents; and that all these differences derive from different understandings of the social goods themselves – the inevitable product of historical and cultural particularism."[2]

When Walzer says that justice is pluralistic, he means two things. At one level, principles of justice will take differing shapes in regard to different contexts of common life within a society in virtue of their grounding in different types of social goods: hence, the logic of how honors are justly awarded (to, for example, important inventions or excellent works of scholarship) may be quite different from the standards for the fair distribution of wealth, or of health care, or of political office. It is this diversity that provides Walzer with his central image of "spheres of justice." But at another level, the crucial implication of the argument from particularism and plurality is that societies as a whole may be thought to vary significantly with respect to their native conceptions of justice. This is not to say that Walzer commits himself

[1] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), p. 5.
[2] Walzer, *Spheres*, p. 6.

to a thoroughgoing relativism with respect to principles of justice.[3] For Walzer, the political distinctiveness of states establishes the most significant boundary within which criteria of justice may be thought to obtain. It is for this reason that he has committed himself to defending, in *Spheres of Justice* and in other venues, a strong account of the "moral standing of states,"[4] one which emphasizes the prerogative, indeed the duty, of states to manage their internal affairs by their own lights.

From these dimensions of pluralism flow several positions regarding essential threats to justice. Walzer identifies these as the dangers of monopoly, dominance, and tyranny. Honoring the integrity of the various arenas within which shared social understandings are held requires that no one criterion be imposed across the board within a society – as, for example, if the criterion of merit were held to regulate all types of distribution, including access to insulin or the right to vote. Likewise, the distinctiveness and autonomy of spheres of justice is undermined if control of the resources in one sphere can be leveraged to provide power and control over other spheres: if, for example, economic power and wealth were to be allowed to leach into control of political office or access to education. Finally, the importance of the particulars of culture and history in shaping the moral culture of each people militates against accepting the validity of imperatives derived either from alien rulers or from deracinated and abstract universal ethical principles. This last point in particular reinforces Walzer's dedication to the cause of defending states against incursions on their right to enforce their own practices of justice.

Accordingly, when Walzer embarks on the constructive work of laying out his theory of justice, he is at pains to highlight and safeguard the competency of states to determine their own bounds of membership. In doing so, however, he does not propose to think of states as isolated and self-sufficient units in the manner of Rawls's theory of justice. To the contrary, he recognizes that the political community "is not, to be sure, a self-contained distributive world: only the world is a self-contained distributive world. ... Social goods are shared, divided, and exchanged

[3] Walzer's resistance to the blandishments of relativism is perhaps most in evidence in his defense of an essentially global and relatively timeless "normative structure" that governs judgments of justice in war: see especially his rejection of historical relativism and his discussion of the international consensus behind the "war convention" in *Just and Unjust Wars* (New York: Basic Books, 1977), pp. 16–20, 44–47.

[4] Michael Walzer, "The Moral Standing of States: A Response to Four Critics," *Philosophy and Public Affairs* 9.3 (1980): 209–29.

across political frontiers." All the same, "the political community is probably the closest we can come to a world of common meanings"; and, because common meanings are, for Walzer, the ground of moral discourse and structure, it is to political communities – states – that we should look to discern the lineaments of actual edifices of justice. We see signaled here already, in Walzer's argument, a tension between global and national models for the scale and scope of justice. In concluding his case for situating justice in the state, Walzer offers this enigmatic statement:

> There is one last reason for adopting the view of the political community as setting. ... The community itself is a good – conceivably the most important good – that gets distributed. But it is a good that can only be distributed by taking people in, where all the senses of that latter phrase are relevant: they must be physically admitted and politically received. Hence membership cannot be handed out by some external agency; its value depends upon an internal decision. Were there no communities capable of making such decisions, there would in this case be no good worth distributing.[5]

The slightly convoluted nature of this passage is symptomatic of Walzer's failure to adequately conceptualize the dynamics of constitutive justice. What does it mean for *a community* – a singular concept – to be distributed? Who establishes what is "internal" and "external" to a community, and how? And if people are "taken into" a community, does it not make more sense to think of the community as being expanded rather than distributed? Moreover, if we speak not of "community" but of "membership" as the good at issue, how can it be *distributed* – as opposed to, say, *extended* – to people from beyond the sphere in which it obtains? To distribute, after all (as the *Oxford English Dictionary* notes), is to "deal out or bestow in portions or shares among a number of recipients; to allot or apportion as his share to each person of a number"; or to "spread or disperse abroad through a whole space or over a whole surface." In either case, the action presupposes a number or space within which distribution occurs. Finally, even if the value of membership depends in some measure on an internal decision to "receive" newcomers, it does not follow that this relation excludes the involvement of external agencies in making determinations of membership. In fact, the conclusion that looms as Walzer ventures further into his analysis of the ethics of

[5] Walzer, *Spheres*, pp. 28–29.

membership is that communities cannot justly make such designations alone or solely by their own lights.

Membership

Walzer's seminal chapter on membership begins with his astute observation that when we blithely assume that distributive justice is a concept that applies to a fixed and established population, "we miss the first and most important distributive question: How is that group constituted?"[6] What makes membership so important in his conception is that it confers admission into the entire network of spheres within which the full range of distributions are normed within a given society. Walzer is well aware of how, as Hannah Arendt influentially pointed out, membership encompasses, among other benefits, the very right to have rights, so that to be without it is to be utterly bereft and vulnerable.[7] The attribution of membership, however, cannot be determined by those who aspire to it or by some external agency; rather, it is the business of countries to determine whom they admit. As Walzer notes, "we who are already members" get to choose. Our power to choose is mandated, or at least buttressed, by our interest in maintaining our own character as a distinctive national community: "The French," for example, "have a right, at some point, to restrict immigration in order to sustain the 'Frenchness' of their country."[8] In keeping with his account of justice, he emphasizes that our choice is guided by our own understanding of the meaning of membership as a social good.[9]

This, on reflection, is a dubious proposition since membership in the relevant sense here – that is, citizenship – is an institution shaped at least as much by the practical relations of nations and the international legal order as by the native traditions and conventions of individual states, a circumstance that Walzer seems to ignore. He is by no means blind, however, to the possibility that strangers who seek membership might levy their own claims to be admitted.

Initially, he considers two types of such claims: appeals to hospitality and good will and appeals to assistance understood in terms of

---

[6] Ibid., p. 31.

[7] Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich, 1968 [1951]), p. 177.

[8] Michael Walzer, "Response," in Yitzhak Benbaji and Naomi Sussmann, eds, *Reading Walzer* (New York: Routledge, 2014), p. 171.

[9] Walzer, *Spheres*, p. 32.

a principle of mutual aid. The first sort of claim, properly considered, can in fact be assimilated to a society's internal standards for conduct since hospitality to strangers is for many peoples intimately bound up with their own understandings of morality and etiquette, whether it be understood as a strong obligation, a counsel of perfection, or something in between. But the principle of mutual aid is something different. The imperative that we help people – even outsiders – who are in dire need provided that we can do so without undue cost to ourselves is a principle that impinges on us from without, as it were – irrespective of whether we have endorsed it as a social good. Walzer says that he doubts that this principle can be established via counterfactual philosophical arguments, as Rawls purports to do. Nonetheless, he seems to be aware that it carries a sort of force that depends not, or not only, on the mores of particular cultural groups but on more independent and enduring factors rooted in something along the lines of the character of humanity or the nature of individual persons – on *Moralität*, we might say, as opposed to *Sittlichkeit*. He thus acknowledges that mutual aid makes an effective claim to be acknowledged as an "external principle for the distribution of membership, a principle that doesn't depend upon the prevailing view of membership within a particular society."[10]

This possibility leads him to undertake an exploration into the degree to which internal principles for inclusion might be constrained through external principles, an exercise that he carries out, in characteristic fashion, through an imaginative and nuanced study of immigration and naturalization policy. His premise is that "the distribution of membership is not pervasively subject to the constraints of justice"[11] – that is, justice in the sense of universal principles of social organization. Yet in the course of his discussion, as it turns out, his initial design of supporting the internal prerogatives of states in matters of membership is progressively undermined.

The case that Walzer carefully builds for the privilege of political communities to control their own shape and consistency by whom they admit is integrally related to his commitment to pluralism and the distinctiveness of peoples. The distinctiveness of cultures and groups, he asserts, cannot be maintained over time without imposing closure at some social level, be it at the level of neighborhoods or that of states, and this requires imposing boundaries and regulating who is admitted

[10] Ibid., p. 33.
[11] Ibid., p. 61.

to membership. Moreover, in order to be effective, closure must be imposed through an agency that is capable of exercising territorial control or sovereignty. These suppositions lead Walzer to propose that we think of states as "perfect clubs," possessing exclusive power over their selection processes.[12]

But here limitations begin to creep in. In practice – and it is the *practice* of justice that is decisive for Walzer – citizenries tend to bow to moral claims to admit outsiders who are tied to them in certain general ways: by ties of consanguinity and marriage, or ethnicity, or nationality. With respect to kinship ties, such as the principle of family reunification embedded in U.S. immigration policy, a general maxim of respecting the integrity of family seems to be in play, and more: Walzer observes, interestingly, that especially in the case of "countries of immigration" built, as it were, on the backs of immigrants, an obligation to admit their relatives embodies what we might term a requirement of commutative justice since it can be seen as a social cost attending labor migration. The case for accepting ethnic confreres or co-nationals, meanwhile, has a different source. Special obligations come with the independence of nation-states, binding states to help and, where necessary, take in those who share in the identity of the nation (or ethnic group or religion) that provides the state with its *raison d'être*. This is, in essence, a duty imposed by the very character of the institution of the nation-state, which embodies the principle that political sovereignty and territorial integrity are ordered to serving the good of a particular "community of fate," as the Germans call it (*Schicksalsgemeinschaft*).

Another inroad into the power of political communities to rightfully determine their own membership is opened up by their entanglement with territorial control. In the course of his argument, Walzer arrives at the recognition that the claim of states to exercise exclusive control over the constitution of a populace is limited by a pair of additional normative factors. First, in discussing what he acknowledges is a broadly shared acceptance that states may not simply expel residents who do not belong to the dominant nation group, he concludes that such residents are protected by "a kind of territorial or locational right."[13] The basis of this right, for Walzer, is located in the contractualist tenor of his political

[12] Ibid., p. 41. Walzer's discussion usefully plays off of the metaphors of clubs, neighborhoods, and families to highlight certain moral properties of groups. A useful addition in this context might have been *teams*, inasmuch as, in contrast to clubs, teams imply a process of selection or formation in which all eligible parties are assigned to one group or another.

[13] Walzer, *Spheres*, p. 43.

theory, and he invokes Hobbes to illustrate that the territorial claims of the state rest on a social compact serving the purpose of preserving the "right to place" of individuals: their entitlement to exist where they have made a life. We might also simply think of what is at stake here as a human right: that is, a form of treatment required to respect the dignity of anyone who is existentially ensconced in the domain governed by a particular community. Expulsion would be unjust for people in this class, but it is important to note that this class is limited. It applies only to people who were "already there" when a new political order formed.[14]

A potentially larger exception is carved out by the second normative factor Walzer considers. "The control of territory," he notes, "opens the state to the claim of necessity."[15] This is because territories can encompass both the natural resources and the political protections desperately needed by poor and oppressed people around the world without access to these goods in their own countries. Those communities in a position to help come under the force of a rough and ready conception of global distributive justice levered, once again, by the principle of mutual aid: as a result, they must face the question of to what extent factors such as their population density and relative wealth oblige them to admit needy strangers. Walzer addresses this problem through a discussion of historical attempts to create a "White Australia" with the professed intention of maintaining a "homogeneous nation." The vast territory held by such a small population, he suggests, could not sustain its putative internal right to limit admissions if the country were to be besieged by necessitous strangers. Rather, that right would be subject to a sort of "moral encroachment." Even after acknowledging that some of the needs of neighbors might be ameliorated by development assistance and transfers of wealth, Walzer concludes that "the collective version of mutual aid might require a limited and complex redistribution of membership

[14] Walzer's language here is once again infected with an ambiguity that stems, I am suggesting, from not having squarely faced the distinctiveness of constitutive justice. "Initially, at least," he writes, "the sphere of membership is given: the men and women who determine what membership means, and who shape the admissions policies of the political community, are simply the men and women who are already there" (*Spheres*, p. 43). It remains unclear here both how the community establishes itself in the first place and how, if membership is "given" and shaped by all, some residents might come to be viewed as outsiders or aliens who do not belong. I will have more to say about territorial rights in Chapter 7 below.

[15] Walzer, *Spheres*, p. 44.

and/or territory."[16] This striking admission is tantamount to an acceptance that claims made in the name of distributive justice on a global scale – conceived, albeit, with reference to groups rather than to all individuals – can outweigh the dictates of justice rooted in a community's own shared meanings regarding membership.

Let us consider, lastly, a set of additional concessions encountered when Walzer contemplates certain special classes of refugees. First, stateless persons constitute a group of uniquely deprived people who lack the very basic good which political community is designed to serve. Their plight is dire enough to generate a human rights case for inclusion so powerful as to trump the limits of risk built into the principle of mutual aid: states should view themselves as obligated to accept the stateless even if it imposes some hardship on them. A different external ground is invoked in cases in which refugees sue for admittance to a country causally implicated in the circumstances that forced them to flee: in Walzer's example, Vietnamese dispossessed by U.S. military actions or, more topically, Iraqi interpreters threatened for having worked for U.S. occupying forces. In such cases, it is the rectificatory face of justice that emerges – or, alternatively, the genre of historical justice – and admittance becomes a form of compensation for past harms or debts – as well as, perhaps, an acknowledgment that in some sense the applicants for admission have already been inducted into the "community of fate" to which they are applying.

A third class of refugees, finally, to earn mention are those who flee persecution for what Walzer terms "ideological affinity" to those peoples to whom they appeal for succor. Walzer suggests that repression of political comrades or co-religionists abroad generates a special obligation to help. On examination we can see that there are several different ways in which this can be the case. The main sort of circumstance Walzer has in mind likens oppression of the politically like-minded to that of fellow nationals. The constraint imposed by this sort of link is weak, leaving much room for political choice in line with internal criteria. However, when what is at issue is *religious* persecution, one might go further to claim again that a human right is at stake and that the outsiders' claim is correspondingly more robust. If, as human rights claimants,

[16] Ibid., p. 47. Although it does not speak to the purpose of the example directly, many have noted that Walzer glaringly refrains from further analysis of the racial basis of the Australian policy. To do so would have entailed considering an additional set of constraints on membership rooted in conventions about illicit forms of discrimination.

refugees require the assistance of the international community or states in a particular position to help, their needs are most likely to be met by societies evincing religious similarities. A last class of refugees of note comprises candidates for political asylum who may or may not have ideological affinities with the country in which they seek refuge. Walzer considers this group in terms, once again, of the principle of mutual aid, suggesting that their acceptance is contingent on the extremity of their need and the relative smallness of their members. But this is actually to give short shrift to the character of the institution of political asylum. Asylum and associated practices such as *non-refoulement* – the prohibition on returning refugees to regimes where they will be directly endangered – likewise fall under the aegis of human rights; and it is for this reason that we find them anchored in a welter of national constitutions and international conventions, not to mention the Universal Declaration of Human Rights. Beyond this, political refugees in particular place a special claim above all on democratic countries because countering the sort of threat they face is fundamentally bound up with the protection of democratic self-determination. If, as Walzer generally argues, the purpose of political community is to guarantee the rights of the individuals who make it up to participate in the shaping of their common life, then to turn away those persecuted for political engagement counters the spirit of the institution.

In the remainder of his argument about justice and membership, Walzer turns from his discussion of initial admissions, in the sense of migration, to the topic of admission as the initiation into full citizenship and political rights offered by naturalization. I will not retrace his argument here: suffice it to note that after a probing comparative discussion of *metics* (aliens) in ancient Athens and "guest workers" in contemporary Europe, he concludes that the right of peoples to exercise self-determination with respect to whether or not they admit established resident aliens to full membership (a "second admissions process"[17]) is not just partly but "entirely constrained" by external moral factors.[18] He characterizes these constraints as being counterbalanced by the right of communities to regulate migration ("first admissions") in line with their own distinctive traditions of membership – a right that is almost absolute and trammeled only by an external principle of mutual aid. But as we have seen, this balance can be overstated, and Walzer's discussion has

[17] Walzer, *Spheres*, p. 52.
[18] Ibid., p. 62.

helped, almost in spite of itself, to identify an impressive slate of ways in which, in fact, external constraints bear on the ethics of admissions.

To recapitulate, this list of external ethical constraints on the native authority of political communities to dispose over matters of membership – constraints that we are often inclined to recognize as binding – includes the following: (1) international norms and practices that shape the meaning of citizenship; (2) appeals for emergency assistance and "humanitarian aid" that invoke the principle of mutual aid; (3) broadly shared principles that value kinship ties and the integrity of families; (4) norms of commutative justice that involve "labor costs," in the case of migrant workers; (5) special obligations to co-nationals rooted in the globalized dynamics of the nation-state principle; (6) a "right to place" for autochthonous residents of territories controlled by a nation; (7) global distributive justice claims related to population density and access to resources; (8) refugee claims that invoke rectificatory justice; (9) refugee claims that invoke ideological affinity; and (10) refugee claims that invoke human rights to nationality, religious liberty, and political asylum.

In fact, the exceptions linked to external moral concerns acknowledged by Walzer extend to virtually all the classes of people who constitute potential additions to the membership of contemporary states, including refugees from humanitarian and natural disasters, migrant workers, "economic" migrants, political refugees, overseas operatives, stateless persons, and candidates for family reunification. The acuity of Walzer's analysis is borne out by the way in which the United States, for example, has seen fit to enact policies that provide for some measure of admissions in each of these cases.

As my re-reading of Walzer shows, the picture that results from his analysis of the normative shape of membership policy is one in which not just naturalization (second admissions) but initial migration (first admissions) proves to be deeply subject to limitations arising from outside of a community's independent understandings of the meaning of membership. Walzer's argument supports this conclusion in spite of his explicit interest in showcasing the force of *internal* understandings of justice regarding membership and buttressing the right of communities to regulate their own shape. The "primary good that we distribute to one another"[19] – membership – operates, it turns out, under criteria of justice that exceed the communal context and at least tend in the direction of universal principle.

[19] Ibid., p. 31.

Between people and cosmopolis

While Walzer's discussion helpfully shows that the boundaries of belonging in a political community are not simply subject to the community's "own" indigenous standards of justice, it stops short of providing a positive account of criteria of constitutive justice. What boundaries are, to invoke a fitting if archaic term, *meet* for communities of justice? This is a problem of both scope and scale. In Chapter 2, I already gave an account of why the cosmopolitan premise of a global *scope* for distributive justice does not in and of itself resolve the problem of just boundaries. Might, though, a universal *scale* serve as the appropriate basis for a set of constitutive criteria that regulate boundaries and membership? Why not simply adopt a moral (as opposed to political) cosmopolitan scheme rooted, for instance, in a theory of natural law, or in liberal conceptions of personhood and respect, or in the notion of universal human rights?[20]

Recall that, as outlined in Chapter 1, the scale of a conception of justice refers to its context, the ideational backdrop that it assumes and builds upon. Ideas and judgments of justice always have a substrate. This backdrop includes an envisioning of the sorts of people who are thought to be "addressees," in ethical terms – to belong, that is, to the moral community with respect to which arguments and justifications regarding justice are made. One can certainly understand the appeal of a scale for justice that is understood to be "universal" and that therefore promises to support principles and conclusions that might regulate and resolve all disputes about who rightly belongs to a particular community or deserves to be treated differently by a given group. Indeed, universal conceptions of justice carry the prospect of settling many other kinds of ethical problems – although we would hardly want to freight them with the expectation that they provide uniform solutions that apply to all settings or with the assumption that they can be brought to bear on all types of moral queries.

Cosmopolitan universalism certainly carries a rhetorical appeal, and it bespeaks the values of many members of liberal egalitarian societies. I will argue, however, that it contains some internal inconsistencies and

[20] Universalist approaches of this sort include the human rights-based theories of Thomas Pogge, "Cosmopolitanism and Sovereignty," *Ethics* 103 (October 1992): 48–75; and Charles Jones, *Global Justice: Defending Cosmopolitanism* (Oxford: Oxford University Press, 1999). See also Darrel Moellendorf, *Cosmopolitan Justice* (Boulder, CO: Westview Press, 2002).

is flawed by a sort of ethnocentrism, and that for these reasons it is not presently sustainable as the basis for a workable account of constitutive justice. We are well advised, I will suggest instead, to look to an account of the scale of justice that is at once more limited and more complex than a straightforwardly universalist account: an account that is trans-communal rather than fully cosmopolitan.

To return for the time being to Walzer's treatment of the justice of boundaries, it is instructive to note that of the constraints of justice enumerated above that he is obliged to acknowledge as bearing on the self-determination of states, few rely on or require a universal scale. Norms and practices regarding the meaning of citizenship, for example, have become significantly globalized since the beginning of the last century, but they still take the character of agreements and shared views and commonalties among collections of nations rather than a global commitment to a regime of citizenship equally encompassing all human persons. There is no established unitary international legal regime that dictates common standards for the allocation of citizenship by states; instead, disputes over nationality are handled jurisprudentially as a matter of conflict of laws or via conventions about refugees and statelessness.[21] Indeed, stateless persons continue to abound, while various parties disagree, for example, about the possibility or propriety of allowing dual citizenships.[22] Certain assumptions about the meaning of citizenship are shared among societies, of course, but these commonalities are generally limited by region or ideology or by what might be thought of, in Samuel Huntington's sense, as "civilizational" affinities. Understandings of citizenship, moreover, continue to evolve – for example, in connection with the relation between nationality and European citizenship. There is certainly a sense in which the nationalist ideal of a world neatly divided up into uniform nation-state citizenries continues to have widespread purchase on the political imagination, but this model in fact has only limited traction in law, political theory, and political practice.

A number of the other normative factors that act in Walzer's account as external moral constraints on state societies involved shared goods

[21] Peter J. Spiro, "A New International Law of Citizenship," *American Journal of International Law* 105.4 (2011): 694–746.

[22] One contemporary case turning on such disagreements is that of the Washington Post journalist detained in Iran, Jason Rezaian, who is regarded by the American government as an American-Iranian dual citizen and by the Iranian justice system as an Iranian citizen only since the Iranian government does not acknowledge the validity of multiple memberships for its citizens.

that function within larger but still limited cultural groupings. These groupings might be thought of themselves as "spheres of justice" that happen to expand beyond the boundaries of political membership corresponding to states. For example, the notion of the importance of kinship relations undergirding the practice of family reunification rests on evaluations of consanguinity and norms regarding family structures that may be widely shared yet can vary significantly from polity to polity and culture to culture. For instance, extended families are common in Asia, the Middle East, South America, and sub-Saharan Africa, but not in other regions.[23] Similarly, the nationalist principle that supports selective entitlements for co-nationals to immigrate or assume citizenship relies on historically contingent formations of language, culture, ethnicity, and ideology. As a rule, individual instantiations of this principle – in, for example, the Israeli Law of Return or the German policy of repatriation of ethnic Germans or "*Aussiedler*" – do not necessarily imply the generalization of this sort of right to all peoples.[24] As Benedict Anderson pointed out, the generic character of nationality is belied by the *sui generis* nature of each actual nation.[25]

For its part, how broad is the reach of the idea that Walzer invokes of mutual aid? The principle of mutual aid applies to relations between strangers, and it stipulates that "positive assistance is required if (1) it is needed or urgently needed by one of the parties; and (2) if the risks and costs of giving it are relatively low for the other party."[26] Walzer quotes Rawls in noting that mutual aid is a duty owed "to persons generally," and he adds that "[m]utual aid extends across political (and also cultural, religious, and linguistic) frontiers."[27] What can we infer about the scale embodied in this principle? Is it a universal requirement? First, it is clear that it applies to persons, or (as Walzer adds) collectivities. However, it does not apply to all persons, only to *strangers* – to persons who encounter one another "out of bounds," as it were, or in a situation in which one or another party has crossed the boundary into the other's

[23] See, e.g., Child Trends, *World Family Map 2013*.
[24] The idea of a "right of return" does, however, remain an aspirational human right that has some backing in international human rights instruments, although it is still not widely acknowledge in customary international law.
[25] Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London: Verso, 1983), p. 5.
[26] Walzer, *Spheres*, p. 33.
[27] Ibid., p. 33.

community.[28] Another presumption it incorporates, therefore, is that of preexisting divisions among societies. The duty does not apply wherever there are cooperative arrangements that bind together the parties in question. One implication of this is that in a cosmopolitan order, the principle of mutual aid is obviated since in the relevant sense all are members of humanity and not strangers to one another. Another element of the principle is that of need – and, related to this, proximity. All persons (and, arguably, some non-persons) can experience need, but not all need generates the duties associated with mutual aid – only those instances that are near enough at hand to enable assistance to be feasible.[29] In this light, it appears that the principle of mutual aid, as an "external principle for the distribution of membership,"[30] functions not as a universal rule but rather as an ad hoc, contingent relation among persons that stands in a certain tension with the ideal of cosmopolitanism.

It may be that of all the external moral constraints on societal decisions about membership that Walzer recognizes, it is the ones involving the human rights of refugees to nationality, religious freedom, and asylum that most rely on a universalist scale of justice. After all, human rights are generally thought to comprise a set of entitlements and protections held uniformly by all human persons in virtue of the dignity that they commonly possess. And yet there are a number of grounds for being skeptical about whether human rights generally, and these rights in

[28] The idea that justice is encountered in the first instance in the encounter between strangers, in the desert or elsewhere, is a popular trope in philosophical argument, and the Good Samaritan story is often cited as a model for obligations to "others" who hail from outside of one's own community. It is worth noting, though, that the parable turns as much on the enmity, hostility, and condescension with which the Samaritans were traditionally regarded by the Hebrews as on their alienness and that in an important sense Samaritans were more akin to poor and outcast insiders than to genuine strangers for Jewish society.

[29] The question of the needs and suffering of distant strangers complicates this question, but it is clear from the literature that significant obstacles exist to perceiving distant suffering as exerting the same moral force as suffering near to hand. See Susan Sontag, *Regarding the Pain of Others* (New York: Farrar, Strauss, and Giroux, 2003); Luc Boltanski, *Distant Suffering: Morality, Media, and Politics* (Cambridge: Cambridge University Press, 1999); and Lilie Chouliaraki, "The Mediation of Suffering and the Vision of a Cosmopolitan Public," *Television & New Media* 9.5 (September 2008): 371–91. Chouliaraki articulates a view of how transnational information flows might counter communitarian impulses operative within nations and cultivate what might be called an "expansive" (as opposed to universal) cosmopolitanism.

[30] Walzer, *Spheres*, p. 33.

particular, necessarily imply or depend upon a straightforwardly universalist foundation.

A first ground has to do with the tenuousness of the notion of a communal entity of the sort in which an institution such as rights would normally make sense. I leave aside for the moment arguments such as Alasdair MacIntyre's or Richard Rorty's about the incoherence of Enlightenment conceptions of human rights as claims justified by ahistorical, essential, fixed features of all people.[31] It is perhaps sufficient to cite Walzer's own observation: "Humanity ... has no history and no culture, no customary practices, no familiar life-ways, no festivals, no shared understanding of social goods."[32] Without the cohesiveness that grounds such understandings, on this view, a concrete, "thick" basis for universal judgments of justice, be they about rights or war or honors, simply does not obtain.

One might counter by maintaining that human rights do not depend on a concrete all-encompassing community and by insisting that they exist as functions of the individual distinctiveness and worth of specific people. But, as Abdullahi An-Na'im (one of our most sophisticated scholars of human rights) observes, to think of rights in terms of individual liberties itself betrays a sort of Western ethnocentrism that works counter to constructive cross-cultural dialogue that promotes human rights.[33] An-Na'im has reflected at length on the complex interplay of the universal and particularist components of human rights, and he has shown persuasively that universalism and cultural relativism are not mutually exclusive but rather interdependent. Human rights are best thought of as deriving from the "relative universality" of human nature, and as being themselves putatively universal, in a manner that relies on as wide a basis of agreement among cultures as possible yet remains open to revision in light of culturally variant interpretations and forms regarding norms about how to respect human dignity. This perspective, applied to our case, helps illuminate how, for example, a human right to asylum might adopt different forms or construe its subject in different ways depending on regnant understandings and traditions regarding

[31] Alasdair MacIntyre, *After Virtue*, 2nd ed. (Notre Dame, IN: University of Notre Dame Press, 1984), p. 67; Richard Rorty, "Human Rights, Rationality and Sentimentality," in Stephen Shute and Susan Hurley, eds, *On Human Rights: The Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993), pp. 111–34.

[32] Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, IN: University of Notre Dame Press, 1994), p. 8.

[33] Abdullahi An-Na'im, *Muslims and Global Justice* (Philadelphia, PA: University of Pennsylvania Press, 2010), p. 76.

persecution and succor,[34] whereas a human right to religious freedom might be constructed in such a way as to privilege the practitioners of those traditions – most notably Christianity – that have served historically as the model for the characteristically modern notion of world religions.[35]

There is a deeper issue that likewise calls into question the degree to which human rights depend straightforwardly on a universalist imaginary. Since its instantiation as an element of international affairs in the period following World War II, the concept of human rights has rested on a stipulation about the supreme importance of human dignity that has commanded widespread assent so long as its content has been left unspecified. This *modus vivendi*, however, has masked an underlying diversity of conceptions of what human dignity – or its analogs in different languages – actually means, and we can readily identify divergent understandings in Confucian tradition, Islamic thought, Roman Catholic moral theology, and Kantian ethics. Dignity need not apply equally to all humans; indeed, one of its historical strands is aristocratic and hierarchical. At the same time, in some traditions dignity is not confined to humans but extends to other sorts of beings. As a result, one could say with some reason that the idea of human rights is associated with a universalizing imaginary that remains variegated and fuzzy around the edges.

In this section, I have been endeavoring to show that normative arguments such as Michael Walzer's about membership and justice, which as I previously argued cannot be sustained on communitarian premises alone, nonetheless do not instead require a foundation that is necessarily universal in scale. Plausible accounts of the justice of boundaries will invoke various principles, values, and norms that are transcommunal, but they do not necessarily go so far as to embody a moral cosmopolitanism. By contrast, many accounts of global justice do rely, explicitly or implicitly, on a universalist schema of justice. The moral cosmopolitanisms on which such theories are based incorporate a predilection for universalist reasoning in regard to justice, be it in terms of impartiality, or reason, or

[34] The modern institution of political asylum in Western countries, for example, relied implicitly on an image of the politically persecuted as occupied in activities – such as campaigning or fomenting public and military opposition – often reserved in traditional societies for males, in a manner that tended to exclude women from recognition as political refugees.

[35] See Tomoko Masuzawa, *The Invention of World Religions: Or, How European Universalism Was Preserved in the Language of Pluralism* (Chicago, IL: University of Chicago Press, 2005); and Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ: Princeton University Press, 2007).

|utility, or some other comparable, putatively objective principle. Let us examine how some representative theories of global justice found themselves on universalist imaginaries with respect to the scale of justice.

The cosmopolitan imaginary

One of the foremost exponents of a global justice outlook with respect to economic justice is Thomas Pogge. Pogge states:

> A moral conception, such as a conception of social justice, can be said to be universalistic given the following conditions: (A) it subjects all persons to the same system of fundamental moral principles, (B) these principles assign the same fundamental moral benefits (for example, claims, liberties, powers, and immunities) and burdens (for example, duties and liabilities) to all, and (C) these fundamental moral benefits and burdens are formulated in general terms so as not to privilege or disadvantage certain persons or groups arbitrarily.[36]

This is a system of morality that imagines a global setting occupied by a multiplicity of "persons," all of whom fall equally under a set of fundamental "principles." Clearly, it is important how these central terms are filled out. For example, as Pogge acknowledges, it remains a contested affair whether "person," with its Kantian resonances, applies fully to marginal groups such as the severely mentally disabled, infants, higher animals, and artificial intelligences. Pogge insists that the stance of universalism outlined by these criteria does not amount to a substantive moral position but merely sketches an approach designed to ensure "systematic coherence in morality."[37] He is even prepared to acknowledge that, in a world in which some cultures militate toward insisting on different moral burdens for children or the specially gifted, the general requirement of equality among persons might need to be "relaxed somewhat" to guarantee the plausibility of the universalistic approach, even though "equality remains the default."[38] Once he applies his universalistic conception to the example of economic justice, however, further features of the moral backdrop or imaginary he employs become apparent: persons are part of a global economic order;

[36] Thomas Pogge, "Moral Universalism and Global Economic Justice," *Politics, Philosophy, and Economics* 1.1 (2002): 29–58.
[37] Pogge, "Moral Universalism," p. 32.
[38] Ibid., p. 31.

they are vulnerable to systems that incorporate them against their will, violating their prerogative to be self-determining and to peacefully and democratically shape their environments; they are injured by serious inequality; and they are marked by needs that consign them to poverty if they are flouted. Equality, self-determination, vulnerability, integration into global institutions, and personhood are all implied characteristics of the entities who populate Pogge's universalist landscape. At the same time, they are stateless and cultureless, and their universality is conceived to be pre-political, even pre-social. As a result, the relevance of this conception to real people remains questionable.

Another entrant in the debate over cosmopolitan conceptions of global justice is Darrel Moellendorf, who, like Pogge, has modeled his theory on John Rawls's constructivist theory of justice. One of the basic problems that Moellendorf faces is adapting a conception of justice which Rawls developed for liberal democratic societies to address all persons globally, a move that Rawls himself specifically rejected. Where Moellendorf's instincts are cosmopolitan and democratic, Rawls's were pluralist, and as a result, the latter felt obliged to develop his account of supranational justice in terms of a dual scale model in which "peoples," not individual persons, are the units of primary ethical significance in matters of justice, while only a thin collection of agreed-upon human rights constrains their interactions. Moellendorf must further stake out his position in response to Rawls's critical claim that democratic suppositions about the subjects of justice illicitly impose a particular historical tradition of liberal citizenship rather than a more abstract, and hence neutral, metaphysical conception.[39] In Moellendorf's defense of his position, he makes it clear that he takes the approach that Rawls developed in *Political Liberalism* to be valid for generating principles of universal applicability, arguing that Rawls himself was overly modest in claiming limited cultural validity for his method. Moellendorf holds, then, that the ideal theory of constructivism, rooted in the original position and its suppositions of participants who possess their own conception of the good life and a corresponding stake in the freedom to live and develop it, functions not as a description of actual people but rather as an adequate basis for devising a system of justice that takes each individual participant's interests fairly into account.

The cosmopolitan picture here is one in which democratic inclinations and interests are implied for all people, irrespective of their beliefs about

[39] Moellendorf quotes Rawls as noting that "[j]ustice as fairness is substantive" (*Cosmopolitan Justice*, p. 18).

democracy or the comprehensive doctrines they explicitly endorse. The "circumstances of justice" enumerated by Hume – namely, that scarcity of resources is a problem for all, that there exists a reasonable pluralism of comprehensive moral doctrines, and that rational means are not at hand for decisively demonstrating the truth of only one set of moral beliefs – ensure an interest for all in acknowledging the outlines of a model of justice as fairness, a model Moellendorf describes as an objective interest in applying and acting upon fair terms of cooperation. Moellendorf adds an argument that aims to show that the "decent hierarchical societies" that Rawls argues should be tolerated internationally cannot, in fact, exist in practice. He further argues that Rawls, by showing deference to such collectivities as peoples, is guilty of a statism that is incompatible with respect for individual persons.[40]

As this last point shows, the moral-anthropological and psychological premises in which Moellendorf's universalism is rooted include a kind of methodological individualism in which groups are epiphenomenal. Even if comprehensive moral, philosophical, and theological doctrines do put in an appearance in his theory, they remain the preserve of individuals, and communal phenomena such as religions are conspicuously absent. In sum, then, if we inquire into the scale of justice in Moellendorf's theory of justice by asking which people or entities it addresses, our answer will be two-fold: the theory takes as its relevant field of application a world of individuals understood in democratic terms as free and equal persons, and by doing so, it directs itself to those democrats who share its concepts and reasoning – an audience which, as he acknowledges, may exclude numerous moral, political, and religious traditions with alternative anthropologies of justice.[41]

---

[40] Moellendorf, *Cosmopolitan Justice*, p. 28.

[41] Intriguingly, in contrast to Moellendorf, Seyla Benhabib, in her *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006), argues that there is a tension between democratic ideals and practices (which she associates with civic republicanism) and cosmopolitan norms of universal justice. How, she asks, "can legal norms and standards, which originate outside the will of democratic legislatures, become binding on them?" (p. 17). For her, the problem is partly occasioned by the perception that cosmopolitan norms are rooted in moral (and legal) persons in a "worldwide civil society" (p. 16): this can conflict with the workings of collective self-determination that are the core of democratic identity. As she notes, the problem of "discursive scope" raised by the tension between bounded and global communities has not been thought through. How, then, does she describe her own cosmopolitan premises? As a discourse theorist, she conceives of the scale of justice as linked to a conversation that potentially includes all people – all persons or moral agents who have interests, who may thus be affected by the actions of others, and to whom justifications for such actions are therefore due.

Kok-Chor Tan states similarly at the outset of his study *Justice Without Borders* that "[c]osmopolitanism, as a normative idea, takes the individual to be the ultimate unit of moral concern and to be entitled to equal consideration regardless of nationality and citizenship."[42] He sets out, however, to modify cosmopolitan universalism so that it can embrace individuals who exhibit the partiality for co-nationals and other preferred groups (family and friends) from which Pogge and Moellendorf prescind, so long at least as these special attachments are "liberal." One might attribute to Tan what I characterized in Chapter 1 as a dual scale of justice since he acknowledges, within bounds, the validity of schemes of justice and obligations rooted in patriotism, nationalism, or comparable communal orders. He is clear, however, that moral cosmopolitanism is a context that is prior to, or more fundamental than, communal standards, and thus, it serves as a check on them; and while communal criteria of justice have their place, they can be affirmed only inasmuch as broad conditions of global justice already apply. This, of course, is a significant qualification. He is likewise clear that states or nations cannot serve as the subjects for conceptions of global justice, because they are not metaphysically suited in the way that moral individuals are and because they cannot adequately represent such individuals' more tangible needs and interests.[43]

The scale of justice employed by Tan thus posits a moral world of individuals who are deracinated in the particular sense of warranting moral consideration independently from their nationality, citizenship, or other markers of identity. At the same time, they possess basic human rights and, beyond these, carry an entitlement to equality that applies not just within individual political communities but also globally. Tan does not go much further in explicating the moral anthropology on which his view depends; rather, he leans on the notion of an "overlapping consensus" among diverse "comprehensive moral doctrines" that sustains commitment to a core of human rights.[44] He does suggest further, however, that with respect to its role and meaning, justice should be understood, at root, in terms of impartiality, where impartiality is equated with the liberal ideal of neutrality with respect to people's conception of the good.[45]

---

[42] Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism* (Cambridge: Cambridge University Press, 2004), p. 1.
[43] Tan, *Justice Without Borders*, pp. 37–39.
[44] Ibid., p. 47.
[45] Ibid., p. 190.

Tan's theory is consistent with David Held's claim that principles of cosmopolitanism are not self-justifying but rely instead on a pair of underlying "fundamental metaprinciples," namely autonomy and impartialist reasoning.[46] The point about autonomy reveals that the universalism informing moral cosmopolitanism is, historically and conceptually, bound up both with democracy, in the sense of collective aspirations for unimpeded agency, and with liberalism, as embodied in individual freedoms. It is, in this sense, a moral system by, of, and for liberal Kantian aspirants to collective self-determination. Held, in outlining the significance of the metaprinciple of autonomy, is certainly right to emphasize that the criticism that its Western provenance limits its cross-cultural validity is not necessarily correct and that a wide variety of people would acknowledge their stake in limiting unaccountable exercises of power and asserting the equal status and worth – that is, the dignity – of persons. Still, it is far from clear that the liberal democratic trappings of cosmopolitan universalism would make up the idiom best suited for translation of those aspirations across the broadest possible range of cultures and societies.

Impartiality, meanwhile, also designates a certain liberal individualist flavor for cosmopolitan universalism. We could add, I think, that this perspective partakes of a secularist imaginary.[47] The idea that no one has special standing when it comes to assessing and adjudicating among different accounts of practical reasoning embraces a "view from nowhere" that has already received abundant criticism with respect to its hermeneutical premises.[48] But one could go further: justice as impartiality neglects, or dismisses out of hand, a range of important "standpoint theories" that argue for the epistemic privilege of certain kinds of marginalized groups or victims of injustice when it comes to matters of justice: e.g., feminists with respect to gender and sexism; racially oppressed groups in connection with discrimination; and proletarians or the economically exploited when it comes to distributive justice. Liberation theologies of various sorts are the religious analogs of such theories, and they too lay claim to privileged, "praxis"-based insights into the requirements of justice.

---

[46] David Held, "Principles of Cosmopolitan Order," in Brock and Brighouse, eds, *Political Philosophy of Cosmopolitanism*, pp. 19–25.

[47] For a rich discussion of the links between social imaginaries and secularity, see Charles Taylor, *A Secular Age* (Cambridge, MA: Harvard University Press, 2007).

[48] For an overview of this debate, see Shane O'Neill, *Impartiality in Context: Grounding Justice in a Pluralist World* (Albany, NY: SUNY Press, 1997).

In surveying a selection of prominent cosmopolitan theories of global justice, my purpose has been to showcase their common reliance, beneath their respective nuances, on an underlying universalist imaginary regarding the scale of justice, one that envisions the field of justice as a global network of relations among individuals uniformly marked by aspirations to equality and autonomy. This background picture, I want to suggest now, carries with it some difficulties that challenge the suitability of a universalist framework for constitutive justice in three ways.

To begin with, some notable critics of cosmopolitanism have contested the proposition that universalist claims of justice can even be made intelligibly.[49] I think there is considerable merit to this set of criticisms. One difficulty for universal conceptions of scale in regard to justice has to do with language, especially the ways in which language structures moral concepts. It seems easy enough to imagine that the scale of justice is properly the realm or domain of all agents, or persons,[50] or human beings, or rational wills constituting a "kingdom of ends" – even if each of these categories might be a bit undefined around the edges.[51] It would follow then that when we make an argument or a claim about justice – whether it be a specific claim, say, that a given distribution of goods or a particular punishment is unjust, or a general argument, for example, that a particular principle of distribution or form of punishment is unjust – our proposition depends in part on, or coheres with, an assumed background: a manifold of objects (or subjects) to whom it applies, or to whom it might be thought to appeal.

Thus, I might say that it is unjust for the wealthiest "one percent" to increase their riches while others hunger, or that imposing a boycott on a foreign nation because of its government's recalcitrance unjustly harms its residents, or that so-and-so's sentence is too heavy or too light. In each case, if I am a universalist, I assume that my judgment would apply uniformly to "anyone" in those circumstances, irrespective of

---

[49] E.g., Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988); and David Miller, *Citizenship and National Identity* (Cambridge: Polity Press, 2000), p. 173.

[50] On the distinction between agents and persons, see Michael Thompson, "What Is It to Wrong Someone? A Puzzle About Justice," in R. Jay Wallace et al., eds, *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford: Clarendon Press, 2004), pp. 333–84.

[51] We face some familiar queries here: Do sentient (nonhuman) animals count? Does what we envisage extend to the legal personhood of corporations? Are various classes of moral patients – e.g., people in persistent vegetative states, or embryos – included?

race, creed, gender, nationality, and so on; moreover, as a universalist, I assume that "anyone" would be able to subscribe to that judgment (i.e. that it meets a criterion of universalizability). This sort of assumption relies, however, on an undifferentiated conception of that manifold of subjects. A finer-grained picture would quickly have to acknowledge that actual subjects are rooted in different social and cultural settings, ensconced in different languages, and schooled in divergent ethical conceptions, such that, for example, a term crucial to justice such as *equality* will vary in its meaning by locality. The variability of interpretations of values and, indeed, of broad understandings of practical rationality subvert the very logic of universalist conceptions of justice.

This point leads to a second criticism of cosmopolitan universalism that is linked to its implicit ethnocentrism. As an ethical outlook, moral cosmopolitanism has a specific genealogy and a set of cultural and political settings within which it is at home. In its aspirations to assert itself worldwide as a self-evident sensibility, it has benefited from the globalization of English, a language in which it finds ready expression,[52] and in which competing, especially non-Western ethical understandings are at a disadvantage. That cannot change the ultimately local origin and base for this perspective, however, or deflect attention from a basic point: there is a contradiction between the putatively universal frame of cosmopolitan justice and its parochial character.[53]

To my mind, the most telling criticism is a third point concerning the difficulty, in theory as in practice, in attaining anything approaching broad agreement about the shared principles that might plausibly define a genuine universal moral community. However much progress has been made toward promoting ethical standards acknowledged by all, we continue to live in a world marked by a genuine ethical pluralism and disagreement that extends to basic understandings of justice. As a result, attempting to reason about justice as if there were a global consensus that supports the secular, individualist, liberal democratic discourse of justice is bound to be self-defeating. That does not mean that it is not worthwhile to continue to promote a cosmopolitan ethos in regard to debates about justice. In our current situation, however, it seems to me that arguments about boundaries and the constitution of communities

[52] For an argument that the linguistic hegemony of English itself imposes injustices of several types, see Philippe van Parijs, *Linguistic Justice for Europe and the World* (Oxford: Oxford University Press, 2011).

[53] Anthony J. Langlois, *The Politics and Justice of Human Rights: Southeast Asia and Universalist Theory* (Cambridge: Cambridge University Press, 2001), pp. 1–11.

of justice need to be contextual in nature, addressing specific boundary issues in light of the interplay between indigenous or local conceptions of justice and more widely shared, generic ethical understandings.[54]

Some inkling of how this approach might look can be gleaned from a look at some of Charles Taylor's work. Taylor, reflecting on the character of distributive justice in general and in Aristotle's account in particular, notes that in social (as opposed to atomist) views of the good, such as Aristotle's, the "structure of society ... provides the essential background for any principles of distributive justice. This means that the structure itself cannot be called into question in the name of distributive justice."[55] He allows later, though, that there can be "arguments about the nature of the framework, from considerations of the goods sought and the nature of the agents associated; and these can sometimes tell us that certain distributions are wrong."[56] This sort of argument, he adds, concerns distributive justice in one sense, but in another, it does not, because it considers questions about the framework that are closed and not allowed within the conceptual protocols of that society.

What, then, is going on here? Taylor suggests that we account for cases in which we might condemn schemes of distributive justice in other societies as "unconscionable and wrong" – because, for example, they endorse slavery and concubinage – with reference to atomist invocations of inalienable rights. By appealing to "trans-societal criteria of right," which must augment social understandings of the good, Taylor here is moving in the direction of what I have termed the issue of

---

[54] For an able defense of contextual political theory, see Joseph Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000). Carens usefully distinguishes among three different scales of justice, which he describes as concentric circles: an outer one attributing minimal standards of justice to "more than the members of any particular political community but perhaps less than all humanity"; a middle one containing standards applicable only to contemporary liberal democracies; and an innermost one marked by the thicker sense of justice "intimately linked to the history and culture of a particular political community" (pp. 32–36). On the contextual dimension of theories of justice, see also Rainer Forst, *Contexts of Justice: Political Philosophy Beyond Liberalism and Communitarianism*, John M.M. Farrell, trans. (Berkeley, CA: University of California Press, 2002).

[55] Charles Taylor, "The Nature and Scope of Distributive Justice," in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985), pp. 289–317, at 294.

[56] Taylor, "Nature and Scope," p. 300.

constitutive justice, although he refers to it as "absolute justice, or some other good."[57]

Taylor goes on to allow that there may be cases of distributive justice that transcend the boundaries of societies in two ways. First, he says, "we are linked together with virtually the whole human race, now that the world economy has penetrated virtually everywhere. ... [T]here are certain questions of distributive justice which arise internationally ... [s]o that our obligations ... may go beyond the boundaries of our political society."[58] This is, in effect, an argument that association and economic interdependence forge a transnational framework within which questions of distributive justice arise and require redress. His second, more expansive point is that even the most general atomistic claims about basic individual liberties and rights – of the sort that we might think apply when two people meet in the desert or encounter one another in the state of nature – hold, and indeed make sense, only within the context of practices and institutions (in short, a civilization) that has a specific character and provenance. According to Taylor, from this it follows that there is built into all talk about justice an implicit commitment to maintaining the civilizational context within which justice retains its sense. Moreover, the historicized character of justice implies "a principle of justice between generations, that the good we have received we should pass on."[59] The source of this principle, as Walzer might note, is internal to the good that is at stake. Ultimately, the picture that Taylor presents is one in which different aspects of justice, including distributive justice, draw on different scales as well as different scopes.[60] A pluralism in this sense, he maintains, is faithful to Aristotle's thinking regarding the parts of justice. One of its consequences is that resolving questions of justice in which different scales clash becomes a matter for ethical disputation and negotiation and for

[57] Ibid., p. 302. His phrasing here contains an illuminating ambiguity since Taylor seems reluctant to speak only of "absolute justice," yet he is unenlightening about what "other goods" might come into question here. It is significant that he uses a teleological term ("good") to complement his reference to the seemingly deontological conception of "absolute justice." I have been making the case that constitutive justice can fill this gap.

[58] Taylor, "Nature and Scope," p. 312.

[59] Ibid., p. 310.

[60] On the matter of scope, he notes, "there is no single answer to the questions of the unit within which men owe each other distributive justice; ... even within one model of society, there are different degrees of mutual involvement which create different degrees of mutual obligation." ("Nature and Scope," p. 312)

intercultural dialogue, not simply deductive philosophical solution in line with overarching universal principles.[61]

This is the direction in which Walzer's account points as well, and it is a direction that in the end calls into question the utility of the cosmopolitan-communitarian divide in thinking about competing views of constitutive justice. As we have seen, Walzer's discussion of membership demonstatrates how a communitarian outlook on boundaries must be complemented by transcommunal considerations., We can point to comparatively moderate and concrete cosmopolitan approaches that revolve around proximate linguistic relations extending beyond, and critiquing, the national ideals of homogeneous language communities instead of assuming a universalist scale imagined as an abstract population of agents or subjects.[62] Debates over the character and reach of human rights likewise provide cosmopolitan models that aspire to a universality understood "not as a *fait accompli*, but rather as a hope or yearning," to be realized in an ongoing way through resolute dialogue and at times agonistic contestation between Enlightenment-based conceptions of justice and "concept-clusters" rooted in other cultures.[63]

At the conclusion of this discussion, I suggest that any coherent account of constitutive justice will introduce itself against the backdrop of a cosmopolitan horizon, inviting us to generalize or universalize, even as it reasons in an idiom related to particular cultural and ethical standpoints. Although accounts of the justice of boundaries cannot help but be conditioned by universalist elements, their hermeneutical origins in particular cultural settings will always inform them and mark them indelibly. The most incisive arguments will thus be transcommunal, starting not from universalist premises but from a specific tradition while remaining open with respect to the extent of their scale.

As a result, it will be helpful, I propose, to think of the field for arguments about constitutive justice as properly located on a sort of middle ground between nation and cosmopolis, in a setting in which the

---

[61] On this point, see Charles Taylor, "Comparison, History, Truth," in Frank Reynolds and David Tracy, eds, *Myth and Philosophy* (Albany, NY: SUNY Press, 1990), pp. 37–56; and Charles Taylor, "Understanding and Ethnocentricity," in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985), pp. 116–33.

[62] For an example of this perspective, see Jessica Dubow and Richard D. Steadman-Jones, "Linguistic Cosmopolitans: Arendt, Čapek, Orwell," *Journal of European Studies* 43.2 (2013): 119–40.

[63] Fred Dallmayr, "'Asian Values' and Global Human Rights," *Philosophy East and West* 52.2 (2002): 173–89, at 185.

universal and particular dimensions of accounts of justice are understood not only to coexist but also to imply one another. While I am not aware of any theorists who have grappled squarely with what I have described as the problematic of constitutive justice, I can point to some constructive work that has addressed the justice of boundaries at this transcommunal level. In the next chapter (Chapter 5), I will, accordingly, consider some current lines of inquiry that approach how we might formulate grounds for criteria that regulate communal boundaries by appealing to normative factors that transcend the confines of historical, cultural communities without necessarily claiming to be universal in scale.

5
Four Transcommunal Approaches

Up to this point, I have been arguing that there is a species of ethical problems involving boundaries and definitions of communal membership that has distinctive features which set it apart from the preserve of distributive or corrective justice. Our thinking about such problems, I have suggested, has been hampered by our reliance on these traditional categories; as a remedy, I have proposed that we analyze the processes through which "communities of justice" are constituted as falling under a distinct category of justice, namely constitutive justice. Plausible accounts of constitutive justice, I have further argued, will be transcommunal in nature, mediating between local moral conceptions and more general, broadly shared ethical concerns in the negotiation of just boundaries. Although the category of constitutive justice is novel, my argument should not be taken as suggesting that its characteristic concerns have hitherto gone entirely unaddressed. To the contrary, the issue has been implicitly addressed in some of the more innovative recent work in political theory and social ethics. In this chapter, I explore four diverse lines of inquiry into justice and the ethics of boundaries that, in my view, map out constructive approaches to some of the central problems of constitutive justice. Such efforts will only benefit from further clarification of the concerns of constitutive justice that inform them.

Interdependence and the "circumstances of justice": Hume, O'Neill, Young

One recent approach that embodies constitutive concerns builds on the notion of human social *interdependence* to construct an account of the scope of obligations of justice. For this view, it is the emergence,

in human interactions, of relations of mutual reliance that defines the proper bounds of justice.

This approach is inspired in part by Hume's classic discussion of the "circumstances of justice." The phrase is associated with Hume's account of the conditions that give rise to a need for justice, that inform the shape that justice takes, and that delineate the types of situations in which it is appropriate to invoke considerations of justice. Hume took up this set of issues in both *A Treatise of Human Nature* and *An Enquiry Concerning the Principles of Morals*, and in both he developed aspects of an argument that locates the need for a discourse of justice in certain fixed features of the human situation.[1] The circumstances of justice, for Hume, consisted of a combination of factors involving the nature of humans and their material surroundings. The first feature he describes is a moderate scarcity of goods, by which he means the existence of limits on resources that fall somewhere between extreme want and over-abundance. The people confronted with scarcity are, second, marked by limited generosity; they are neither utterly selfish nor consistently magnanimous. Third, they share a rough equality of capacities and aptitudes, in which, despite substantial individual variations, as a rule no one radically wields dominant power over all others or enjoys complete invulnerability to them. Finally, and most important for my discussion, no humans are entirely self-sufficient; rather, they are interdependent in that they all depend on other people and things for satisfaction of their needs.[2]

It is important to note that there is a certain interlocking relationship between the latter two conditions since significant disparities of power or inequalities undermine the ability to coexist in a society of interdependence. Without all of these factors taken together, avers Hume, the "cautious, jealous virtue of justice would never once have been dreamed of."[3] Hume's interpreters disagree over how exactly he understood these

---

[1] David Hume, *A Treatise of Human Nature*, David Fate Norton and Mary J. Norton, ed. (Oxford: Oxford University Press, 2001), esp. pp. 307–41; *Enquiries Concerning Human Understanding and Concerning the Principles of Morals*, 3rd ed., ed. L.A. Selby-Bigge and P.H. Nidditch (Oxford: Oxford University Press, 1975), esp. pp. 183–92.

[2] Hume's mature discussion of this theme is in the *Enquiry*. There are differing accounts of how many conditions or circumstances he sets out. See D. Clayton Hubin, "The Scope of Justice," *Philosophy and Public Affairs* 9 (1979): 3–24; and also Simon Hope, "The Circumstances of Justice," *Hume Studies* 36.2 (2010): 125–48.

[3] Hume, *Enquiries*, p. 184.

conditions to constitute "circumstances of justice."[4] What is clear, however, is that he found justice – and, for him, the related notions of right and property – to be what we might call a calibrated feature of human relations arising, and becoming possible, relevant, and normative, only within specific constellations.

There is a context to what Hume was proposing here. His view was rooted in part in his rejection of the Aristotelian idea that purposes inherent in nature provided guidance for the development of human community. For Hume, the development of society was a matter of construction left to human devices. His structural ethic for society was itself built on conceptions of (1) the centrality of the institution of property; (2) the necessity of a division between a personal or private realm in which natural sympathies might be given play and the public realm of "civil society" in which "artificial virtues" such as justice and respect for property hold sway; and (3) a central role for "utility" (or interest or happiness or good) as a rationale that backs such virtues. The conventions that establish the "artificial" virtues associated with justice were grounded in their usefulness to society, in the sense of their necessity for effective social cooperation.[5]

Hume's account has been criticized in various respects, and it has been argued that his claims about the importance of the first three conditions of scarcity, limited generosity, and equality may be overstated.[6] His emphasis on interdependence, however, seems to be on firmer ground. His chief insight here was that as the breadth of commercial and civil relations expand, the relevance of natural virtues becomes attenuated, in part because people are unable to sense the effects of their actions on distant others.

Hume drew certain conclusions about the application of justice that set his approach apart from Aristotle's, which, as we saw in Chapter 1, excluded many classes of people from the scope of justice. Hume criticized Europeans for their unjust treatment of Indians in the New World,

---

[4] For an overview of the debate, see Hubin, "The Scope of Justice."

[5] This is not to say that his "circumstances" wed him to a utilitarian view and are not relevant to other approaches: indeed, John Rawls famously invokes the notion as a building block in his decidedly non-utilitarian theory of justice.

[6] Martha Nussbaum, for example, criticizes Hume's conception of the circumstances of justice, and the third condition of rough equality in particular, for patently excluding as subjects of justice animals, the disabled, and, arguably, women. See her *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Harvard University Press, 2006), pp. 45–49.

and he also attacked the subjection of women in the varied societies of his day. In his *Enquiry*, he noted:

> [A]gain suppose, that several distinct societies maintain a kind of intercourse for mutual convenience and advantage, the boundaries of justice still grow larger, in proportion to the largeness of men's views, and the force of their mutual connexions. History, experience, reason sufficiently instruct us in the gradual enlargement of our regards to justice, in proportion as we become acquainted with the extensive utility of that virtue.[7]

Here we see how knowledge of others and interdependence with them pushes and expands the reach and range of justice. In Hume's moral geography, it was beyond such ties, or in their breach, that justice stopped and the laws of war (or "humanity") took over to regulate human relations in the service of utility: and where such rules were rejected, only savagery without ethical limits remained.[8]

Amartya Sen, in discussing Hume's conception of the circumstances of justice, locates in him an anti-colonialist sensibility that led him (says Sen) to the view that "the diagnosis of injustice in ongoing arrangements ... might demand the need to change an existing boundary of sovereignty."[9] Beyond this, though, Hume, so far as I know, did not interest himself in the implications of his view for boundary questions.[10] Had he done so, however, the broad outlines of the stance he would have taken are perhaps not difficult to divine. In his line of thinking, justice is not a preexistent, universal virtue (except in the sense that it arises everywhere as a matter of necessity[11]) that stands as an autonomous (or theonomous) standard for evaluating human conduct and

---

[7] David Hume, *Enquiries*, p. 192.
[8] Hume, *Enquiries*, pp. 187–88.
[9] Amartya Sen, "The Boundaries of Justice," *New Republic*, December 14, 2011.
[10] Hubin notes that Rawls, who otherwise explicitly and fully endorses Hume's account of the circumstances of justice, attaches an additional condition, a temporal and spatial requirement that "individuals coexist together at the same time on a definite geographic territory" (John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 109). The point of this seems to be to establish a link between cooperation, on the one hand, and proximity, territory, and, by implication, landed communities or proto-states, on the other, a move which prejudices the question of constitutive justice in a manner in which Hume does not.
[11] Hume, *Enquiries*, p. 203.

institutions. Rather, "public utility is the *sole* origin of justice"[12]: justice, that is, is a system of virtue and obligation determined by, and contingent upon, a *usefulness* that arises only in certain situations and social configurations. Reason (which is not a self-sufficient and free-standing guide but rather what Hume elsewhere famously characterizes as the "slave of the passions") and custom are the tools with which the conventions of justice are crafted. These conventions then become the basis for expounding rules and precepts, cultivating sentiments and inculcating habits that support honor, respect for property, and similar sub-virtues of justice. For Hume, conventions of justice do not have global reach.[13] But as relations of interdependence stretch ever further and across more societal boundaries, they progress in that direction. In short, the condition of interdependence associated with the Humean notion of circumstances of justice leads to a transcommunal conception of justice that is capable of taking on constitutive questions.

It is a testament, perhaps, to the versatility of the idea of circumstances of justice that its logic is also appropriated by Onora O'Neill in an account of justice that otherwise owes considerably more to Kant than to Hume. The core of O'Neill's argument is that the scope of justice extends to all those whose subjecthood and agency we tacitly assume as part of our own actions, habits, practices, and institutions.[14] She takes up as her project the task of identifying – in light of the difficulty of coming up with a comprehensive, definitive specification of criteria of personhood, subjecthood, and agency – practical procedures for determining the scope of ethical consideration in regard to justice. In this pursuit, she takes up the idea of the circumstances of justice in a rather novel way. As she notes, "[t]he circumstances of justice are in the first place, so to speak, the circumstances of injustice: they are circumstances which generate the problems for whose resolution justice is needed."[15] For her, the operative insight that informs the idea for Hume and his followers concerns its incompleteness: the contingent character of the circumstances of justice underscores the open-ended nature of ethical standing. She builds on this notion to articulate an account of *standing*

---

[12] Hume, *Enquiries*, p. 179. Emphasis in original.

[13] Hope, "The Circumstances of Justice," p. 138.

[14] Onora O'Neill, *Bounds of Justice* (Cambridge: Cambridge University Press, 2000), pp. 186–202. See also her "Justice and Boundaries," in Christine Chwaszcza and Wolfgang Kersting, eds, *Politische Philosophie der internationalen Beziehungen* (Frankfurt: Suhrkamp, 1998), pp. 502–20.

[15] Onora O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge: Cambridge University Press), p. 99.

with respect to justice that is rooted in specific presuppositions built in some shape or form into all human activity. In a Kantian spirit, she fixes on a small set of assumptions that structure practical activity, and out of them, she devises her own analog of the circumstances of justice.

Whether or not we acknowledge them, she points out, our actions have built into them a multitude of assumptions, and we can deny that we are committed to them only on pain of rendering our actions incoherent. Among those presuppositions, she points to three as especially important with regard to fixing ethical standing, labeling them the assumptions of plurality, connection, and finitude. The first of these denotes our presupposition – conscious or not – that there are *others*, separate from us, who will or might be affected by our actions or who may affect us. We might deny that our actions aim at others in this way, but such denials are defeasible inasmuch as it can be determined objectively on whom our actions might exert an effect. And any such prospective others, according to O'Neill, have standing and may be treated justly or unjustly. Similarly, the second assumption concerns our *connectedness* with others: our situation in a complex web of causal relations, in which actions can directly affect others and concatenate or serve to establish structural shifts to our environment and society in ways that routinize the impact of our actions. The third assumption regarding *finitude* refers to the further premise that those on whom we act have limited capacities, capabilities, and vulnerabilities; in this regard, it evokes Hume's point about the rough equality of human actors regarding their power and vulnerability. As with the conditions of equality and interdependence that Hume expounded, the assumptions of plurality, connectedness, and finitude hang together. They show that broad swaths of human action are informed by, and hence rely on, an implicit acknowledgment of webs of relationship and mutual dependence. O'Neill shows how denial of any one of these assumptions – for example, by acting as if our behavior has no impact on anyone else or as if those with whom we interact cannot be harmed by us – can undermine the integrity of our agency and render our actions incoherent. In sum, for her, "the combination of agency and vulnerability constitutes the circumstances of justice."[16]

Now it is not rigorously argued in O'Neill's account why all potential assumptions about others embodied in our actions should be thought to be equivalent or whether all such assumptions should equally implicate

[16] O'Neill, *Bounds of Justice*, p. 138.

the agent in relations of justice – or whether, conversely, different presumed relations might produce different sorts of moral relations. All the same, she has developed a powerful basis for linking justice to the ground of moral obligations in general.

The resulting view is a conception of moral standing with reference to principles or maxims regarding justice that is outflowing, in the sense that it expands along with the increasingly interconnected, globalizing world within which everyday actions have come to be conceived. O'Neill presents it as a relational view, one which expands well beyond the anti-cosmopolitan frames of communitarian accounts without engaging in the abstract, essentialist claims of more thoroughgoing forms of moral cosmopolitanism.

This has implications for who is included within practical domains of justice As O'Neill notes, T'ang dynasty Chinese and the Anglo-Saxons, or Viking Dubliners and ancient Peruvians, would not in their mutual ignorance have presumed each other to have moral status. Today, in contrast, "[t]hose who view 'foreigners' and other 'outsiders' as people with whom they can trade, translate and negotiate, reason and remonstrate, whom they can resent and despise, and who can carry complex and intelligent roles cannot coherently rescind such assumptions of possible connection in order to limit the scope of their ethical consideration, or confine justice within the boundaries of states or communities."[17]

Indeed, O'Neill goes further than this, arguing that traditional assumptions regarding the appropriateness and indispensability of states as guarantors of justice are not sustainable today. Given the complex nexuses of causality and institutional relations in our world, obligations of justice can no longer reasonably be viewed as confined to nation-states; rather, the scope of principles of justice has become "more or less cosmopolitan."[18] Accordingly, a wealth of additional, non-state-based "networking institutions" – for example, the international banking system, communications networks, transnational corporations, and non-governmental organizations – should be thought of as additional components in the construction of the scope of justice in a manner that responds to transnational and global concerns.

The view of "more or less cosmopolitan" justice that O'Neill derives from her interpretation of the circumstances of justice may be summarized

[17] O'Neill, *Towards Justice and Virtue*, p. 113.
[18] Ibid., p. 121; and her *Bounds of Justice*, pp. 192, 195–197, 200 (she also refers to an "approximate moral cosmopolitanism" on p. 201).

in three points. First, she develops the Kantian argument that moral standing extends outward, in the concatenating relations of agency and vulnerability presumed by human practices, to encompass, contingently and in a variegated way, sets of actors and subjects that tend toward the global.[19] Second, she makes a case that relations of justice are more prudently thought of in terms of obligations than in terms of rights. Third, she allies obligations of justice with the design and action of a variety of agencies that extend beyond states to a broader set of "networked institutions," in overlapping areas of competency that in various ways render traditional state boundaries not extraneous or obsolete but "porous." Far from necessitating some sort of global government or state, justice, in her view, requires either making existing boundaries more porous in specific ways or compensating those who are harmed by unjustifiable exclusions.

We see here an argument that delineates a transcommunal *scale* for justice, couched in the language of moral standing, and then combines it with a transnational *scope* featuring variegated institutions designed to carry out obligations of justice. O'Neill does not provide a detailed or compelling account of how the two are linked, and her endorsement of "institutional cosmopolitanism" is underdeveloped.[20] Nonetheless, her appropriation of the flexible idea of "circumstances of justice," and the attention she gives to interlocking relations of vulnerability and agency, are suggestive.

Iris Marion Young explicitly endorses O'Neill's view and further develops some of its central lines of thought, providing a richer account of how being implicated in webs of action creates contexts of justice that extend beyond state boundaries. Her argument is premised on an analysis of the complex way in which injustices arise from the embranglement of personal actions and social structures. As she notes, "[i]t is … structural relationships and vulnerabilities that generate obligations of justice."[21] In this way, she expands the idea of the circumstances of justice in recognition of the fact that harms can be, and often are, mediated and ramified through intricate social forces of

[19] And beyond? O'Neill notes that debates about how far personhood and thus moral status extends remain unresolved (*Bounds of Justice*, pp. 190–91), and it is not directly clear from her argument whether her logic can consistently be confined to (post-natal) humans only, or it might extend to encompass other entities.

[20] See O'Neill, *Bounds of Justice*, p. 201.

[21] Iris Marion Young, *Responsibility for Justice* (Oxford: Oxford University Press, 2011), p. 139.

which Hume would hardly have been aware – sociological relations that are not only obscure from the standpoint of individual knowers but readily responded to with avoidant behavior or denial. To counter this tendency, she argues, "as individuals we should evaluate our actions from two different irreducible points of view: the interactional and the institutional."[22]

Young articulates her corresponding view of justice in a theory of political responsibility derived from what she terms a "social connection" model:

> Wherever people act within a set of institutions that connect them to one another by commerce, communication, or the consequences of policies, such that systemic interdependencies generate benefits and burdens that would not exist without those institutional relationships, then the people within that set of interdependent institutions stand in relations of justice.[23]

Existing in such a relationship renders people liable to legitimate claims of justice against them even as it leads them to expect to be treated justly. It is worth noting that Young does not see the obligations of justice as uniform with respect to their character or to whom they apply. She adds two axioms to her theory: first, the greater the (both causal and institutional) connections among people or the more power people exercise over others, the more strongly principles of justice apply; and second, because individuals cannot act alone to effect justice, their obligations are not in the first place to other individuals but rather to form institutions through which they can act collectively.

The obligation attendant upon this relation, according to Young, is to "constitute and support" political organizations and structures designed to combat injustices and promote justice among the members of the group in question.[24] This is an obligation that can be discharged only collectively. It is an important emphasis in her theory that the basic institutions of society (those seen by John Rawls, for example, as the subject of social justice) comprise only part of the field of just relations: at least as significant are the more informal social relations that make

---

[22] Young, *Responsibility for Justice*, p. 73.
[23] Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), p. 242. Cf. *Responsibility for Justice*, p. 105.
[24] Young, *Inclusion and Democracy*, p. 224.

up the texture of civil society, both within states and globally.[25] As with O'Neill and Hume, the *interdependence* at the heart of social connection here is again the crucial notion: and it is not produced by and premised on the bonds of political membership; rather it is "ontologically and morally" prior to political institutions, and indeed, it is what creates the need for them.[26] It follows from this picture that, while formal changes to legal and political structures may be necessary to address problems of injustice that exceed state boundaries, informal civic movements and other forms of collective action should form the main avenue of responsibility and redress.

What are the institutional implications of this approach? Young makes the perceptive point that boundaries – whether municipal or national – often ignore the "spatial distribution of benefits" that produce a variegated landscape of power and disenfranchisement, of privilege and poverty. Taking such spatial factors into account weighs in favor of regional arrangements, or rearrangements, of governance that balance local autonomy and larger-scale modes of coordination in a form of federalism.[27]

It is an important premise of Young's argument that "[t]he scope of a polity ... ought to coincide with the scope of the obligations of justice which people have in relation to one another because their lives are intertwined in social, economic, and communicative relations that tie their fates."[28] Because, at the international level, relations of justice extend well beyond national boundaries, some form of global governance is required to cope with injustices in the economic or environmental realms or with regard to communications, transportation, or conflict resolution. At the same time, Young, a seasoned defender of group identity and multiculturalism, is concerned to honor and protect the value of national identities against any centralizing or assimilating political forces. Her solution is to insist that such identities be viewed as relational and open rather than as self-constituting and closed. She

---

[25] She provides a detailed case study of these dynamics in connection with the international movement to ameliorate unjust conditions in sweatshops. Young, *Responsibility for Justice*, pp. 123–51.

[26] Young, *Responsibility for Justice*, p. 139.

[27] Young, *Inclusion and Democracy*, p. 198. She faces the question of how to define regions by noting that large metropolitan areas, together with suburbs and exurbs, constitute both centers of economic interaction and geographical centers. As she notes, demographic development is in the direction of a world of large metropolitan centers of this sort (p. 232).

[28] Young, *Inclusion and Democracy*, p. 229.

insists, too, that they be viewed as self-determining in the sense of bearing entitlements to non-domination – although not to exclusive autonomy and non-interference. In short, she proposes linking self-determination not with nations but with the looser and more diverse notion of *peoples*. Casting collective identities in this way avoids the essentialism of nationalist ideologies and acknowledges the importance of overlapping or hybridized memberships. Young concludes that in our world of economic and social globalization, formal institutions of governance should aspire to be global in scope (here she views the UN as providing a basis that is, however, in need of democratic reforms). However, at the same time she insists that additional, non-governmental forms of self-determination should be reserved for "peoples." Her admittedly idealistic recipe for pursuing global justice involves, in short, strengthening local forms of self-determination while at the same time extending a set of decentered, democratic, regulatory regimes of global scope designed to protect smaller units from domination at the hands of larger ones.

Young's focus on the concrete dimensions of socioeconomic and political interdependence adds needed substance to O'Neill's more abstract concern with agency. It is an additional noteworthy feature of Young's proposal that she gives some consideration to how to cope with specifically constitutive questions of justice. Her description of how different types and sizes of "peoples" might be distinguished is, necessarily perhaps, only very loosely fleshed out. (We will look more closely at this general issue in Chapter 6.) But she does explicitly take up the question of how to deal with conflicting claims of membership:

> Protection of human rights is ... the best answer to the problem of disputed membership. Peoples should have the prima facie right to define the meaning and terms of membership in its self-determining institutions. When some individuals claim membership that is disputed by those institutions, they should first have special protection of their persons, and then have fora in which their claims may be heard and adjudicated.[29]

It remains unclear here, however, what criteria might be appealed to in order to adjudicate such disagreements, especially if the prima facie right of peoples is to be viewed as defeasible. The mention of human rights

[29] Ibid., p. 265.

here seems designed to afford procedural protections to individuals in such cases, not to resolve the issues at stake by injecting a universal rule.

An additional recent proposal that works broadly within the Humean tradition that links justice to interdependence is Ayelet Shachar's argument that *rootedness*, in the sense of established links to the economic and societal fabric of a community, be recognized as a basis for establishing citizenship or like forms of political membership.[30] Shachar expounds the idea of *jus nexi*, a legal principle of rootedness or "genuine connection" that she puts forward as a candidate, along with the traditional principles of *jus soli* and *jus sanguinis*, for grounding legal determinations regarding inclusion in a polity. A legal theorist, her central insight is that if it is unjust for citizenship to be handled solely as a birthright, recognizing that it is a type of inherited property can open up new legal and ethical vistas for reasoning about how it should be transferred and distributed. In keeping with this idea, she develops an innovative proposal to institute a "birthright privilege levy" as a form of redistribution of opportunity to people who are rooted in (and hence belong to) a community without benefiting from the privileges attached to a passport. The rationale for such a program is embedded in "a broad, social-relations-centered, inclusive interpretation of what is owed to those locked outside the enclosed circle of members by those who enjoy access to the scarce property of citizenship in a stable and affluent community as a result of inherited entitlement."[31] In this view, membership entitlements are understood to grow (or decline) through the social fact of actual involvement with a polity (or its absence) rather than through inherited citizenship.

Shachar's theory provides us with some promising resources for addressing aspects of constitutive justice, although it also has its shortcomings. One of its chief benefits is its relevance to the transnational sphere. Although her account focuses on belonging and citizenship in bounded communities, it has a transnational dimension that associates political membership and democratic voice with contexts (for instance, ecological regulation) in which the genuine connection principle can be extended beyond borders.[32] At the same time, however, Shachar relies on a conception of actors that is largely individualist and hence unattuned

[30] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA: Harvard University Press, 2009).
[31] Shachar, *The Birthright Lottery*, p. 190.
[32] Ibid., p. 182.

to some of the group dynamics that shape belonging and rootedness. In addition, she does not directly investigate the critical question of how actors become positioned to establish "genuine connections" in the first place. As a result, her analysis leaves us in the end with some probing questions of constitutive justice: Inasmuch as relations of interdependence do not simply arise willy-nilly but can be shaped, what governs their creation? And what recourse is there when people are excluded from networks and relations through which they might otherwise develop relations of rootedness and belonging? Can there be something like a natural entitlement to the chance to establish one's membership in a community? It is to a line of inquiry entertaining this sort of question that we turn now.

Recognition and the common good: Hegel, Ferrara, Tietz

A second, somewhat more adventurous approach harks back to Aristotle by way of Hegel, incorporating the idea of recognition and the venerable notion of the common good into a eudaimonistic understanding of the scope of justice. In this section, I critically discuss the work of Alessandro Ferrara and Udo Tietz as expositors of this line of thought.

As Axel Honneth has shown, in his early work Hegel, galvanized by his introduction to Aristotle's conception of the *polis*, developed a political philosophy that highlighted the importance of intersubjectivity and public life in human affairs.[33] Hegel's goal was to construct an account of natural law which countered the atomistic bias that, he found, deformed not only the contractarian tradition going back to Hobbes but also the individualistic moral theory of Kant.[34] In contrast to the conceit embodied in those approaches of isolated subjects existing prior to the construction of community and society, Hegel articulated a conception of the ethical integrity of society as a fundament for subjectivity and freedom, a view modeled on the Aristotelian portrayal of the city-state. His crucial insight was to grasp the ethical relations that produced the bonds of solidarity requisite for building up human freedom as involving a dynamic of a struggle for mutual recognition. In the account he gradually worked out, elements of Aristotelian teleology

[33] Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge, MA: MIT Press, 1996), esp. pp. 3–63.

[34] Hegel criticized these two views under the heading of "empirical" and "formal" conceptions of natural law in his *Natural Law*. On this point, see Honneth, *The Struggle for Recognition*, pp. 11–16.

regarding the unfolding of sociality were combined with Hegel's own agonistic conception of dialectics to produce a theory in which progressive conflicts and reconciliations – the "struggle for recognition" – build solidarity and individual freedom at the same time within a given society.

The theme of recognition that Hegel initially appropriated from Fichte ultimately came to encompass three modes that were progressively ordered and linked with different stages of the emergence of the enlightened society. A first, affective form had its home in the family and took the form of a loving response to needs of individuals. A successive, formal mode was rooted in the rise of civil society and defined by commercial and legal relations of respect for persons. The apotheosis of recognition occurred in the state in the form of the solidarity of subject-citizens who apprehend one another as "concrete universals." For Hegel, these levels of recognition enabled the "reconciliation" of participants in the ethical life of a society in a manner that enabled them to be truly, positively free and unfold their potentialities; and in this sense, his Aristotelian premises were realized.

The idea that human flourishing and agency depend on relations of mutual recognition has been revived in contemporary political theory by Honneth, Charles Taylor, and others.[35] Indeed, the theme of recognition, attached especially to acknowledgment of the value of group identities in the politics of collective grievances and multiculturalism, has established itself as a criterion of distributive justice in a way that has challenged the accustomed focus on allocations of goods of various sorts.[36] It has also directed attention to the role of disrespect (*Mißachtung*) in a way that raises questions about the relations and relative priority of justice and injustice; I will return to this issue in the next chapter below (Chapter 6). The question for us here is how recognition might

[35] Honneth, *The Struggle for Recognition*; Charles Taylor et al., *Multiculturalism and "The Politics of recognizability"* (Princeton, NJ: Princeton University Press, 1992); Patchen Markell, *Bound by Recognition* (Princeton, NJ: Princeton University Press, 2003); Paul Ricoeur *The Course of Recognition*, David Pellauer, trans. (Cambridge, MA: Harvard University Press, 2005); Kwame Anthony Appiah, *The Ethics of Identity* (Princeton, NJ: Princeton University Press, 2007); Robert B. Brandom, "The Structure of Desire and Recognition," *Philosophy and Social Criticism* 33.1 (2007): 127–50; and Judith Butler, *Frames of War: When Is Life Grievable?* (London: Verso, 2009).

[36] For a debate on the respective merits and deficits of these two approaches to justice discourse and activism see Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (New York: Verso, 2003).

be applied so as to illuminate the specific field of constitutive questions surrounding the topic of justice. This is a topic on which Hegel failed to pronounce.[37]

From the standpoint of constitutive justice, a basic question regarding the applicability of a theory of recognition concerns the levels at which recognition might be thought to be operative. At one level there is, after all, a process in international relations through which polities – states, or governments – "recognize" one another – or more importantly, acknowledge new formations – by legally acknowledging both one another's existence and the rights and responsibilities that go with it. Is that all that is at stake here? Our concern is to inquire into the normative grounds behind such acts: what makes recognition of Slovenia or Croatia or Kurdistan or ISIL just or unjust, and to whom? The Hegelian-Aristotelian thesis is that recognition at the level of people, of concrete actors, plays a role in determining just relations. Thus, *interpersonal* relations, in dynamics of inclusion and exclusion, involve recognition, alongside the (presumably metaphorical) level of state interaction. Groups – inasmuch as they are generally acknowledged by philosophers to admit of collective intentions, actions, and other features that make them subject to recognition or disrespect – play a role in this picture. Institutions, too (for example, a constitutional regime), can embody provisions and practices that reflect relations of recognition. Finally, within interpersonal relations is where the interaction between recognition and relations-to-self – of agency, of self-esteem, of identity formation, of flourishing – is carried out.

How, within these different nexuses, might we think of recognition as a normative *point d'appui* for tracing just boundaries for communities of justice? One approach that makes a promising foray in this general direction is Alessandro Ferrara's "judgment theory of justice." He uses a conception of recognition as the basis for an account of how claims

[37] Arto Laitinen has done some preliminary work on the constitutive issue of who – or what sort of entities – might participate in dynamics of recognition and the networks that they constitute. He distinguishes, insightfully, between the modes of "recognizing," on the one hand, which can apply to any bearers of normatively relevant features, including not only persons but (nonhuman) animals, works of art, wilderness, and so on, and "giving and getting recognition," on the other, which requires that both donor and recipient be recognizers who care about being recognized. Arto Laitinen, "On the Scope of 'Recognition': The Role of Adequate Regard and Mutuality," in Hans-Cristoph Schmidt am Busch and Christopher Zurn, eds, *The Philosophy of Recognition: Historical and Contemporary Perspectives* (Plymouth: Lexington Books, 2010), pp. 319–42.

of justice might be established transcommunally by way of a process of counterfactually positing new boundaries, identities, and constellations of common goods.[38]

Ferrara presents his theory in the course of an attempt to show how, in a context in which earlier attempts to found universal principles as valid apart from any cultural setting have foundered, human rights claims might be made broadly compelling in a manner that is "translocally located yet … *situated*."[39] The central insight that Ferrara builds on in this work – namely, that aesthetics provides a valuable and versatile resource, the "force of exemplarity," that may be extended to political processes of justification – is taken not from Hegel but from Kant's third critique. A useful, important feature of his view is that it incorporates an experiential dimension in judgments of justice:

> [I]n politics no less than in art the exemplary provides guidance and exerts cogency beyond its immediate context of origin *not* as *schemata* do, by providing prior cases to which we can assimilate the present one, but as works of art do, namely, by providing outstanding instances of authentic congruency that are capable of educating our discernment by way of exposing us to selective instances of that special pleasure called by Kant the feeling of "the promotion of life" [*Beförderung des Lebens*].[40]

Despite the prominence of this Kantian element, Hegel's dialectical sensibility, his criticisms of Kantian atomism and deracination, and his theory of civil society all infuse Ferrara's discussion.

So, too, does Hegel's conception of recognition. In his discussion of justice, including global justice, Ferrara takes as his problematic how to cope with circumstances of conflict among social actors. All identities – collective and individual – are, Ferrara insists, constituted by relations of recognition, which in turn "is made possible by the intersection of shared values and beliefs.[41] To act justly when conflicts arise requires the

---

[38] Alessandro Ferrara, *Justice and Judgment: The Rise and the Prospect of the Judgment Model in Contemporary Political Philosophy* (London: SAGE, 1999); Alessandro Ferrara, *The Force of the Example: Explorations in the Paradigm of Judgment* (New York: Columbia University Press, 2008); Alessandro Ferrara, *The Democratic Horizon: Hyperpluralism and the Renewal of Political Liberalism* (Cambridge: Cambridge University Press, 2014).

[39] Ferrara, *Force of the Example*, p. 122. Emphasis in original.

[40] Ibid., p. 22. Emphasis in original.

[41] Ibid., p. 90; *Democratic Horizon*, pp. 34–35.

maintenance of these relations. One way to do this is in light of a new communal identity that may be counterfactually posited to emerge from the actors' intersection and, more specifically, through action in accordance with the "exemplary authenticity" that characterizes the new identity. This authenticity, Ferrara maintains, can be recognized through the faculty of *sensus communis*, that capacity which makes possible the apprehension of beauty as well. The key is that "the requirements of the flourishing of the new communal identity formed at the intersection of those in conflict help us to adjudicate the controversy."[42] The common good of this emergent entity – that is, the requirements for its flourishing – serves as the basis for "world-disclosing" reflective judgments about justice, judgments which are limited in their variations only by a conception of equal respect for the parties that constitute the superordinate identity.[43] Judgments of justice thus emerge in human praxis and propose an "ordering function" in a manner that takes on normative force by pointing the way toward a more fulsome vision of how humans can live well.[44] The basis for caring, from our individual vantage points, about the "fulfillment of the superordinate entity" is bound up with our "eudaemonistic self-reflection" as actors, which enables us to perceive that, as Aristotle held, acting according to justice improves our own lives.[45] It is revealing that Ferrara compares his notion of exemplary authenticity, and the act of aesthetic innovation or political autogenesis in which it is expressed, to the "normative bootstrapping" that he sees at work in theories of democratic founding.[46]

Ultimately, for him, this process tends toward a conception of justice as attaching to humanity, understood not in abstract definitional terms but rather as an all-inclusive network stemming from relations of recognition. It is here, in fact, that Hegel's philosophy figures most explicitly in Ferrara's effort to articulate a conception of justice that is

---

[42] Ibid., p. 129.

[43] Alessandro Ferrara, "Two Notions of Humanity and the Judgment Argument for Human Rights," *Political Theory* 31 (2003): 392–420.

[44] Ferrara, *Justice and Judgment*, pp. 190–91.

[45] Ferrara, *Force of the Example*, pp. 130–31.

[46] His example is Bruce Ackerman's work (*Force of the Example*, p. 37), but the point could be made in regard to Habermas, Benhabib, and others; see my discussion of the paradox of founding in Chapter 3. Intriguingly, Ferrara also quotes Paul Ricoeur in likening the exemplary power of art to "a trail of fire issuing from itself" (*Force of the Example*, p. 22); the quote is from Ricoeur's "Aesthetic Experience," in *Critique and Conviction: Conversations with François Azouvi and Marc de Launay*, Kathleen Blamey, trans. (Cambridge: Polity Press, 1998), p. 180.

broadly based enough to support the practice of global human rights. In attempting to explain how a normativity mediating between universality and particularity can become "situated" concretely in a political order, Ferrara invokes Hegel's conception of ethical life as the stage at which the tensions present in civil society become reconciled through the institutions of the state and the rule of law. For Ferrara, Hegel's conception shows the need to ground the shared basis of freedom and subjectivity for a community in concrete institutions. But where, for Hegel, the *Volk* was the community in question and the state the key to reconciliation, Ferrara asserts that in our present historical phase, the field of action has shifted to the level of *humanity*. For him, the normativity of a scale of justice associated with humanity is reflected in the supplementation of actors in global civil society, such as transnational corporations and global non-governmental organizations, with a broad range of political institutions – for example, inter-governmental organizations, treaty organizations, and regional entities – that collectively further the project of international law. The result is, in a Hegelian sense, an emergent "global history whose subject is humanity."[47] It follows that as this history progresses, a pluralistic order emerging from the overlapping of diverse cultural sensibilities will solidify in a global form of ethical life.

Overall, Ferrara's "judgment view" provides a promising account of how criteria of justice may be understood to exert cogency beyond their original contexts – indeed, to carry universal significance – without being thought to take the form of abstract universal principles. Three components in particular from his approach – the analogy to aesthetics, the role of recognition, and the eudaimonistic conception of flourishing – stand as enrichments to the burgeoning discussion of constitutive justice.

An approach with a similar broad profile can be found in the "procedural Aristotelianism" set out in the perceptive yet under-appreciated work of Udo Tietz.[48] Tietz likewise defends a conception of community that is defined in terms of a shared common good rooted in a practice of mutual recognition. He takes as his central problem the issue of how to mediate between communitarian accounts of ethics and politics and their universalist, Kantian interlocutors. His aim is to articulate a theory of community that bridges the particularism of tradition-based conceptions of community and the universalism of rationalist conceptions of

[47] Ferrara, "Two Notions of Humanity," p. 415.
[48] Udo Tietz, *Die Grenzen des Wir* (Frankfurt: Suhrkamp, 2002).

context-independent morality. Relying on a method that ambitiously blends Gadamerian hermeneutics with a proceduralism drawn from discourse ethics, he develops a stance that he calls "reflective particularism." The idea behind this approach is that under conditions of modernity, cohesive ethical communities can exist only if the shared values on which they are based are understood to be founded not apodictically but rather on what the members affirm to be good. It is this latter element that makes a community's values "reflective." In spelling out this view, Tietz develops a further insight, arguing that the basis of a group's identity and convictions regarding the good life is anchored linguistically and is nurtured through a shared language: he therefore describes his account as an interpretation of the "deep grammar" (*Tiefengrammatik*) of the crucial interrelated terms of community (*Gemeinschaft*), the common good (*Gemeinwohl*), and common reason (*Gemeinsinn*).

In contrast to communitarian thinkers, Tietz's hermeneutical approach does not lead him to focus exclusively on communal groups and the ethical horizons they contain. To the contrary, he argues that in order for the convictions of particular communities to be coherent, they must be articulable to outsiders, to members of other groups; that is, they must meet minimal standards of rationality that extend across all such groups and thus encompass all who are capable of linguistic justification. Moreover, he notes, there will be a subset of ethical goods that likewise hold across all groups: these, he says, meet the broad criteria for being understood as moral (rather than ethical) values, in the (German) sense that they are thought to apply independently of any grounding within the customs and mores of historically specific communities. In acknowledging this transcontextual element, he honors his Kantian intuition about the need for a universal dimension in ethics. At the same time, Tietz insists that this broader context is not simply an abstract implication of philosophical principles. Rather, it too has a communal dimension: it constitutes a "we" that is all-encompassing yet otherwise comparable to the "we" constituted by any limited, concrete community. Therefore, Tietz refers to these two types of communities as "we_1" and "we_2" groups, where we_2 communities may be political or of many other sorts and may comprise many different types of groups that may overlap or occupy differing scales. By emphasizing the commonalities that unite we_1 and we_2 groups, he performs the useful service of helping to bridge the misconceived gap between morality and ethics that has dogged the post-Kantian German philosophical tradition.

The conventions of we_2 rationality establish a baseline that communal conceptions of the good must meet, but they do not provide an

independent basis beyond this for validating them. Rather, says Tietz, the shared claims of a community regarding the good life in a sense validate themselves, with reference to internal criteria such as coherence, authenticity, and contextual fit with concrete living conditions. In fact, at root, it is the community's values and beliefs that constitute the community in the first place.

If that is the case, then how does this theory deal with normative questions of boundaries and membership? In a discussion of social inclusion and exclusion, Tietz notes that membership in a we_2 community is not a natural circumstance but rather a social fact, established through discursive practices of attribution and recognition among speaking and acting subjects.[49] Attributions of membership demonstrate mastery of a linguistic system of pronouns that enables our group ("us") to distinguish ourselves from your group ("you") and from other groups ("them"); moreover, these pronouns designate groups with shared values and principles that undergird their identity. Tietz draws here on Wilfrid Sellars: "people constitute a community, a *we*, by virtue of thinking of each other as *one of us*, and by willing the common good *not* under the species of benevolence – but by willing it as one of us."[50] The criteria for belonging and the constitution of a community always exist in a relationship of mutual dependence. And those criteria are in turn bound up with the defining values of the group. According to Tietz, it is those values and criteria – and not any spirit of malice or hostility – that enable a group to exclude persons whom its members judge not to belong.

Such persons are not without recourse, however. They may, as outsiders, criticize a community's criteria for inclusion in hopes that the in-group will revise them. This is their prerogative as members of a larger common we_1 community. That common broader identity also enables them under certain conditions to seek protection of their human rights within a political we_2 community, at which point they may aspire to adopt the distinctive values of that community and work toward membership. Tietz insists that the boundaries of an ethical community – "*die Grenzen des Wir*" – are always drawn from within.[51] But the implications of his position, as we saw was the case with Walzer, qualify this claim significantly. For one thing, the criteria for inclusion

[49] Tietz, *Grenzen*, p. 224.
[50] Cited in Tietz, *Die Grenzen des Wir*, p. 225; from Wilfrid Sellars, *Science and Metaphysics: Variations on Kantian Themes* (London: Routledge and Kegan Paul, 1968), p. 222.
[51] Tietz, *Die Grenzen des Wir*, p. 232.

adopted by a community must meet a standard of reflection that is set by involvement in the broader community of communities, the we_1 group, and this circumstance establishes a common footing for outsiders with insiders. For another thing, if those criteria are linked to notions of the good life that constitute the community's identity, this opens up the possibility that either (1) outsiders could adopt this *telos* securely enough to become "one of us" or (2) through a process of dialogue, outsiders could help insiders to shift their conception of the good life in a way that opens it outward to an expanded membership.

The approach that Tietz outlines produces a perspective on constitutive questions that presents what we might call a chastened eudaimonism: groups embody, and define themselves in terms of, projects aimed at conceptions of flourishing. There is an internal connection between principles of inclusion/exclusion and minimal standards of rational explication and justification held by humanity as a whole. It follows from these propositions that just standards for affixing or recognizing communal boundaries flow from centrally shared ethical outlooks and that these establish limits that are negotiable in light of encounters with other views.

Much work remains for this approach – for example, in pursuing more deeply the question of how central ethical outlooks arise in the first place, or in spelling out the hermeneutical standards for interpretations of common goods, or in sorting out divergent and potentially conflicting levels of identity and community. In the focus on mutual recognition and shared flourishing that it shares with Ferrara's theory, however, it helps develop themes that offer helpful perspectives on the issue of constitutive justice.

Democracy and pragmatism: Dewey, Hurley, Fraser, Bohman

Democratic ideals that draw on the pragmatism of John Dewey constitute a third prospective source for transcommunal criteria of constitutive justice. We recall from Chapter 3 the conundrum that the issue of constitutive justice – of boundaries and criteria for inclusion and exclusion – poses to the theory of democracy. The *demos* problem, as Claus Offe describes it (or the "problem of 'constituting the *demos*,'" in Robert Goodin's words[52]), suggests on its face that "[i]t is democratically impossible for the people to decide or (re)define who belongs to the people."

[52] Robert E. Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy and Public Affairs* 35.1 (2007): 40–68.

The implication is that democratic theory does not command principles or precepts that can ground coherent normative judgments about who, in justice, should be included in the founding of a polity. A further implication is that in practice the means and maxims that are adopted to establish citizenries will be anti-democratic in character: war, autocratic fiat, racism, and so on. This limitation also, it follows, infects the process of revising boundaries for existing political communities.

In Chapter 3, I discussed some perspectives on this paradox that view it as genuinely inhibiting the capacity of democratic theory to generate consistent criteria for just boundaries. Some theorists, however, have remained determined to show that the democratic impulse is equal to the task of generating such criteria. Here I discuss some of the more promising contributors to this line of inquiry. The approaches that I canvass grapple with the challenge of adapting democratic insights to conditions of globalization by reconstructing central notions of self-determination or non-domination and by combining them with insights regarding reflexivity and pragmatism.

The shared trajectory of these approaches locates them in a philosophical stream that draws heavily on the political thought of John Dewey. As a political theorist, Dewey influentially developed the notion that democracy, far from merely denoting a particular set of institutions for regulating political decisions, embodies an ethos that extends "to matters of the mind, heart, and spirit."[53] This ethos applied, in turn, not just to structures for deliberation and voting but to other contexts, such as schools, economic relations, science, and other sorts of social endeavors. It could therefore be extended and reinterpreted to adapt democratic culture to changing social conditions.

This approach to democracy was informed in part by ideals of positive liberty and civic virtue that, mediated by the idealism of T.H. Green, stretched back to earlier republican forebears. At the same time, it represented an application of Dewey's distinctive philosophical sensibility to the political realm, a sensibility shaped by his version of pragmatism. Dewey brought to bear an epistemological stance prizing a certain conception of collective inquiry that emphasized the inseparability of knowledge from its practical consequences and historical contexts. He combined this with a philosophical anthropology emphasizing the relational and holistic dimensions of personhood over more atomistic

[53] Melvin L. Rogers, "Introduction: Revisiting the Public and Its Problems," *Contemporary Pragmatism* 7.1 (2010): 1–7, at 4.

conceptions of individuality.[54] The upshot of Dewey's approach was a vision of democracy as an ongoing project capable of continually revising its institutions and, indeed, its values in an experimental fashion in order to respond to emerging challenges and opportunities.

This supple and reflexive conception of democracy was perhaps most fully articulated in *The Public and Its Problems* (1927).[55] This work is instructive for our discussion since Dewey took up in it the question of how a public is constituted and reconstituted on an ongoing basis. His answer was that it is "problems" – shared interests or a common state of being affected by the "conjoint activities of individuals and groups"[56] – combined with the process of experimentation, deliberation, and action in response to them – in short, *problem-solving*, that defines publics and their scope. Dewey notes, invoking Jane Addams's famous maxim, that "the cure for the ailments of democracy is more democracy," but he adds that "[t]he prime difficulty ... is that of discovering the means by which a scattered, mobile and manifold public may so recognize itself as to define and express its interests."[57] This process cannot be forced: new conditions and forms bring themselves about in a manner that invokes the democratic paradox. Dewey adds, "[r]egarded as an idea, democracy is not an alternative to other principles of associated life. It is the idea of community life itself."[58] And publics provide the social basis, the raw association to which political organization may be added to form a state. The public, as a realm of the sort of inquiry and debate that has funded more recent theories of deliberative democracy, is in an important sense prior to, and potentially formative of, political boundaries and borders.

Susan Hurley is one contemporary philosopher who has explored the Deweyan sense that democracy can revise itself in line with certain deep ideals in order to reflexively generate new political forms, institutions, and models of membership. Her theory also reflects Dewey's holistic anthropology. According to her innovative proposal, the ongoing

---

[54] As Matthew Festenstein writes (*Pragmatism and Political Theory: From Dewey to Rorty* [Chicago: University of Chicago Press, 1997], p. 80), "[f]or Dewey ... 'men are not isolated non-social atoms, but are men only when in intrinsic relations' to one another, and the state in turn only represents them 'so far as they have become organically related to one another, or are possessed of unity of purpose and interest.'" The quotes are from *The Ethics of Democracy*.

[55] John Dewey, *The Public and Its Problems* (Chicago, IL: Swallow Press, 1927).

[56] Dewey, *Public*, p. 35.

[57] Ibid., p. 146. The quote, slightly altered, is from Jane Addams, *Democracy and Social Ethics* (New York: Macmillan, 1905), pp. 11–12.

[58] Dewey, *Public*, pp. 147–48.

revision of jurisdictional boundaries and units of political agency in our globalizing world should be envisaged not simply as subject to uncontrollable forces but rather as potentially guided by values "endogenous to the theory of democracy."[59] On her view, and in contrast to the statement of Claus Offe cited above, both initial choices about the boundaries and makeup of the *demos* and secondary disagreements about jurisdictional issues can be made or resolved in more or less democratic ways. For this proposition to make sense, she recognizes however, democracy itself must be redefined.

Hurley's distinctive methodological premise is that philosophy of mind can inform political philosophy.[60] In this case, she proposes to investigate the "still-fruitful classical idea that there may be analogies between social and political structures, on the one hand, and the structure of the mind, on the other."[61] Her guiding supposition is that rationality, like democracy, is a phenomenon with boundary issues. She notes that cognitive science has come to challenge received assumptions about the character of rationality as a "vertical" function internal to individual actors. The field is, moreover, in the process of coming to endorse a revised, holistic view that grasps rationality as a matter of integrated "horizontally modular" processes that encompass sub-personal processes of perception, agents, agents' actions, and agents' surroundings. Her broadly pragmatist conclusion is that "[r]ationality can be conceived in general terms as an emergent property of … a complex system, distributed across organisms and their structured environments."[62]

This image of decentered rationality provides the model that she then suggests be applied analogically to help understand how democratic properties are modified in a globalizing world. As with the classical conception of rationality, a classical, vertical understanding of democracy as confined within set territorial units should be replaced, she argues, with a complex, "horizontally modular" conception of democracy suited to a globalizing context in which national boundaries have become permeable and "leaky." Like rationality, democracy can also be rethought as an "emergent property of the higher-order system of relations between various functional power networks, global institutions,

---

[59] Susan L. Hurley, "Rationality, Democracy, and Leaky Boundaries: Vertical vs. Horizontal Modularity," in Ian Shapiro and Casiano Hacker-Cordón, eds, *Democracy's Edges*, pp. 273–93.
[60] See her *Natural Reasons* (Oxford: Oxford University Press, 1989).
[61] Hurley, "Rationality," p. 276.
[62] Ibid., p. 284.

and processes. ... The operation of 'external' forces can be democratized, appropriately inhibited and facilitated, not just by 'internal' control, but also, or instead, by being embedded in a larger system with a complex structure and dynamics."[63]

What sort of method might help this process? Hurley's answer is striking, and it is reminiscent of Dewey's democratic theory. She suggests that the evolution of political institutions can be explored through a simulation process that employs network modelling (inspired by similar approaches in cognitive science) in order to determine which developments might produce more or less democratic results. She is proposing, in other words, a mode of experimentation and collective inquiry geared toward inventing democratic institutions, units, boundaries, and practices for a transnational setting.

The resulting democratic theory embraces, in a prima facie manner, certain "distinctively democratic" criteria in accordance with which the setting of boundaries might be deemed more or less just: self-determination, autonomy, respect for persons, equality, and "contestability." These values, selected for their "traditional" pedigree, presuppose the "vertically modular world" in which they were conceived, and it remains for Hurley to show to what extent they will be adaptable to the emergent horizontal democratic order she theorizes.[64] She makes a creative inroad into this problem, however, when she stipulates, once again in Deweyan fashion, that the substance of democratic norms and the structures and procedures they underwrite are, in her model, "dynamically and adaptively related" and that playing with different possibilities regarding techniques of organization may well stimulate the imagination regarding the norms that should guide them.[65] In conceiving of the criteria for evaluating boundaries as themselves in part dependent on the character of the emergent structures they profess to assess – that is, as self-generative or recursive criteria – Hurley's suggestive formulation offers a stimulating perspective from which

[63] Ibid., p. 287. Hurley cites David Held here as holding a similar view in his conception of cosmopolitan democracy.

[64] Hurley, "Rationality," p. 290.

[65] Hurley, "Rationality," p. 289. Extending her guiding analogy to rationality, Hurley makes the intriguing point that such complex modelling could likely show that individual "subnets," though they are themselves not recognizably democratic, might well interact in a system in such a way as to produce democratic results at a higher level of organization, much in the way that sub-personal processes, though not in themselves rational, may be essential components of rationality.

to illuminate the paradoxical (as opposed to antinomic) character of constitutive justice.[66]

Constructive approaches to the boundary issue from the standpoint of democratic theory can also be found in the fold of critical theory. As we saw in Chapter 2, Habermas, despite the versatility and virtuosity he has displayed in his interpretation of discourse ethics and communicative action, has not squarely or successfully grappled with the *demos* problem. However, a number of his colleagues and heirs have aspired to do just that. Two particularly astute accounts are those by Nancy Fraser and James Bohman, each of whom further adapt the Deweyan paradigm of reconstructing democratic theory along pragmatic, reflexive lines.[67]

Among democratic theorists, it is perhaps Nancy Fraser who has analyzed the problem of constitutive justice most clearly. Her reflections on the impact of various modes of globalization on discourses of democracy and justice have enabled her to focus on the problem of "framing" as a fundamental issue for theories of justice.[68] By this she means the question of how the bounds of justice are delimited. The matter has become pressing in an age in which a transnational civil society has emerged that features bonds and relationships that are untracked from formal state politics. Under such conditions, the "Westphalian" framing of justice, premised on a political imaginary seeing the world as a symmetrical field of political units and structures of political control, has become compromised by trans-border injustices to the point where established boundaries no longer conform to the geography of relations of justice. The result is a proliferation of problems of "misframing": cases in which those who should be included in the scope of communities of justice

[66] See also William Connolly's account, in "The Ethos of Sovereignty," of how a "democratic ethos" can animate a circulation of forces that relate a "positional sovereignty" to surrounding nexuses, including "the multitude and the traditions it embodies," in an organic process through which the contours of sovereignty and belonging are continually renegotiated.

[67] For an argument about how to exact an account of justice from democratic theory in a manner intended to extend Habermas's theory to constitutive concerns, see Eva Erman, "The Boundary Problem and the Ideal of Democracy," *Constellations* 21.4 (2014): 535–46.

[68] Fraser's work on theories of justice initially focused on feminist critiques and the case for emphasizing problems of redistribution of resources over competing discourses of justice that emphasize identity politics and the recognition of diverse social groups. Her turn to concerns of framing resulted in her *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2009).

are unjustly excluded or those who should be excluded are unjustly included.[69] As an example of this type of "meta-political injustice," she cites the impact of the international "gerrymandering" of political space into a system in which the global poor are sharply disadvantaged. Fraser's response to this problem is a complex theory of justice that takes into its scope not only traditional concerns such as the distribution of goods but also matters of justice raised by the delineation of boundaries and other meta-political questions. Her account also emphasizes reflexivity and the reconstruction of basic democratic values.

Fraser's theory aims to integrate three levels at which questions of justice arise and are contested: she links these levels to the notions of the "what," the "who," and the "how" of justice. The "what" of justice refers to the objects with reference to which matters of justice have been contested and adjudicated in modern societies. This category includes two major families of claims – one regarding redistribution of economic goods and the other concerned with recognition of and respect for cultural identities. The "who" of justice, for its part, refers to the question of which entities constitute its subjects. The long-prevalent assumption that the "who" is unproblematically provided by the nation-state society, Fraser notes, has come to be questioned in an age of globalization. "[D]isputes that used to focus exclusively on the question of *what* is owed as a matter of justice to community members now turn quickly into disputes about *who* should count as a member and *which* is the relevant community."[70] This has given rise to a new family of claims revolving around questions not of redistribution or recognition but of representation. These second-order claims concern the frame within which it is proper and just to consider first-order questions, and they inaugurate the *political* as a third dimension that must be addressed alongside the *cultural* and *economic* by theories of justice. To be effective, an account of justice must be able to address situations of economic maldistribution, cultural misrecognition, and political misrepresentation alike – and that involves taking stock of the ways in which they may all be interrelated. Indeed, misrepresentation emerges in Fraser's theory as the key form of injustice. Because misrepresentation includes, in addition to "intra-frame" injustices such as unjust exclusions of members or inadequate forms of representation in the rules

[69] Her focus on framing is in itself a useful innovation in justice studies. It evokes the related discourse in visual ethics of the "ethics of the frame": see, e.g., Lisa Downing and Libby Saxton, *Film and Ethics: Foreclosed Encounters* (London: Routledge, 2010), esp. chaps. 1 and 4.

[70] Nancy Fraser, "Reframing Justice in a Globalizing World," *New Left Review* 36 (2005): 1–19, at 4.

for adjudicating disputes, instances of misframing – that is, unjust ways of defining communities of justice in the first place – it prefigures and can contribute to problems of maldistribution and misrecognition. It can thus be considered "the defining injustice of a globalizing age."[71] To be able to conceptualize problems of misframing and misrepresentation, says Fraser, is to render the discourse of justice reflexive in a manner that unlocks deep mechanisms of injustice. Addressing injustice at this level, however, requires the further step of posing the question of the "how": what are just ways of remedying misframing and establishing just frames that respect the subjects (the "who") of justice? The problem is a difficult one because competing visions of how to frame discursive communities of justice may be incommensurable with one another, and criteria for adjudicating among them may be hard to come by.

It is here that Fraser's democratic commitments come to the fore, and her initial step toward addressing the "how" problem is to defend a particular "critical-democratic" criterion for evaluating competing accounts of "who" is within the bounds of justice. She argues that since normal discourse that presumes deep agreement about the parameters of justice has been displaced, "a theory of justice for abnormal times requires a determinative normative principle for evaluating frames."[72] What principle might fill this role? Her response is a proposal for democratizing the frame of justice, drawing on a sense of democracy as entailing, at root, "participatory parity." In formulating her own guiding principle for democratic justice, she considers and discards some current alternatives: the "membership principle" that links the bounds of justice to collectivities organized around citizenship or national cultures, the more expansive "principle of humanism" that attaches the bounds of justice to personhood, and the "all-affected principle" that delimits those bounds in accordance with webs of social relations of interdependence.[73] She argues for, instead, what she terms

[71] Fraser, "Reframing Justice," p. 10.

[72] Fraser, *Scales*, p. 63.

[73] Fraser associates the standard of citizenship with Will Kymlicka, that of nationality with David Miller, and that of personhood with Martha Nussbaum, although others could be named. A number of democratic theorists have articulated versions of the all-affected principle, including Carol Gould, David Held, and Robert Goodin. For a useful overview, see Sofia Näsström, "The Challenge of the All-Affected Principle," *Political Studies* 59.1 (March 2011): 116–34. Fraser criticizes this approach, though (*Scales*, pp. 63–4), on the grounds that it predisposes theorists to look to social scientific analyses in order to resolve frame disputes at the expense of focusing on the moral dimensions of social relations.

the "all-subjected principle": "all those who are subject to a given governance structure have moral standing as subjects of justice in relation to it. ... An issue is justly framed if and only if everyone subjected to the governance structure(s) that regulate the relevant swath(s) of social interaction is accorded equal consideration."[74] Governance structures, for her, include not only states, but inter-governmental organizations such as the WTO and the IMF, as well as transnational regimes for regulating such areas as nuclear power, environmental effects, health, policing, and intellectual property. This principle leads in practice not to a single global frame but rather to a plurality of different frames for different issues. The "how" question of justice, then, asks in which ways such frames can be institutionalized so as to remain accountable to discursive contestation. A meta-democratic approach, Fraser concludes, must work on two tracks, capitalizing on existing discursive fora such as the World Social Forum but compensating for their relative lack of power by also developing new global democratic institutions for airing and producing binding adjudications to disputes about framing.

Fraser's treatment of "scales of justice" extends the Deweyan trajectory in some important ways, contributing to it a nuanced conception of how justice can be misframed and mining the ethos of democracy for normative guides to promoting justice in a transnational setting. Her account of the reflexivity of framing processes is in line with the pragmatic approach, as are her suspicion of the idea that experts might be expected to resolve framing problems and her insistence that every point at which closure is attained be regarded as provisional.[75] Curiously, she does not deal explicitly with the paradox of the *demos* problem. Nor does she grapple with the dimension of justice that involves rights and the conflicts that can arise with democratic processes for forming the public will – nor, for that matter, does she investigate the intersection of moral discourse and democratic theory. The lacuna in her account regarding what sort of institutions might lend themselves to addressing framing questions is filled to an extent, however, by James Bohman's work on transnational democracy.

---

[74] Fraser, *Scales*, p. 65. A comparable proposal that links inclusion in the *demos* to "all those whose identities have been substantially constituted through such regimes' coercive policies" is made in Rogers M. Smith, "The Principle of Constituted Identities and the Obligation to Include," *Ethics and Global Politics* 1.3 (2008): 139–53.

[75] Fraser, *Scales*, p. 72.

Bohman sets for himself the task of limning how in a globalized setting basic concepts associated with democracy, including publics, citizenship, human rights, and federalism, might be rethought in order to remedy the democratic deficits of international society.[76] For him, the key to democratic justice is ensuring self-rule or self-determination. In this endeavor, however, he asserts that democratic theory can no longer rely on eighteenth-century assumptions about the nation-state as the sole context for the *demos*: rather, it must come to terms with conditions that have linked the challenge of democracy to a plurality of cross-cutting larger and smaller units, or *demoi*. Bohman's picture of the transition to transnational democracy explicitly draws on Deweyan themes: it is pragmatic in its response to changing social facts, experimental in its view of how new institutions should evolve, and emphatic about reflexivity in the process through which publics must revise democratic norms and concepts. Bohman reads Dewey's theory of democracy and publics as having the implication that "the full potential for transnational democracy requires a constant interaction among institutions and publics – indeed, one that is fully reciprocal and co-constitutive. A condition of democracy in the reflexive sense ... requires that publics be able to shape the very institutions that in turn shape their freedoms and powers."[77] How might a complex system of *demoi* function in a way that leaves open opportunities for ongoing reform and democratization? Bohman's principal insight here is that these units must be coordinated and counterbalanced in such a way as to safeguard the value – classically articulated in the focus of republicanism on checks and balances – of "non-domination." I will return to this motif in my closing chapter (Chapter 7).

While Bohman's initial objective is to outline how the idea of democracy can be adapted to *demoi*, his concerns are as much practical as theoretical. For him, the European Union is an important test case for how diverse polities can be integrated into a complex structure that ensures the non-domination of its members. He sees the EU as a promising example of how states, rather than simply establishing a new, an all-encompassing *demos*, can construct a polity of *demoi* that combines new deliberative fora with older forms that are iterated at different levels and that collectively reinforce each other. At the same time, he is critically aware of democratic shortcomings in the EU's structure, but he argues

[76] James Bohman, *Democracy across Borders: From Dêmos to Dêmoi* (Cambridge, MA: MIT Press, 2007).
[77] Bohman, *Democracy across Borders*, p. 91.

that these are produced not so much by a general lack of inclusion as by a more specific "deficit in the reflexive capacity of citizens to initiate democratic reform."[78] His proposals for reform of the EU lead into further consideration of how his conception of transnational democracy might grapple with security and conflict resolution and with the problem of borders.

In his discussion of borders, Bohman begins by denying that the *demos* problem is dispositive under present conditions. Rather, the challenge to democracy presented by borders is the effect it can have of subjecting one *demos* to domination at the hands of others: Bohman calls this the *demoi* problem. In a precise example of what Fraser calls misframing, Bohman notes that this problem "emerges wherever there are multiple units necessary for good governance, yet there exists a unitary institutional design that is still guided by the principle that democracy requires control by a single *demos*."[79] Such a situation, by placing a set of noncitizens under domination, "breaks the linkage between democracy and justice."[80] Restoring this link, Bohman argues, cannot be accomplished by striving to find a single optimal constitutional structure that minimizes exposure to nondemocratic forces; rather, it can be attained only by democratizing borders and boundaries and thus decentering the power of initiating deliberations about how to draw lines and affix memberships. In practice, this means that both citizens and noncitizens must be able to participate in setting the agenda for how the distribution of normative powers is settled.[81] Bohman roots his assertion that just boundaries of justice depend on democratic processes in the claim that "democracy and justice are mutually dependent terms and ... one cannot be achieved in any secure way without the other."[82] In extending this claim through an argument about the interdependence of transnational democracy and human rights, Bohman extends his account to an area that Fraser largely ignored.

---

[78] Ibid., p. 16.
[79] Ibid., p. 176.
[80] Ibid., p. 177.
[81] This sort of thesis is further developed in Arash Abizadeh's piece, "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders" (*Political Theory* 36.1 (February 2008): 37–65), in which he argues that because a democratic polity is in principle unbounded, democratic theory requires that regimes of closure must be justified to outsiders as well as insiders.
[82] Bohman, *Democracy across Borders*, p. 17. Cf. Carol Gould's discussion of the relation between justice and democracy in *Globalizing Democracy and Human Rights* (Cambridge: Cambridge University Press, 2004), pp. 13–49.

The Deweyan line of thought I have traced here presents a range of theoretical options and practical proposals for overcoming or circumventing the *demos* problem. It highlights a pragmatic approach brought to bear on the process of reconceptualizing and reconstructing core values of democracy. It also models a style of reflexive inquiry that offers a useful theoretical resource for grappling with the recursive character of the construction of just boundaries for the scope of justice. To be sure, the *demos* problem is only part of the broad nexus of issues of constitutive justice, which encompasses nation-building, state-building, and the formation of other sorts of communal identities and cultural horizons as well – matters to which I will turn in Chapter 6. But the powerful link between democracy and modern conceptions of justice ensures that democratic theory has much to contribute to accounts of constitutive justice.

Deconstruction and reconstruction: Derrida

A final line of inquiry that I want to consider here is one that, to a certain extent, challenges and subverts the notions of inner and outer, of cosmos and *polis*, of universality and particularity, and even of principle and criterion that I have used to frame my discussion of constructive alternatives for thinking about constitutive justice. The postulate is that the mode of deconstruction articulated by Jacques Derrida in the latter part of his career can be fruitfully brought to bear on questions of unjust exclusions and the underlying logic that informs who are thought to be subjects of justice. Derrida maintains that deconstruction provides an effective tool for critiquing the political status quo; beyond this, he suggests, it can also fulfill a reconstructive function.

Derrida's philosophical reputation rests largely on his development of deconstruction as a tool for fastening on instabilities built into categories, dualities, and other textual features and exploiting them to call into question central assumptions and practices that mark the Western intellectual tradition. His excavations of repressed incoherencies and self-contradictions at the heart of cherished metaphysical concepts including *presence* and *being* enabled him to mount powerful challenges to hierarchical structures such as "logocentrism," the widespread subordination of writing to speech in philosophical thinking. Derrida's early focus on "grammatology" and the logistics of texts led some to perceive deconstruction as a solipsistic pursuit with little relevance to the world of politics or social justice. As we saw in Chapter 3, however, Derrida's concern with the philosophical oddities of language readily supplies a

point of purchase on such political issues as the act of constitutional founding, and in his later work, he turned his critical attention to questions of justice, hospitality, democracy, sovereignty, and other ethico-political themes, in the process developing a revised conception of deconstruction.[83] This mode pointedly demonstrated that deconstructive arguments can be used to criticize injustices; beyond that, it prominently recognized the existence of "undeconstructible" values – chief among them, justice – that are themselves unattainable and yet exert an irreducibly urgent force on human efforts to devise and apply laws and, more broadly, ethical reasoning. Within this approach is the seed of a response to problems of constitutive ethics.

The key text in which Derrida discusses justice is an essay entitled "Force of Law: The 'Mystical Foundation of Authority,'" in which he applies his deconstructive toolkit to the relation between justice and law.[84] In characteristic fashion, he identifies and traces a series of aporias that attach to this relation. The first arises in the tension between the general application of a rule in law and the uniqueness of the situation of each subject, which, to be judged justly, requires either an exception from or the reinstitution of the rule so that the law must constantly be upheld and suspended at once. Justice, it follows, cannot be realized in law, which is founded in violence;[85] it thus remains always out of reach. And yet we are always obligated to reach, or responsible for reaching, for it; indeed, Derrida asserts that justice, its impossibility notwithstanding, exerts an unbroken urgency on us to pursue and impose it. What drives these aporias is what Derrida somewhat hesitantly calls an "idea of justice" that, he says, is infinite in that it is irreducibly owed to the other.[86] It is this idea of justice that is, in Derrida's schema, undeconstructible: it serves as the impetus, the motive, for the

[83] Derrida usefully discusses how he unfolded a treatment of the relation between democracy and justice over the course of writing several works, in his "The Last of the Rogue States: The 'Democracy to Come,' Opening in Two Turns," *South Atlantic Quarterly* 103.2–3 (2004): 323–41, at 333–37.

[84] Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" in Drucilla Cornell et al., eds, *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992), pp. 3–67.

[85] Derrida, "Force of Law," p. 6. Here Derrida builds in an interpretation of Walter Benjamin's theory of the relation between law and violence in his renowned essay "*Zur Kritik der Gewalt*," translated into English as "Critique of Violence." As Derrida notes, the meaning of *Gewalt* in German extends beyond violence to aspects of authority, power, and force.

[86] Derrida, "Force of Law," p. 25.

deconstructive critique of the failings of law. "Justice," says Derrida, "is deconstruction."[87] He is referring here specifically to the *doing* of justice, the pursuit of an undeconstructible justice through the deconstructive practices that take aim at injustice in the law, in claims of authority and legitimacy, "and so on." But what is this "idea of justice"? He is careful to distinguish it from an abstract regulative idea in the Kantian sense and from a particular messianic expectation generated by one of the religions or by Marxism – all of which are horizons that only inadequately point to (and occlude) it. Justice is, we might say instead, the object of a structure of evaluation and expectation that is simply a given directionality of (and in) human experience. It is a motivating drive; it is a precondition for knowing, evaluating, and acting; and – in a generic sense – it is an article of faith.

What deconstructive critique in the sphere of justice attacks, to put it another way, is the manner in which assimilation to laws rips subjects and actions out of their singular contexts. Deconstruction seeks justice, then, by seeking to attend to context and to how language promotes solidarity and honoring of the other.

At this point, we are in a position to inquire how this approach shapes judgments about the constitutive dimensions of justice. In "Force of Law," Derrida explicitly takes up the question of how subjects of justice are constituted. He remarks, for example, on the importance of shared language to justice: "It is unjust to judge someone who does not understand the language in which the law is inscribed or the judgment pronounced. … the violence of an injustice has begun when all the members of a community do not share the same idiom throughout."[88] The figure of (nonhuman) animals, too, plays an important role here. Derrida points to the practice of assimilating some persons to animals as a way of excluding them from the community of justice, and he notes, "[c]arnivorous sacrifice is essential to the structure of subjectivity."[89] In later work, however, Derrida sets himself against these tendencies, bringing his deconstructive apparatus to bear in order to contest the distinction between humans and animals. Intriguingly, he employs reflections on the figure of the wolf as tyrant or sovereign in order to link the human-animal divide to the division that establishes the nation-state.[90]

---

[87] Ibid., p. 15.
[88] Ibid., p. 18.
[89] Ibid.,, p. 18.
[90] See Jacques Derrida, *The Beast and the Sovereign*, vol. I, Michel Lisse et al., eds, Geoffrey Bennington, trans. (Chicago, IL: University of Chicago Press, 2009).

Derrida addresses another constitutive question in his work on hospitality.[91] Like justice, hospitality is an undeconstructible, a source of a drive toward acceptance of the other. As with justice, Derrida sees the desire to be unconditionally hospitable – to open the borders to accept newcomers, to adopt a posture of unlimited inclusivity – as a means to prevent or, more accurately, to at least minimize violence. And as he acknowledges of justice, he likewise notes that hospitality can never be fully attained and thus it requires constant effort to improve it.

From his reflections on language, animals, and strangers, a picture emerges of the sorts of consequences that a mode of political deconstruction might have as an intellectual tool and practice of constitutive justice. Boundaries are rightly subjected to ongoing critique. Decisions are necessarily provisional. The capacity to be an "other" – of hospitality, of justice – qualifies one for prospective inclusion in the collective task of remedying injustices. And a goal of justice becomes the amelioration of the various forms of violence, originary and otherwise, bound up with the establishment of the political realm of *droit* or law.

A central point on which the various lines of inquiry surveyed in this chapter agree is that at least for political communities, the frame of reference for just criteria of belonging cannot be merely an internal one. At the same time, these approaches are all, to various extents, leery of the proposition that universal moral principles might fill this role in a sort of centripetal fashion, even if some of them guardedly associate themselves with the agendas of cosmopolitanism and global justice. In their own ways, all of these approaches embrace the task of trying to mediate between universalism and particularism in their normative orientations.[92] They evince, importantly, a recognition of the limited, context-related, centrifugal character of the operations through which communities emerge. Criteria of membership, to be sure, presuppose a set of *potential* members larger than the community itself, a larger population from within which actual members are identified. Yet this set does not by any means need to correspond to the class of all human persons. Furthermore, the construction of membership always goes hand in

[91] Jacques Derrida and Anne Dufourmantelle, *Of Hospitality*, Rachel Bowlby, trans. (Stanford, CA: Stanford University Press, 2000)

[92] In this task, they share a central feature with the more sophisticated understandings of human rights. See, e.g., Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson, eds, *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001); and David P. Forsythe and Patrice C. McMahon, eds, *Human Rights and Diversity: Area Studies Revisited* (Lincoln, NE: University of Nebraska Press, 2003).

hand with the production of some "other," the subset of nonmembers against whom the community of belonging is defined. Again, this subset is not necessarily the set of *all* others. Given this circumstance, we might say that constitutive criteria are properly conceived as heterologically contextual – as rooted, that is, in concrete negotiations of identity and otherness.[93]

In the next chapter (Chapter 6), we turn to a closer examination of some of the intellectual elements – including a disciplined grasp of the processes of differentiation through which communities of justice are formed – that, I argue, are indispensable to the work of articulating constructive accounts of constitutive justice. As we progress toward my own proposal of such an account, we will find that such elements may be usefully augmented by ideas and themes – including non-domination, responsibility, reflexivity, and the common good – gleaned from our exploration of transcommunal approaches to constitutive questions.

[93] On the topic of otherness and its implications for conceptions of justice that "emerge out of the injustices of regimes of distributive justice in response to the call of another Justice," see Michael Dillon, "Another Justice," *Political Theory* 27 (1999): 155–75.

6
Constituents of a Theory

Valuable though the insights contained in the transcommunal approaches that we have examined may be, they represent only the beginnings of full-scale theories of constitutive justice. The interdependence model, the eudaemonist-recognition model, the pragmatic-democratic model, and the deconstructionist model all present promising trajectories for developing constructive, systematic frameworks for evaluating prospective rationales for moral and political boundaries around communities of justice, even as they identify problems and lacunae that such frameworks need to address.

It is certainly possible to envision additional approaches to constitutive justice of varying philosophical casts. Although I have argued that cosmopolitan adaptations of Rawls's theory have not squarely grappled with constitutive questions, certain Rawlsian conceptions such as reflective equilibrium and overlapping consensus could readily contribute to sketching a normative account of how appropriate scopes for "peoples" might be defended and how competing scales of justice might be reconciled.[1] Alternatively, a liberal theory might develop Ronald Dworkin's jurisprudential conceptions of "integrity" and "fit" into an apparatus for triangulating just conceptions of community.[2] One could readily imagine, too, how an appropriately modified theory of natural law or natural rights might be invoked as the basis for parlaying such traditional notions as the *communitas perfecta* into a criterion for assessing

[1] I discuss the notion of reflective equilibrium below in Chapter 7. On the notion of an overlapping consensus, see John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: Harvard University Press, 2001), pp. 32–38.

[2] On "fit" as an interpretive concept and on the relation between law and the politics of integrity, see Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

putative boundaries.[3] Indeed, it is to be hoped that such accounts, and others, will find their exponents. My purpose in this chapter, however, is not to speculate about potential lines of argumentation regarding constitutive questions. Rather, it is to proceed further with a discussion of some of the elements that theories of constitutive justice in general should be expected to address. My aim here is, first of all, to identify characteristic theoretical and empirical concerns that attach to questions about how just borders, social boundaries, and memberships might be determined – concerns with which plausible normative responses will therefore need to grapple. Beyond this, however, how I cast the issues will inevitably say something about my own normative sensibilities in regard to constitutive questions.

Stories of peoplehood

In entering this field, we can benefit from considering a recent work of political theory that, in a manner comparable to my argument here, has sought to recast some important aspects of how political communities are thought about and argued over. Rogers M. Smith's path-breaking *Stories of Peoplehood* mounts an astute critique of ongoing debates about nationalism, citizenship, and democratic theory, arguing that political theorists have persistently failed to appreciate the importance of how senses of "political peoplehood" are generated, maintained, and transformed.[4] Theorizing about appropriate civic ideals and republican institutions is all well and good, he suggests, but modern societies cannot be understood or properly argued about without a grasp of how people's allegiances and political affiliations are shaped through processes of "people-building." By this he means something analogous to, but more encompassing than, nation-building since "peoples," for him, also include political collectives organized along lines other than nationality: political beliefs, economic ties, race, religion, and so on. To address this lacuna, he sets out to develop a general theory of how acceptance

[3] Although they do not quite effectively thematize the problem of constitutive justice as I have developed it, two valuable recent studies in the comparative ethics of boundaries do give a sense of the range that such theories might take. See David Miller and Sohail H. Hashmi, eds, *Boundaries and Justice: Diverse Ethical Perspectives* (Princeton, NJ: Princeton University Press, 2001); and Allen Buchanan and Margaret Moore, eds, *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003).

[4] Rogers M. Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (Cambridge: Cambridge University Press, 2003).

is generated, among insiders and outsiders alike, of shared beliefs that certain human populations constitute political peoples.[5]

Smith's theory takes as a premise that political peoples are not natural or primordial but are instead created through (admittedly asymmetrical) interactions between leaders and constituents aimed at attaining stable structures of power. These interactions may take the form of coercive force, but importantly, they otherwise employ persuasive stories that propagate conceptions of political identity. Smith posits that there are three main types of stories that contribute to building the crucial basis of trust and a sense of worth within peoples: "economic" stories, "political power" stories, and "ethically constitutive" stories. In contrast to the other types, ethically constitutive stories are

> accounts that present membership in a particular people as somehow intrinsic to who its members really are, because of traits that are imbued with ethical significance. Such stories proclaim that members' culture, religion, language, race, ancestry, history, or other such factors are constitutive of their very identity as persons, in ways that both affirm their worth and delineate their obligations.[6]

It is this notion that Smith sees as the most distinctive and innovative aspect of his theory, and he is right to suggest that philosophers and political theorists in general have tended to overlook the importance of such stories.

Smith provides copious examples of such accounts, ranging from the formation of the Jewish people to the recent projects of post-Soviet republics such as Kyrgyzstan, but he is not content simply to sketch the role of such "stories of peoplehood." Rather, he is acutely aware of the potential for harmfully chauvinistic results that such stories carry, and he sets himself the further task of articulating a normative theory that can set out how to identify and limit their unjust effects. His response is to argue for the preferability of "moderate" peoples that strike a median between, on the one hand, narratives that are too weak to create viable attachments and, on the other, stories that are totalizing and that claim absolute sovereignty over their members. He further defends two propositions: that it is best to foster a vibrant politics of contestation and deliberation among rival stories of peoplehood; and that ethically constitutive

[5] Smith, *Stories*, p. 15.
[6] Ibid., pp. 64–65.

stories that are particularistic need not be eschewed but should be linked to larger, more universalistic narratives regarding humanity as a whole. Such a politics, he proposes, bears the potential to check the excesses of overly domineering and derogatory stories and might foster the institutionalization of varying and crosscutting memberships – local, national, and transnational – in a manner supportive of aspirations to cosmopolitan democracy.

Smith's theory is innovative and largely succeeds on its own terms. But it also has some lacunae – ethical, conceptual, and empirical – that help pinpoint important elements for what I have termed a theory of constitutive justice. There is, for instance, the philosophical question of agency: of who we should understand the agents who construct peoples to be and of how they act. At stake in particular, given the character and scale of such construction projects, is how *collective* agency is understood. Smith's argument reflects certain presuppositions here regarding the character of actors: he speaks of the rights and choices of individuals and groups,[7] refers to the role of "shared beliefs" in constituting peoplehood,[8] and specifies that elites and would-be constituents interact in the shaping of peoples.[9] Moreover, although he claims that his theoretical focus on stories "is of no special importance,"[10] his insistence that stories are partially constitutive of people's interests suggests that he senses a link between narratives and agency.[11] It is not incumbent upon him as a political scientist, however, to further spell out the philosophical outlines of his assumptions about action, freedom, and responsibility, and he does not do so.

His study, as I noted, aims to provide both normative arguments and empirical guidance regarding stories of political peoplehood. His discussion of people-building is rife with illustrations from societies around the world, from Han China to colonial America, from Cuba to Liberia. And yet there remains a paucity of detail when it comes to the actual mechanisms through which senses of peoplehood are shaped. Smith understands people building to be akin to nation building on a grander scale, and thus, he directs his attention away from the more prosaic

[7] Ibid., p. 131.
[8] Ibid., p. 15.
[9] Ibid., pp. 36–41.
[10] Ibid., p. 44.
[11] Ibid., pp. 45–47. It is, however, a bit surprising that he does not refer to the work of Alasdair MacIntyre, perhaps the preeminent expositor of narrative accounts of agency, since he does refer to the other major thinkers (e.g., Taylor, Sandel, and Walzer) commonly associated with MacIntyre as communitarians.

mechanics of state-building. At the same time, however, he argues effectively that ethno-nationalist conceptions cannot effectively be separated from the civic dimensions of peoples, and one might expect that he would evince a more direct concern with how the trappings of statehood and governance are used to reinforce, replicate, and disseminate the stories he describes. I have argued elsewhere that alongside nation-building and state-building, what I call "civitas-building" is an important analytical category for understanding the ethics of political community.[12] This entails noting how not just a discursively developed sense of peoplehood, but an actual, institutionalized political community is assembled and propagated through the concrete means of communication, economic ties, and modifications of land, in ways that may or may not map onto states (as the example of Kurdistan shows). Even when it comes to people-building, Smith stops short of exploring the dynamics and technologies involved. Where Benedict Anderson, for example, has spoken of print-capitalism, or Manuel Castells of networked information technologies, Smith leaves the material means of people-making largely undiscussed.

There are also entirely reasonable limits to the conceptual apparatus Smith provides. Interested as he is in *peoples*, he provides a useful typology of such groups and further identifies the set of relevant questions for sketching their common features and differences. He is sensitive to how particularistic conceptions of identity often imply more encompassing conclusions with regard to other groups, and he is alert to the complexity of questions about who gets to define groups and to the modulations of sovereignty that various sorts of groups employ. But if his analysis of communities is sharp, the attention he provides to their edges – and to links between peoples and territory – is sketchy. Where our interest is with borders and boundaries, inclusions and exclusions, a different set of concepts and questions is required.

A final limitation of Smith's study involves his treatment of justice. The normative component of his theory aims to spell out how we might contravene stories of peoplehood that embody "viciously unjust political projects."[13] Smith is not shy about specifying which sorts of stories he means: these are racist, or chauvinistic, visions of identity that claim absolute control over their members. He is comparatively coy, however, with respect to what he understands justice to be or how he thinks attributions

[12] William A. Barbieri Jr., *Ethics of Citizenship: Immigration and Group Rights in Germany* (Durham, NC: Duke University Press, 1998).
[13] Smith, *Stories*, p. 125.

of injustice might work, even as he engages in detailed discussions of Rawls's and Habermas's political philosophies. Such an understanding, however, will be important to a theory of constitutive justice.

Smith's short book cannot be faulted for failing to provide a comprehensive discussion of, as his subtitle advertises, "the politics and morals of political membership." The gaps I have identified here concerning agency and story, the empirical and conceptual features of boundary-making, and the dynamics of justice helpfully identify some primary elements that theories of constitutive justice, for their part, should be expected to include. Accordingly, my argument in this chapter is that normative theories regarding just criteria for the constitution of moral and political communities should be informed by understandings about the workings of social agency, about the mechanics and conceptual dimensions of boundary-making, and about the character and empirical aspects of justice. I will address each of these themes – who forms boundaries, of what sort, how, and to what ethical effect – in turn.

Agency

A central premise on which my entire discussion of "constitutive justice" is founded is the notion that communities of justice are artifacts. Contemporary regional unions, modern nation-states, classical empires, and ancient *poleis* – all are constructed, shaped, modified, and delineated in diverse ways. Local communities, religions, tribes, and nations are produced and bounded, in part, through judgments, rituals, patterns of discrimination and exclusion, and conquest.[14] Even scales of justice are manufactured, in a sense: cosmopolitan visions, two-kingdom

[14] I recognize that this statement might be countered by perspectives, internal to some religious communities, that peoples are shaped by divine fiat or other nonhuman forms of action, such that one might argue, for example, that the answer to the question "Who is a Jew?" can be resolved only with respect to sacred sources of authority. But even such a question admits of hermeneutical dimensions: scripture must be interpreted and applied, with an ineliminable component of human practical reasoning involved. Historically and sociologically, religions are subject to many of the same power-political, structural, and discursive processes of formation as other large-scale social groups: see, for example, Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, CA: Stanford University Press, 2003); and Tomoko Masuzawa, *The Invention of World Religions: Or, How European Universalism Was Preserved in the Language of Pluralism* (Chicago, IL: University of Chicago Press, 2005). In the case of Judaism, an additional legal-political dimension of agency is introduced through the link binding Israeli citizenship to the Jewish people.

theologies, codes of chivalry, and the prerogatives of supermen and superior races have all stemmed from and been defined by specific sorts of thinkers, under specific conditions, with specific motives and rationales in play. To characterize these varying constellations as artificial is not necessarily to say that they are "unnatural." Indeed, they have in many respects built on, or built in, elements of human social existence that were natural in the sense of bring encountered, so to speak, as "givens." But to call communities of justice artificial *is* to point out that, even in the many cases in which such groupings have been naturalized – made to seem, that is, somehow prior to or independent of culture – this has been achieved only by downplaying or effacing the role of (more or less purposive) human action in informing them. My purpose, conversely, has been to underscore that our collectivities are, at least in part, creations: indeed, moral achievements.

What do I mean by this last phrase? As I noted above in Chapter 1, to point to the constructed character of communal boundaries is to open them up to ethical analysis. This statement carries within it some interlocking propositions. First, groups do not arise without human participation. I will have more to say below about what forms such participation takes, but suffice it to say here that groups have memberships and that memberships must be established, recognized, asserted, and in some cases policed. Second, groups could be otherwise, in numerous ways: they could have been defined according to different features, or conceived as more or less exclusive, or divided from or reunited with other related groups. In short, their outlines are contingent on how people participate in their establishment and maintenance. Not only does this mean that the people who shape groups have options. It also implies that they are in the relevant sense free. Freedom is, after all, a sine qua non for ethical inquiry. Third, groupings can be created or identified willy-nilly, *nolens volens*, arbitrarily, as when an isolated tribal group propagates itself through in-group reproduction; or they can be constituted purposefully, as when a monarchy or a republic is established or when the aforementioned tribal group places limits on intermarriage with other groups. Fourth, groupness carries with it moral effects. To be included carries with it an identity that may be morally empowering or, in some cases, stigmatizing, and it will in any event shape one's self-perception and, as Smith argues, one's sense of worth in some ways and not others. Exclusion can deprive one of benefits reserved for members, make one vulnerable to unfair discrimination, or otherwise produce harm that may or may not be remedied by inclusion in another group. Finally,

fifth, those who shape communal groups may be seen as responsible for these effects.

"Responsible" is a term, of course, that carries some distinct meanings; by it, I mean not only that participants in the delineation of groups should be seen as the source of group identities but further that they are accountable (may be called to account or held answerable) and potentially culpable (i.e. susceptible to judgments of praiseworthiness or blameworthiness) in some measure for the moral effects that arise. I say "in some measure" to qualify the picture of responsibility in two ways: first, because some – the leaders or elites who divine, devise, or impose membership criteria – play a greater role than others do, who may simply internalize and reinforce such criteria, and responsibility is therefore not distributed equally among them; second, because attributions of responsibility do not conventionally attach to actions or processes that are arbitrary in the sense of being non-voluntary. However, responsibility is not confined exclusively to intentional action, and indeed, it extends to a large swath of human activity or behavior that I am describing as purposive. Action that is purposive but not intentional may fall within the ambit of responsibility if, for example, it involves negligence, which is to say a failure to direct our action in light of moral considerations of which we either were, or ought to have been, cognizant.[15] Taken together, these propositions support the view that the processes through which groups arise and are maintained embody ethical projects that invite attributions of responsibility and moral judgment.[16] They invite ethical analysis; more specifically, they call for assessments of justice, in the broad sense of judgments of right and wrong with respect to the character of human relationships.

Once we accept the proviso that the formation of boundaries, inasmuch as it entails human agency, is subject to questions of justice, we are obliged to entertain some further ethical questions of a moral-anthropological cast. Whom should we view as responsible? Who acts, and how? Having some grasp of these matters is important if we want to be

[15] Negligence is a comparatively unobjectionable legal conception. A more thoroughgoing notion of how we can be responsible for unintended actions is Karl Jaspers's idea of "metaphysical guilt" (*The Question of German Guilt*, E. B. Ashton, trans. (New York: Capricorn, 1961)), which refers to complicity in evil acts carried out by one's collectivity to which one fails to object.

[16] Cf. Marion Smiley, *Moral Responsibility and the Boundaries of Community: Power and Accountability from a Pragmatic Point of View* (Chicago, IL: University of Chicago Press, 1992), esp. pp. 179–224.

able to plausibly claim that a particular set of exclusions is unjust or that a particular rule of inclusion would serve justice and should therefore be adopted.

Social action in general evinces complex individual and communal dimensions, and how one conceives of agency has weighty implications for how responsibility is understood. This is nowhere more so the case than with boundaries. Whether an account of agency posits only rational individual actors or includes corporate actors such as nations or peoples has a clear bearing, for example, on the sort of attributions of accountability that are requisite to the task of evaluating constitutive processes. Parsing out who precisely contributes what to the sculpting of *political* communities over time is a deeply complex business in itself. It is all the more difficult to trace the webs of action through which *social* groups such as ethnic or religious communities take on their contours, and the genealogical challenge of reconstructing how cosmopolitan ideas and particularist schemas of special obligations have emerged and interacted is enormously daunting. I will not take up these tasks directly here. But I do want to offer a few proposals about how best to think of agency in connection with constitutive justice. In particular, I want (1) to underscore the need to attend to social, and not just individual, agency and (2) to acknowledge the crucial role of narrative and "imaginaries" in informing action. After all, it could be argued, in light of the perspective I am presenting, that the very moral qualities we associate with individuality or "personhood," and the capacity for agency that we associate with them, are themselves parasitic upon the workings of constitutive justice; it could be argued that they are statuses, that is, that we attribute to or distribute among ourselves.

In regard to social agency, we can hardly speak of the constitution of communities without addressing the actions of groups. When we talk and think about large-scale developments or events it is common to use the rhetorical device of referring to groups as singular actors (or patients): The U.S. attacked. The UN and various churches condemned the action. The Iraqi people bore the brunt of the damage. Doctors Without Borders dispatched a humanitarian mission. Such talk can be consistent with an individualist ontology if one views such usages as strictly metaphorical. It can be reconciled with methodological individualism even if one holds that group agents are not just metaphorical but real – even personal in a sense – so long as such entities are not thought to share in features such as consciousness or some related "psychologically mysterious element" properly attributable to only natural, individual human beings such as

a spirit or a discrete mental life.[17] Whether groups can be coherently thought to "have minds of their own" in any strict sense or to possess some sort of ontological distinctness remains a debated question, one that has received increasing attention since post-World War II debates about the collective guilt of Germans.[18]

In fact, there is a reasonably well-defined nexus of features that mark and structure the broad topic of the morality of groups.[19] Philosophers disagree about the specific workings involved in actions attributed to groups, emphasizing, for example, that joint actions or shared agency, as projects in which individuals coordinate what they do, need to be distinguished from collective or corporate agency, in which action is attributed directly to a group. There is broad agreement, however, on the chief questions that fall under social agency, and these can be grouped under two headings. The first set of issues is primarily descriptive and has to do with how group agency can be thought to work. One way to think of the features involved is in terms of a general phenomenology of moral acts in which agency entails judging the requirements of a situation, formulating an intention, willing to act accordingly, and carrying out the act. At each of these points, the meaning of social agency has incited debate and disagreement. From the standpoint of the morality of groups, the conditions for action – the relevant circumstances according to which the exigency to act arises – already bear the imprint of groups due to the relevance of what Durkheim famously called social facts,[20] innumerable generally agreed-upon propositions that, for example, establish bits of paper as money or stamps, enact borders, or fix correct usage. Mutual trust and common commitments establish the very basis for human interaction. Then, in any given situation, action depends on a sort of meeting of the minds: some degree of *common knowledge* is a precondition for acting together, and practical judgments tend, as well, to draw on shared experience in some form. For such a communal

---

[17] See Christopher List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011).

[18] See Hannah Arendt, "Collective Responsibility," in James Bernhauer, ed., *Amor Mundi* (Dordrecht: Martinus Nijhoff, 1987), pp. 43–50.

[19] A useful overview is Larry May, *The Morality of Groups: Collective Responsibility, Group-Based Harms, and Corporate Rights* (Notre Dame, IN: University of Notre Dame Press, 1987). See also Carol Rovane, *The Bounds of Agency: An Essay in Revisionary Metaphysics* (Princeton, NJ: Princeton University Press, 1997).

[20] Durkheim developed this conception in several works, beginning with *The Division of Labor in Society* (1893). See also John Searle, *The Construction of Social Reality* (New York: Free Press, 1995); and Margaret Gilbert, *On Social Facts* (Princeton, NJ: Princeton University Press, 1989).

basis of perception to ground action, next it is necessary that there be an element of *intentionality*, taking the form of *collective intentions* or, at the very least, *shared goals*. Realizing such intentions, in the classical schema, necessitates a movement of the *will*, and here again the social perspective invokes such concepts as Rousseau's *volonté generale* or R.G. Collingwood's joint will.[21] Lastly, of course, willed intentions must be carried out. Once again, there are differing views of how collective action works: for Raimo Tuomela, for example, it is a matter of individuals entering into a "we-mode" of action distinct from their normal personal way of acting.[22] There is considerable agreement among philosophical analysts of social agency that it is not merely reducible to an aggregation of individual acts. On each of these points, however, there are lively debates pitting those who argue that group actions are supervenient on individual dispositions and can be fully distributed to the accounts of individual actors against those who see group entities as somehow transcending the individual projects of their members.

These disagreements extend to the second set of more properly moral questions that involve the evaluation of group acts. Here discussion revolves around the theme of *collective responsibility*, in the sense not of causal involvement but of accountability. Assuming that collective entities may be seen as acting in some sense freely, independently, and purposively, what can be said about ethical limits to their actions and their praiseworthiness or blameworthiness for the consequences? Can there be such a thing as collective guilt? How, philosophically, does complicity function and how should it be judged? What do we mean when we say that collectivities suffer? Can the landscape of moral relations that bind people be thought intelligibly to generate group rights, or strong duties of solidarity, or merely mutual personal obligations? Again, these ethical questions inspire interpretations that divide methodological individualists from their more collectively minded colleagues.

Resolving their ontological disagreements, however, is not material to my purposes here. What does bear on my argument is that the discourse of the morality of groups provides an important, indeed indispensable, vocabulary for specifying ethically how communities of justice are constituted and who is responsible for it by offering a perspective in which agency, including judgments of responsibility, is understood in

---

[21] R.G. Collingwood, *The New Leviathan: Or Man, Society, Civilization and Barbarism* (Oxford: The Clarendon Press, 1942), pp. 148–60.

[22] Raimo Tuomela, *The Philosophy of Sociality: The Shared Point of View* (Oxford: Oxford University Press, 2007).

a diversified field peopled not only by individuals but by various actors constituted by people acting collectively, communally, or corporately. I would argue that the debates I have described among theorists such as Tuomela, Margaret Gilbert, and Michael Bratman still tend to be overly individualistic in their assumptions about agency, which, shaped deeply by Kantian thought, are rooted in a model of individual freedom of the will as the source of action. There are various ways in which, in my view, their approach could be enriched.[23] Although Durkheim is sometimes mistakenly cast as positing society as a supra-personal, organic entity, his conception of the *conscience collectif* is in fact a sophisticated medium for exploring sociological dimensions of coordinated action that often escape the notice of analytic philosophers. Inspired by Durkheim's theory of knowledge, Mary Douglas's theory of institutions in *How Institutions Think*, meanwhile, is a useful anthropological corrective to individualistic interpretations of collective intention.[24] Perhaps most critically, the phenomenology of action, especially as developed by Maurice Merleau-Ponty, offers illuminating criticisms of modern assumptions about the free will of the individual *cogito*. It then goes on to present a persuasive alternative picture of how human autonomy is irremediably mediated and relativized by both our embodied nature and by "general intentions" and other shared structures of consciousness.[25]

An understanding of agency alive to the interplay of individual and collective dimensions is essential if we want to make plausible judgments of responsibility with respect to how communal boundaries are constituted. This may be obvious in connection with certain sorts of processes. It is easy to condemn the Rwandan genocide as an immoral, unjust exercise in attempting to redraw boundaries. But who is responsible for it? Responding to such a question engages not only historical and empirical data but understandings of agency. Were the attacks on Tutsis centrally coordinated or spontaneous?[26] What role did the use of

---

[23] Axel Honneth and Hans Joas, *Social Action and Human Nature*, Raymond Mayer, trans. (Cambridge: Cambridge University Press, 1989), is an excellent introduction into this field.

[24] Mary Douglas, *How Institutions Think* (London: Routledge and Kegan Paul, 1987). Her conclusion is that "[f]or better or worse, individuals really do share their thoughts and they do to some extent harmonize their preferences, and they have no other way to make the big decisions except within the scope of institutions they build" (p. 128).

[25] Maurice Merleau-Ponty, *Phenomenology of Perception*, Colin Smith, trans. (London: Routledge & Kegan Paul, 1962), esp. pp. 387–407.

[26] On this point, see Larry May, *Genocide: A Normative Account* (Cambridge: Cambridge University Press, 2010).

media to portray them as inhuman or as "cockroaches" play – who instigated it, how did it prompt action, and how did it inform perceptions of Tutsis as so different that killing them might be readily rationalized?[27] To what degree did the system of identity cards and other trappings of colonialism deepen – or indeed manufacture – divisions between Hutus and Tutsis?[28] To what extent did the indifference of external actors such as the UN or the Catholic Church[29] constitute a sort of culpable negligence or even complicity?

Similar questions could be asked about apartheid policies or institutionalized caste systems, about putatively unjust immigration or naturalization policies, and about other political modes of imposing boundaries. Perhaps less obviously, they can also be asked about symbolic processes propagating chauvinistic modes of nationalism, racism, or other forms of morally questionable social exclusion and hierarchy. In each case, it will be apposite to inquire into the various topics I associated with social agency above. Thus, it will be important to identify central social facts regarding the conditions under which distinctions are made and lines are drawn and to bring to light what possibilities are opened or foreclosed by common knowledge and experience. Likewise, evaluating how communities are defined will turn on grasping the processes by which political will is formed or collective intentions are negotiated and articulated. Finally, the means and modes of joint action through which people construct group identities, delimit membership, and police boundaries must also be investigated and understood.

These descriptive features of agency, of course, must be augmented by normative analysis. Evaluations of responsibility and guilt are underdetermined by references to collective intentions; otherwise, it would be difficult to speak sensibly of denial, complicity, or negligence as irresponsible due to the absence of (explicit) intentionality. Beyond this point, I must leave the matter of relevant norms open here. Filling in such norms is part of the order of the day for a theory of constitutive justice.

---

[27] See Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Ithaca, NY: Cornell University Press, 2006).

[28] See Timothy Longman, "Identity Cards, Ethnic Self-Perception, and Genocide in Rwanda," in Jane Caplan and John Torpey, eds, *Documenting Individual Identity: The Development of State Practices in the Modern World* (Princeton, NJ: Princeton University Press, 2001), pp. 345–58.

[29] On the latter connection, see James Jay Carney, *Rwanda Before the Genocide: Catholic Politics and Ethnic Discourse in the Late Colonial Era* (Oxford: Oxford University Press, 2013).

With a complex picture of the agency involved in the constitution of communities such as I have described, it begins to become possible to ground sensitive judgments about responsibility for the shape of our political and normative landscape. And yet here we bump up against a familiar problem having to do with the recursive relation at the heart of the formation of groups. If various modes of individual and social moral agency are implicated, as I have insisted, in the forging of collectivities, then we might well further ask how the social agents involved, be they groups or associations, are themselves conceived (of) or constituted in the first place.[30] The constitutive question cycles back on itself.

We can make some headway in addressing this problem if we pick up the cue from Rogers Smith regarding the importance of what he calls "stories of peoplehood." As I noted above, Smith seems to sense, but does not develop, the philosophical link between stories and agency. But an estimable body of research has accumulated in recent years that supports a number of links between the human penchant for story-telling and various features of morality and action. These range from the macro-level observation that cosmogonic myths provide the indispensable backdrop or context with respect to which human projects and perceptions of meaning in life are able to make sense,[31] to the micro-level proposition that there is a rudimentary narrative structure to experience that informs how humans structure their sensory perceptions into an ongoing, coherent stream.[32] At intermediate levels, stories may function literarily, in order to capture the warp and woof of complex ethical experience that can in turn school moral perceptions;[33] or etiologically,

---

[30] It would not be nonsensical to ask, too, how individual agents are constituted, if we acknowledge that "the individual" is a historically contingent category and further that, as Derek Parfit has influentially argued (*Reasons and Persons* [Oxford: Clarendon Press, 1984], esp. Part Three), individual identity is philosophically ambiguous.

[31] Robin Lovin and Frank Reynolds, *Cosmogony and Ethical Order: New Studies in Comparative Ethics* (Chicago, IL: University of Chicago Press, 1985); Nancey Murphy and George Ellis, *On the Moral Nature of the Universe: Theology, Cosmology, and Ethics* (Minneapolis: Augsburg Fortress, 1996); and Jerome Bruner, "The Narrative Construction of Reality," *Critical Inquiry* 18.1 (August 1991): 1–21.

[32] The classic essay here is Stephen Crites, "The Narrative Quality of Experience," *Journal of the American Academy of Religion* 39.3 (1971): 291–311.

[33] See, e.g., Martha Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (Oxford: Oxford University Press, 1992); Robert Coles, *The Call of Stories: Teaching and the Moral Imagination* (New York: Houghton Mifflin, 1990); and Wayne Booth, *The Company We Keep: An Ethics of Fiction* (Berkeley, CA: University of California Press, 1988).

as a means of explaining human actions;[34] or biographically, as a foundation for one's sense of the story of one's life or as a skeleton for the structuring of character.[35] Beyond the interlocking links shown here at various levels of existence between stories and the makeup of human actors, a strong case can be made – and has been most compellingly by Paul Ricoeur – that moral agency is essentially a narrative function. To formulate an action is, in Ricoeur's terms, to "emplot" it: to place it within a context, to identify it as emanating from a particular character, and to perceive it as imbued with meaning deriving from broader stories and myths.[36]

Most relevant to our purposes here is the role of stories in constructing and defining the identity of groups, be they nations, states, or religious communities. Communities large and small are inseparable from the histories they propagate about themselves.[37] Indeed, it is difficult to conceive of a group as a historical entity in abstraction from some story that recounts the circumstances under which the group came into being, how it has developed, what distinctive features have come to "characterize" it and set it off from other groups, and what purposes or ends inform its ongoing existence.[38] The details of the story will be contested, and indeed revisions to the story are a primary means via

---

[34] As Alasdair MacIntyre remarks, "Narrative history of a certain kind turns out to be the basic and essential genre for the characterization of human actions;" indeed, he concludes, the human is "essentially a story-telling animal" (*After Virtue*, 2nd ed. (Notre Dame, IN: University of Notre Dame Press, 1984), pp. 208, 216); see also David Carr, *Time, Narrative, and History* (Bloomington, IN: Indiana University Press, 1991).

[35] See Stanley Hauerwas, "The Self as Story: Religion and Morality from the Agent's Perspective," *Journal of Religious Ethics* 1.1 (1973): 73–85; and Iris Murdoch, *The Sovereignty of Good* (London: Routledge & Kegan Paul, 1970).

[36] Paul Ricoeur, *Time and Narrative*, vols. 1–3, Kathleen McLaughlin and David Pellauer, trans. (Chicago, IL: University of Chicago Press, 1984, 1985, 1988); and *Oneself as Another*, Kathleen Blamey, trans. (Chicago, IL: University of Chicago Press, 1992).

[37] Margaret R. Somers, "The Narrative Constitution of Identity: A Relational and Network Approach," *Theory and Society* 23 (1994): 605–49.

[38] Ricoeur describes the "historiographical operation" as the means by which historians participate in a "circle of interpretation" through which they reassess and narrate the story embodied in the "collective memory" of a group. See his *Memory, History, Forgetting*, Kathleen Blamey and David Pellauer, trans. (Chicago, IL: University of Chicago Press, 2004). On the manner in which historical sciences are complemented by literary narratives and other modes such as film and architecture, see Homi K. Bhabha, ed., *Nation and Narration* (London: Routledge, 1990); and Stefan Berger et al., *Narrating the Nation: Representations in History, Media, and the Arts* (New York: Berghahn Books, 2008).

which the consistency and membership of groups change, but that a story or narrative structure exists in the first place is implied by the very claim to identity of the group.

It is an important feature noted by MacIntyre and Ricoeur that no self or group is the sole author of its own story. People, solely or in groups, are born, or form, already with a history.[39] In life, they must coexist with others and interact with one another's narratives. In this sense, they can be at best co-authors, and their stories are a product of mutual, or shared, freedom. Thus "France" (that is, the French nation) enacts its history as a people in conjunction with "Germany" and "England," in a manner analogous to how my personal story – the narrative that binds together the disparate events in my life into a cohesive whole that gives sense and (one hopes) meaning and point to the whole – is bound up with those of my parents, spouse, and children, among others.

Another important feature of stories as a source of identity is that they embody value. They portray as desirable certain virtues and may even make certain maxims or patterns of behavior definitive: in the story of Islam, submission to Allah becomes the hallmark of a Muslim. Indeed, moral principles and criteria, from the Ten Commandments to the Golden Rule and the Categorical Imperative, become intelligible only against the backdrops afforded by the stories that give context to the terms and assumptions that inform them. As a result, we can say that identity-forming stories carry normative content.[40] This content may be viewed by outsiders as idiosyncratic or wrong, and it may be criticized as such, but to have purchase, criticisms will need to find a common context in which they become intelligible.[41]

Now if to be constituted as an agent means to have a story grounding an identity and providing a context for action, then those entities who are eligible for the attribution of responsibility will be storied beings. If we want to determine whom to hold responsible for the atrocities committed in Rwanda, we have to look to the interplay of those actors – neighbors, radio broadcasters, the Interahamwe, the UN Peacekeepers,

---

[39] As MacIntyre concisely puts it (*After Virtue*, p. 221), "I am born with a past."

[40] I leave open here the question of whether there are, or even can be, narrative-independent values that might somehow be appealed to in order to evaluate the normative content embodied in such stories. See, however, my "Ethics and the Narrated Life," *Journal of Religion* 78 (1998): 361–86.

[41] Thus, if criticisms of female genital cutting, capital punishment, or torture practices appeal to human rights standards, they will need to rely on a human story that can effectively claim broad subscription.

and so on – who have been narratively constituted as agents.[42] How they were constituted as agents will likely point us toward additional, prior processes of group constitution and complicate the overall picture. That is unavoidable once we open up our understanding of agency to group actors. Focusing on the significance of narrative for agency does, however, shed some light on how the sort of collective actors who help constitute communities of justice come into being. At the same time, it highlights an important feature of such communities themselves since their identities as communities will also be intertwined with an emerging story, as Smith suggests, that aspires to establish (at least some kinds of) communities as agents.[43]

Benedict Anderson's distinguished account of how nations are constituted as "imagined communities" is instructive here, not only because of its artful descriptions of the myriad stratagems through which the institutions of modern nations and states have been constructed but especially because of its exploration of the importance of communal forms of imagination in contouring communities. Although he notes that any community larger than a village must be established in part by imagining itself, Anderson himself is concerned primarily with the "nationalist imagination," by which he means the imaginative processes that have enabled the formation of large-scale, bounded, sovereign nation-states. He helps show how cartographic representations and museum displays fed into spatial conceptions of nationalism. Only tangentially – when, for example, he remarks that in an earlier era dynastic realms were the only imaginable political systems[44] – does he touch on how the workings of collective imagination are constrained and shaped by horizons bound up with the cultural and technological possibilities of the day.

---

[42] Note that common features or the possession of common interests are not enough to constitute a collection of people into an agent. The class of people with long noses or brown eyes, or the totality of stock owners, do not become an agent until a narrative forms in which they for some reason acquire such features as collective intentionality, collective memory, common knowledge, a political will, etc. For a view that social groups need not acknowledge or be aware of their membership in a social group, however, see Elizabeth Cripps, "Collectivities without Intent," *Journal of Social Philosophy* 42.1 (Spring 2011): 1–20.

[43] For a thought-provoking treatment of how communal narratives help fashion law into a "bridge to the future," see Robert Cover, "The Folktales of Justice: Tales of Jurisdiction," *Capital University Law Review* 14 (1985): 179–203.

[44] Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London: Verso, 1983), p. 19.

Charles Taylor builds on some of Anderson's ideas in his use of the "social imaginary" as a way of characterizing the background understanding or world picture that informs and conditions societies or cultures and their actions.[45] He goes beyond Anderson, though, in developing the rudiments of a social theory about how certain ideas gradually embed themselves, produce institutions and practices, and spread within a population in the form, eventually, of perceptual templates and unexamined assumptions about the world. What is a social imaginary, for Taylor? It is "not a set of ideas" – it is, more basically, "what enables, through making sense of, the practices of a society." More specifically, a social imaginary is a background, an inchoate and implicit orientation in – or of – social space that carries understandings of "how we stand in relationship to one another, how we got where we are, how we relate to other groups."[46] It is, to use a Heideggerian term, a *Vorgriff*, a shared layer of perception that carries with it a repertory of collective actions of which it "makes sense."

Chief among the components of a social imaginary is a conception of normative order which varies from civilization to civilization and can shift significantly over time. In a roughly sketched historiography, Taylor charts the emergence of the "modern social imaginary" operative in the West. In his telling, modernity replaced older imaginaries infused by natural law or cosmic hierarchy with a new landscape that upholds instead the notion of an order of mutual benefit. The modern social imaginary has come to be marked by novel and distinctive social features such as markets, a public sphere, politics, peoples, societies, individuals, and sovereignty. These features, we should note, are not fixed; they can mutate, or dialectically confront radically different or alien conceptions of human relations: to each other, to power, to time, to law, to the land.

The notion of a social imaginary is a useful crystallization of Taylor's abiding concern with the epistemological background to political and ethical reasoning, and it effectively links a social understanding of agency to the political question of how the boundaries and key structures of a social entity or polity are envisioned. Taylor shows how an emergent social imaginary is initially driven, to a great extent, by the ideas of elites, and only subsequently diffused and disseminated among

[45] See Charles Taylor, "Modern Social Imaginaries," *Public Culture* 14.1 (Winter 2002): 91–124; *Modern Social Imaginaries* (Durham, NC: Duke University Press, 2004); and *A Secular Age* (Cambridge, MA: Harvard University Press, 2007), especially pp. 159–211. As I noted above, Taylor's use of the term also owes something to Jacques Lacan, Cornelius Castoriadis, and Bronislaw Baczko.

[46] Taylor, "Modern Social Imaginaries," p. 107.

the masses.[47] Echoing Anderson's point about how the national imagination cultivates selective forgetting with regard to its modern origins, Taylor emphasizes how social imaginaries aspire to a self-evident status that renders their role in shaping political communities invisible. He is less illuminating about the horizontal dimension of social imaginaries. With what scope, and within which cultural and geographical spaces, might they be identified? Taylor recognizes that multiple modernities, as S.N. Eisenstadt describes them,[48] are accompanied by multiple social imaginaries; however, he limits his own investigations to the modern Western social imaginary, leaving open the question of how it might butt up against other social imaginaries and of how they might be distinguished from one another.[49] Nonetheless, his treatment demonstrates the need to take into account how collective and presumptively normative images of the shapes and boundaries of societies and other sorts of communal entities become embedded as horizons of agency that favor certain eventualities while foreclosing others. His conception also draws our attention to the question of whether and how ongoing developments might be opening up prospects for new possibilities, such as regional polities along the lines of the European Union, layered *demoi* as proposed by James Bohman and David Held, or a "clash of civilizations" as imagined by Samuel Huntington.

Theories of constitutive justice, I have argued in this section, are necessarily premised on an understanding of agency: of how humans act in ways for which we may consider them to be morally accountable. Where the topic at issue is the large-scale shaping of communal formations and boundaries, an account of agency must recognize that complex modes of collective and corporate action are involved. As a result, constitutive accounts should incorporate an understanding of social agency that addresses the related phenomena of common knowledge, shared

---

[47] Taylor's work, naturally, focuses on the first stage of this process, and there remains a need for greater examination of the second, crucial phase of dissemination if we are to get a handle on how the conditions of belief mutate in practice. Graham Ward has helpfully pointed to the work of Michel de Certeau as an example for the sort of historiographical approach required here: "History, Belief, and Imagination in Charles Taylor's *A Secular Age*," *Modern Theology* 26.3 (July 2010): 346.

[48] S.N. Eisenstadt, "Multiple Modernities," *Daedalus* 129.1 (2000): 1–29.

[49] This was one of the central problems encountered by Alasdair MacIntyre in his own attempt to theorize about the interplay of "traditions" of rationality and justice in his *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1989).

intentions, and collective responsibility. (Individualist accounts are not ruled out, but they will be at a disadvantage.) I have further suggested that such an understanding will be enriched by attending to the central part of narratives in constituting social actors and the decisive role of social imaginaries in shaping the field of possibilities within which collective constitutive projects work.

An account of the moral agency involved in the constitution of communities must be augmented, naturally, with a more fine-grained view of the actual activities through which the lines around and between communities are drawn: an account, that is, of boundary-making. I now turn to that exercise.

Boundary-making

Alongside an understanding of actors and action (that is, of the *who*), a theory of boundary-making (of the *what* and *how*) is a further essential element for accounts of constitutive justice. Clearly, a *constitutive* approach requires that the theorist attempt to come to terms with how the components of communities of justice come to be hewn or joined and how the physical, social, and intellectual boundaries defining them are made. We may put the relevant question here in this way: How are communities of justice delineated, and by whom? Note that the equivocal character of the question calls for two interrelated sorts of responses. Insofar as it is a *theoretical, definitional* question, it calls for an exercise in *conceptual clarification*. Viewed as a *practical, empirical* query, it demands a *social analysis*. Both kinds of reflection yield important preconditions for ethical reasoning about the justice of boundaries.

The conceptual side of a theory of boundary-making addresses a characteristic set of issues surrounding the notions of boundaries and community employed in arguments about constitutive justice. To get a handle on the notion of boundary-making, it is useful to begin by noting some generic features of boundaries. Boundaries (or bounds or borders) are in the first place markers for the limits of entities or objects. They can mark either the extremities of a given object (the edge or the horizon), in which case we speak of "*boundaries-of*," or a divide (a border) between two like objects, for which we say, rather, "*boundaries-between*."[50] In either case, they are directional and perspectival,

[50] For an intriguing alternate theory asserting that boundaries are not dependent on entities but rather come together to constitute entities, see Andrew Abbott, "Things of Boundaries," *Social Research* 62.4 (Winter 1995): 857–82.

indicating inner and outer realms from the standpoint of an insider. Boundaries may be unilaterally organized (like the edges of a circle in an undifferentiated field) or dialectically set to separate entities or to divide fields (as with Mercatorial borders); but in either case, they embody a mediation between what is in and what is not-in. With respect to additional objects within or outside of the entities in question, boundaries can be said to include or exclude. Boundaries can be experienced as natural or given (the shore of an island or the skin of an orange[51]) or, in a plethora of ways, subject to human perception and agency (the edges of a cornfield or the sidelines on a football pitch). Inasmuch as boundaries are not taken to be givens, they can take on or embed purposes: to divide, to define, to enclose, to exclude, to protect, or to constrain. These functions will be important when it comes to evaluating or modifying boundaries.

Among the many other prospective qualities that we might identify, a couple of features relevant to our inquiry here have to do with the *consistency* of boundaries. Boundaries can be sharply delineated (a city limit) or fuzzy (the edge of a mountain range). And they can be "closed" or "open," that is, impermeable or porous, susceptible of flows from one field to another: we say, for example, that money or goods or information or migrants flow(s) across political borders.

As spatial conceptions, plural boundaries can be related to one another in a variety of ways. They can be, that is, crosscutting, or concentric, or hierarchical. Such different models open up human possibilities when it comes to judgments about how it might be just to draw lines impinging on human relationships.

I have been speaking so far of boundaries primarily as features of space, place, and landscape.[52] This is already to think of boundaries not only in sheerly physical terms but in terms of how persons humanize their environs – that is, socio-spatially. The thrust of this book, however, extends this trajectory to an examination of the boundaries of social

[51] Note, however, that even such "natural" objects can come to be modified as human powers expand to the point at which, for example, island shorelines are reconfigured by rising sea levels induced by anthropogenic climate change or the qualities of orange skins are altered through genetic engineering.

[52] Debates about the proper understandings of space and place are involved and complex. Perhaps the most influential text on the distinction is Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (Minneapolis, MN: University of Minnesota Press, 1977). I refer to place as implying a phenomenological appropriation of a site in space that thereby relates it to human purposes. On the links between space, place, and moral agency, see Robert Sack, *Homo Geographicus* (Baltimore, MD: Johns Hopkins University Press, 1997).

groups of various sorts: communities, societies, states, nations, ethnic groups, races, religions, and so on. To associate boundaries with groups of people is to employ a metaphor or to employ an abstraction from the physical boundaries that can mark the limits of objects. To do so is to wander into the modern fields of sociology and especially human geography, and these literatures consequently become important sources of theoretical insight in considerations of constitutive justice.[53]

Introducing humans into the equation and speaking of group markers adds some additional conceptual features to our discussion of boundaries. Groups may be, and often have been, defined by spatial lines, but they can also be delineated by other markers of cohesion: blood, language, phenotype, creed, and so on. It has become a commonplace in boundary studies to think of boundaries not as static features but as *processes* of differentiation. Where groups of people are the objects encompassed or set off by boundaries, a "we/us" and a "they/them" are created: outsiders become "Others," with the range of possible philosophical implications this term evokes. As this last point suggests, an asymmetry tends to be built into boundaries, whereby "insiders" have more to say than "outsiders" about the lines of demarcation; this asymmetry then becomes compounded when the "insiders" on one side of a boundary exercise greater power in relation to a set of "outsiders" than the latter, as "insiders" on their side of the boundary, exercise with respect to the former as "outsiders." A further asymmetry concerns the relation between a social entity's external boundaries and its internal divisions.[54] Lines of demarcation and even the basis of belonging in a particular bounded group can be rooted in mentalities: thus, we become able to

[53] David Harvey has argued powerfully for the need to integrate geographical knowledge into philosophy and social theory: see his *Cosmopolitanism and the Geographies of Freedom* (New York: Columbia University Press, 2009). See also Stuart Corbridge, "Marxisms, Modernities, and Moralities: Development Praxis and the Claims of Distant Strangers" *Environment and Planning D* 11.4 (1993): 449–72; David M. Smith, *Moral Geographies* (Edinburgh: Edinburgh University Press, 2000); and David M. Smith, *Geography and Social Justice: Social Justice in a Changing World* (London: Wiley-Blackwell, 1994). For an excellent bibliographical discussion of several intersections between geographical inquiry and justice, see Alex Jeffrey, "Geography of Justice," *Oxford Bibliographies* (online) at http://www.oxfordbibliographies.com/view/document/obo-9780199874002/obo-9780199874002–0055.xml.

[54] In trying to cope with this issue, Ian Shapiro and Casiano Hacker-Cordón come up with the odd and decidedly uncomfortable-sounding designation of "outer" and "inner edges" of democracy. Shapiro and Hacker-Cordón, eds, *Democracy's Edges* (Cambridge: Cambridge University Press, 1999).

speak of "imagined communities." A social boundary will always have a symbolic or representational component, and generally, as Charles Tilly has pointed out, it will have a narrative attached to it, on both sides.[55]

As I suggested in Chapter 1, the discourse of justice has been deeply informed in recent decades (for example, for Rawls and his interlocutors) by the modern social imaginary, which posits a world in which boundaries set apart nation-states that are territorial; that are constituted of defined, exclusive citizenries; and that correspond with discrete moral and legal regimes of justice.[56] The nation-state has thus been envisaged as a self-contained and clearly demarcated community of justice. Under the weight both of criticisms of this rather simplistic view and of ongoing developments broadly related to the notion of globalization, these elements – territory, membership, and normative orders – have more recently shown signs of becoming disaggregated. We see this in discussions of "postnational citizenship" – the notion that especially contemporary "social citizenship" has become detached from traditional states and nations[57] – as well as in debates about cosmopolitan democracy or "global cities."[58]

In a global scene in which boundaries are thus becoming unbundled and proliferating, some additional wrinkles have complicated the concept of social boundaries. As Saskia Sassen has pointed out in her influential work on globalization, for instance, territorial boundaries no longer delineate domains of absolute sovereignty, as the authority of states has become less exclusive than it once was through the strengthening of various international regimes and transnational actors. Moreover, there is a sense in which national borders have evolved from spatial lines and

---

[55] Charles Tilly, *Identities, Boundaries, and Social Ties* (London: Paradigm Publishers, 2005), p. 134. See also Sarah Green, "A Sense of Border: The Story So Far," in *The Blackwell Companion to Border Studies*, Thomas M. Wilson and Hastings Donnan, eds (Oxford: Blackwell, 2012), pp. 573–92.

[56] Derek Gregory, in *Imagined Geographies* (Cambridge, MA: Blackwell, 1994), pp. 34–37, argues suggestively but without great rigor that a nineteenth-century "colonizing" mentality played a similar role in picturing or, in Heidegger's sense, "enframing" the world in a modern optic that was hierarchical and emphasized the gap between center and margin.

[57] See, e.g., Yasemin Nuhoglu Soysal, *The Limits of Citizenship: Migrants and Postnational Citizenship in Europe* (Chicago, IL: University of Chicago Press, 1994); and Linda Bosniak, *The Alien and the Citizen: Dilemmas of Contemporary Membership* (Princeton, NJ: Princeton University Press, 2006).

[58] On the latter, see Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton, NJ: Princeton University Press, 1991).

become embedded in persons or products. At the same time, boundaries have undergone a sort of pluralization, so that "there are multiple locations for the border, whether inside firms or in long transnational chains of locations that can move deep inside national territorial and institutional domains."[59] According to one view, spatial boundaries are in the process of being replaced by the networks conditioning relations of inner and outer in social, economic, and political realms.[60]

It is worth reflecting, finally, on the power that is involved in conceptualizing boundaries.[61] Those who wield this power shape intellectual discourse in vital ways. As Sassen has argued, state-centric interpretations of political space have dominated and, she suggests, distorted the major models employed in modern social science. Part of the task of conceptual analysis related to boundary-making is to attend to the manner in which contending accounts of appropriate boundaries, and indeed one's own theory, themselves engage in intellectual boundary-making. Even more importantly, the capacity to define reigning conceptions of boundaries can help shape realities in the political world. For example, depending on the extent to which they cover and mesh with existing mechanisms for the distribution or redistribution of goods, the boundaries that become privileged in political discourse can exercise a deep impact on debates about distributive justice. Or, boundaries once

---

[59] Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton, NJ: Princeton University Press, 2006), p. 416.

[60] Ash Amin, "Regions Unbound: Towards a New Politics of Place," *Geografiska Annaler* 86 B.1 (2004): 33–44.

[61] Here a central problem arises in the form of the epistemic privilege commonly enjoyed by existing members of a community. This privilege, rooted in asymmetries between membership and nonmembership as well as in the otherness of the excluded, tends to result in the assignment of greater weight to the perspectives of insiders vis-à-vis outsiders when boundaries are contested with respect to their justness. In response to this situation, there is, I believe, a need to help compensate for the exclusion of the other – in a manner that goes beyond simply recognizing the constitutive role of otherness or difference in the establishment of communal boundaries. My considered view is that some strategy of preliminary inclusiveness would be appropriate to help set the burden of proof in cases of contested boundaries. This might take the form of incorporating an assumption of putative membership, or treating liminal cases as potentially belonging, or extending membership on ad hoc, provisional terms. For some proposals along these lines, see Jean Cohen, "Changing Paradigms of Citizenship and the Exclusiveness of the *Demos*," *International Sociology* 14 (1999): 245–68, at 261; and Alessandro Ferrara, "Two Notions of Humanity and the Judgment Argument for Human Rights," *Political Theory* 31 (2003): 392–420. I return to this point in the concluding chapter (Chapter 7) below.

defined and endorsed can become self-fulfilling, whether it be in the declaration of a new state or the propagation of a geopolitical idea such as the "clash of civilizations." Conceptions of bounded communities can at once both reflect and inform history.

To see how bounded communities can fulfill different roles based on how their central characteristics and boundaries are conceptualized, one need only cast an eye at the career of Smith's central trope, the notion of a "people." This notion has been linked with quite different constructions of boundaries and community as it has proceeded from its ancient Hellenistic association with the *demos* of democracy, through its medieval conceptualization in the *jus gentium*, to the Wilsonian formulation of the principle of self-determination of peoples (*ethnie*), and then to John Rawls's recent rearticulation of the law of peoples.[62] In the days surrounding the collapse of the Berlin Wall, when the chant of the German crowds migrated tellingly from the democratic mantra "we are the people" ("*Wir sind das Volk*") to the nationalistic slogan "we are one people" ("*Wir sind ein Volk*"), the purpose was to exchange boundaries, from East-German to All-German.

The sort of *conceptual* analysis of boundaries I have outlined here should be guided by this question: what aspects of existing or possible boundaries conduce to posing questions about justice? This question is further refined once we attend in a more applied, *empirical* vein to the specific means and processes through which social boundaries are fashioned in practice. The historical and contextual character of conceptions of communities underlines the importance of a social analysis in any portrayal of boundary-making. Some working notion of how, in practice, communal boundaries of different sorts tend to form and develop over time is requisite for any attempt to formulate criteria for evaluative judgments about them. Which aspects of boundaries are impervious to human agency, and which are amenable to it – and in which ways? What aspects of boundary-making are driven by power relations, or by economic interests, or by deep-seated psychological or evolutionary processes dealing with a need to differentiate between insiders and outsiders or the self and the other? (In other words, how do causes, motives, and reasons interact here?) And how are various means – ranging from naked force to laws and social norms to other symbolic forms of interaction – used to establish and perpetuate boundaries in practice?

---

[62] On the relation between nation and people in modern politics, see Bernard Yack, "Popular Sovereignty and Nationalism," *Political Theory* 29.4 (2001): 517–36.

Questions such as these have fueled the emergence of an interdisciplinary field of boundary or border studies that draws on perspectives from sociology, anthropology, political science, psychology, history, and media studies. A social analysis of boundary-making starts by mustering the menu of modern mechanisms through which social lines are instantiated and modified.

A useful basis for providing a résumé of techniques for social boundary-making is provided by Charles Tilly, who has condensed his insights from a career of tracing boundaries into an analytic description of "social boundary mechanisms."[63] He distinguishes between modes that *precipitate* boundary change and those that *constitute* it. Boundaries can emerge or be changed in response, naturally enough, to encounters between previously separate groups or networks in a shared space. They can also be imposed or altered by authorities in a position to draw lines by fiat, "distinguishing citizens from noncitizens, landowners from other users of the land, or genuine Christians from insufficiently pious persons."[64] Existing lines of demarcation are also frequently borrowed and extended to like cases in new locations; as Tilly notes, this mechanism frequently reproduces or compounds inequalities as, for example, racial, gender, or class divides in one setting – in schools, say, or military branches – are exported to another.[65] Another widespread modus for revising boundaries is through conversation: symbolic exchanges of information that can incrementally shift, for good or ill, representations of the (national, or sexed, or racial) other. Finally, there is a sort of economy of boundaries in which shifting incentives for respecting or subverting boundaries can produce change: here Tilly provides the example of how the Berlin Wall was breached and collapsed once certain disincentives for East Germans were replaced by incentives to cross the border.

Boundaries can be intensified or weakened by actions or processes that shift the relations among or between the groups on either side or alter their representations or narratives about the boundary. Likewise, boundaries can be made more salient or, conversely, deactivated in relation to other sorts of boundaries, as when "social citizenship" increases in importance relative to traditional national citizenship or when, say, a wealthy African American professional expresses solidarity with (or is assimilated by outsiders to) the black underclass, thus rendering his or

[63] Charles Tilly, "Social Boundary Mechanisms," *Philosophy of the Social Sciences* 34.2 (2004): 211–36.
[64] Tilly, "Social Boundary Mechanisms," p. 218.
[65] Ibid., p. 219.

her socioeconomic class moot. A further mechanism can resituate persons with respect to boundaries – for example, in cases of religious conversion or rites of passage, naturalization, racial passing, or sexual reassignment surgery: such transfers can have the effect of reinforcing boundaries. In addition to such cases that involve individuals, entire groups can be reassigned. In a sense, the curious hodgepodge of racial and ethnic identities listed on U.S. census forms (Hispanic/Latino/Spanish – White – Black/African American/Negro – American Indian/Alaska Native – Asian Indian – Chinese – Filipino – Japanese – Korean – Vietnamese – Other Asian – Native Hawaiian – Guamanian/Chamorro – Samoan – Other Pacific Islander – Some other race) is an encapsulation of the history of such boundary negotiations.[66] Finally, the overall ecology of boundaries can be reorganized in ways that ensconce one or more boundaries as decisive in shaping social interactions. This was the case, for example, when the Nazis' racial policies reconstituted some Germans, suddenly, as Jews, overriding their own self-understandings; or when the U.S. reorganized its racial practice around a one-drop rule in the nineteenth and early twentieth centuries, in the process sublating prevalent conceptions of racial differences among whites into an overarching system of biracialism.[67]

With this framework in place, we can begin identifying some broad genres of boundary-making. As I suggested above, contemporary developments have highlighted the distinction between boundaries associated with *territorial control and sovereignty*, those associated with *peoplehood and national identity*, and those associated with *normative orders and civic belonging*.[68] The parlance of social historians has often distinguished between the processes of "state-building" and "nation-building" with respect to the first two categories. State-building refers to the process of creating a spatially distinct set of institutions uniting a particular territory under the control of a unified authority: in addition to the drawing of fortified and controlled borders, it tends to involve the establishment of a national economy, a policed legal system, taxation and the redistribution of resources, a system for cataloging and surveilling residents, a military, and various other trappings of modern states. By contrast, *nation*-building encompasses processes that build up the collective identities of

[66] These categories, from the 2010 census, remain the object of study and ongoing revision. See the U.S. Census Bureau's "Overview of Race and Hispanic Origin: 2010," at http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

[67] On the latter history, see, e.g., Matthew Pratt Guterl, *The Color of Race in America, 1900–1940* (Cambridge, MA: Harvard University Press, 2002).

[68] Compare this with Saskia Sassen's theses regarding the three categories of territory, authority, and rights: Sassen, *Territory, Authority, Rights*.

groups united by a common language, history, genetic heritage, culture, or comparable set of distinguishing characteristics: there is, notoriously, no simple set of features that defines nations across the board.[69] Even so, because nations tend to rely heavily on fellow feeling and shared symbolic worlds, the sorts of means commonly thought to belong to the toolkit of nation-building include histories, stories, mythologies, languages and literatures, rituals and dress, music, and a range of other symbols and practices that set the group apart from others.[70] Where a nation is ensconced in a state, additional nation-building tactics may involve the standardization of language and history as well as the adoption of flags, anthems, holidays, and other official markers of identity – even a civic religion. To these terms an additional process should be added that corresponds with the production of normative orders, a process which I have termed "*civitas*-building." This denotes the construction of a normative political community or *demos* or *Staatsvolk* that may or may not correspond to a nation or be coextensive with a state, and it is achieved through the legal and discursive negotiation of inclusion in full citizenship in a polity.[71]

Additional genres of boundary-making are attached to those other large-scale groups or identities that shape the lives and fortunes of people in modern societies.[72] Religious traditions are likely the most significant of these. They are, on the one hand, overarching symbolic

---

[69] There is a vociferous debate among historians of nationalism over the extent to which nations are essentially modern inventions (see, e.g., Ernest Gellner, *Nations and Nationalism* (Oxford: Basil Blackwell, 1983); and Eric Hobsbawm and Terence Ranger, eds. *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983)) or simply present-day modifications of considerably older ethnic groupings (John Armstrong, *Nations Before Nationalism* (Chapel Hill, NC: University of North Carolina Press, 1982); Anthony Smith, *The Ethnic Origins of Nations* (Oxford: Blackwell, 1986)). Since both sides acknowledge that nations evince a substantial degree of social and political construction, resolving that particular debate is immaterial to my purposes here.

[70] As Bernard Yack remarks, one of the intriguing aspects of the selective history that goes into nation-building is that "there is a sense in which we choose our national ancestors." As he adds, "[t]he identification and commemoration of individuals and groups as national ancestors encourages us, anachronistically, to impute to them our own sense of national community." Bernard Yack, *Nationalism and the Moral Psychology of Community* (Chicago, IL: University of Chicago Press, 2012), pp. 87–88.

[71] Barbieri, *Ethics of Citizenship*, chap. 1.

[72] For a quite nuanced overview, see Harrison C. White, *Identity and Control: How Social Formations Emerge*, 2nd ed. (Princeton, NJ: Princeton University Press, 2008).

structures that themselves divide the world and its populations in various ways: thus, for example, Islam has distinguished between the Muslim commonwealth or *umma*, the People of the Book (which includes Jews and Christians), and *kafirs* – those without belief – while Confucianism traditionally posited a divide between the *zhu xia* – the civilized peoples of the center – and the barbarians who inhabit the four corners of continent and beyond.[73] But even as religions collectively define their own memberships, they are also subject to boundary-making by other powers. Liberal states consign them to the private sphere; other potentates create national churches; and scholars of religion impose categories and definitions that inform the meaning of religious identity: thus, Islam and Confucianism are reshaped through the encounter with colonialism.[74] Much has been written in recent years about the construction of gender, where ideas about masculinity and femininity vary significantly by culture; and, increasingly, much has been written about the production of the sexes and sexual orientation. Likewise, racial classifications – which can vary immensely from country to country – have garnered scrutiny that has illuminated the complex system of cultural coding, latent assumptions, and structural inequalities that supports the "peculiar institution" of race.[75] Similarly, senses of ethnic identity are produced and shaped largely by state-societal dynamics bound up with minority politics.[76]

A crucial feature of all of these types of boundary-making is their penchant for naturalizing themselves and disguising the artifice and agency they involve. Races trade on their connection to phenotypical differences to present themselves as biological substrates of human existence. Nations frequently portray themselves as essentially primordial. Religions can carry the additional cachet of being linked to a supernatural

---

[73] Miller and Hashmi, *Boundaries and Justice*, pp. 95, 103, 106, 210. Religions' self-definitions can clash with those of the state. On the impact of government policies on religious boundaries in multicultural societies such as Canada and Israel, see Rene Provost, ed., *Mapping the Legal Boundaries of Belonging: Religion and Multiculturalism from Israel to Canada* (Oxford: Oxford University Press, 2014).

[74] Edward Said, *Orientalism* (New York: Pantheon, 1978); Lionel M. Jensen, *Manufacturing Confucianism: Chinese Traditions and Universal Civilization* (Durham, NC: Duke University Press, 1997).

[75] See Geoffrey C. Bowker and Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (Cambridge, MA: MIT Press, 1999), pp. 195–226.

[76] See, for example, Florin Curta, ed., *Borders, Boundaries and Ethnogenesis: Frontiers in Late Antiquity and the Middle Ages* (Washington, DC: Brepols Publishers, 2006).

or eternal order or of having a divine provenance. Territorial borders quickly become reified or take on ontological weight. The effect of such beliefs is to insulate these identities and their boundaries by deflecting attention from the role of human agency in producing them and the possibilities of human agency in altering them.

Another noteworthy feature of the boundary-making genres I have canvassed is that they integrate numerous *kinds* of actions, both material and symbolic. A menu of material means of boundary-making would run from military conquest, ethnic cleansing, and the building of physical barriers; to migration, identity cards, visas and border controls; the extension of laws and coercive structures of enforcement; taxes, tariffs and market restrictions; segregation and legal discrimination; secessionist or irredentist campaigns; population and eugenics policies; circumcision and other modes of bodily marking; and limits on technology, communications, and mobility. The toolkit for symbolic line drawing is similarly robust, and it includes writing history; a passel of human sciences; standardization of language; loyalty oaths and pledges of allegiance; socialization through education; the discursive reinforcement of boundaries in literature, popular culture, and other media; memorialization and sacred structures; holidays and rituals; and propaganda and the propagation of stereotypes and *Feindbilder*. These diverse means can be readily combined; in addition, their effects readily ramify at deeper levels of social agency. Thus, national, racial, or ethnic boundaries or territorial borders can become reinforced by structural inequalities and power differentials or become connected to fears and antipathies through cultural codings and the workings of cultural memory.[77]

In a field riven with divides associated with race, ethnicity, and ideology, it is perhaps the nation that provides the most accessible illustration of the sociohistorical dimensions of boundary-making. This circumstance is not only because of the ever-increasing treasury of scholarship on nationalism but because the nation usefully combines (some would say blurs) the political and moral dimensions of community. Nations emerge into definition through complex negotiations of language and dialect, through territorial proximity and kinship ties, through the cultivation of common symbols and stories, through the manipulation of images of other nations or barbarians, and through shared tribulations

[77] Jan and Aleida Assmann, *Schrift und Gedächtnis: Beiträge zur Archäologie der literarischen Kommunikation*. (München: Fink, 1987); Aleida Assmann and Linda Shortt, eds, *Memory and Political Change* (London: Palgrave Macmillan, 2011).

and triumphs. Exodus and occupation can make or break them. Nations rely on oppositional processes of differentiation from other competing nations in order to identify and build up their central characterizing traits. Significantly, elites usually play a disproportionate role in the crafting of national identity. The borders of nations may be ragged and porous if left untended, or they may be razor-sharp if cultivated from within – or imposed from without. If nations succeed in taking on the trappings of a state, then the tools of state-building – taxation, tariffs, conscription, passports, and border controls – are used to augment the more discursive techniques of nation-building and produce a much more structured set of boundaries conditioned in part by encompassing norms of international order.[78] If the nation is regarded as a community of justice, then judgments about how it ought to be constituted need to take into account the complexity of the processes through which nations are formed.

Justice and injustice

The historical struggles through which our conceptions of peoples and nations have been forged alert us to a final important component of a theory of constitutive justice: accounts of agency and boundary-making must be conjoined with at least a rudimentary understanding of the character and workings of justice and injustice. Only thus can a particular account of how boundaries are forged and by whom issue into a judgment of whether and why those boundaries are morally proper or problematic; only thus can an account of boundary-making become a *social critique*. A stance on the dynamics of justice, furthermore, is essential for the task of formulating means of redress.

What does a conception of justice entail here? As I have noted is the case with boundary-making, an account of justice has both a conceptual and a practical side to it. On what *theoretical* grounds do claims of justice rest? What discursive territory do they occupy; that is, how are they related to other ethical terms, and what is their grammar? What hermeneutical rules or guidelines apply to claims about just or unjust cases of exclusion or inclusion? These sorts of questions will inform how theories of constitutive justice frame questions about the rightness and

[78] For a study that analyzes how the global state system and international relations interact with nation-building, see Harris Mylonas, *The Politics of Nation-Building: Making Co-Nationals, Refugees, and Minorities* (Cambridge: Cambridge University Press, 2012).

wrongness of boundaries and how to resolve them. This framing function, we would be remiss not to note, carries with it the possibility of misframing, to invoke Nancy Fraser's term, or of hermeneutical injustice, to use Miranda Fricker's, and it is thus itself a topic of constitutive justice.[79] On the practical side, further queries confront us: How, empirically speaking, do claims of justice arise? Which matters of justice are most pressing? What resources are at our disposal to address them?

My primary point here is the analytical one that some combined theoretical and practical understanding of justice will be a central element for any systematic attempt to articulate ethical criteria for assessing whether any given boundaries are just or not. The specifics of such an understanding can be expected to vary significantly, and that is likely as it should be. Nonetheless, I do want to propose a further point here, namely that at least when it comes to constitutive questions, in important respects injustice should be viewed as prior to justice, both practically and theoretically. As I will further argue, this point has further implications for the directions that theories of constitutive justice might fruitfully take.

To assert the priority of injustice is to counter a widely shared conception about the relation between justice and injustice. The prefix attached to injustice implies that it is simply a negation of justice and that its meaning is therefore dependent on justice. It would seem to follow as well that to get a grasp of what constitutes injustice, one would be required logically to draw on some prior, reasonably well-defined conception of justice. Moreover, it would seem that in practice, having an understanding of justice should necessarily precede being able to identify an occurrence or state of affairs as unjust.

But none of these inferences is necessarily true. For one thing, the scope of "injustice" need not be defined by everything that is *not justice*: it is quite possible that many or most things are neither just nor unjust, because moral terms do not apply to them or they are ethically neutral.[80] Additionally, the etymologies of words can be misleading, and there is no semantic requirement that stipulates that words with a negating element cannot refer to positive states of affairs. What would it mean to be "combobulated"? Since that word is not in usage, we would have to

[79] Nancy Fraser, "Reframing Justice in a Globalizing World," *New Left Review* 36 (2005): 1–19; Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford: Oxford University Press, 2007), pp. 147–77.

[80] On this point, see R.E. Ewin, "On Justice and Injustice," *Mind* 79.314 (1970): 200–216; and Eric Heinze, *The Concept of Injustice* (London: Routledge, 2013).

infer its meaning from "discombobulated." For Gandhi, "*ahimsa*" – the negation of *himsa*, harm – was, he insisted, a law of love: *himsa*, accordingly, was constituted as a violation of this law.[81] According to the *OED*, "couth" came into usage over the last century or so only as a "deliberate antonym of uncouth." Note, too, that injustice has, in addition to its abstract sense – and unlike justice – a discrete, concrete meaning, so that we can speak of doing someone an injustice (but not "a justice," although, contrariwise, a person can *be* "a justice" yet not "an injustice"). It is, as a consequence, certainly conceivable that injustice might signify a state of affairs to some extent independent of justice, or that justice and injustice might be dialectically interrelated and co-constituting, or that justice might be derivative of or extrapolated from the more immediate and affective domain of injustice. Even if one viewed the meaning of injustice as parasitic upon that of justice, it would be quite possible to think of the latter meaning of justice as accessible only indirectly, through a sort of *via negativa* provided by experiences of injustice.[82]

The notion that justice is dependent on injustice and not the other way around has had its expositors. When Hobbes wrote, for example, that "the definition of injustice is no other than the not performance of covenant, and whatsoever is not unjust, is just," he defined justice as a remainder concept pinned to a comparatively narrow conception of injustice.[83] Elaine Scarry has reasoned that injustice is tantamount in meaning to injury and that a just and peaceful world would be one marked by the absence of injuring power from the world: justice is constructed here as a double negative.[84] Richard Bernstein has argued from the standpoint of critical theory that justice is properly enacted as a practical, "emphatic" affair, revolving around political struggles to eliminate injustice, while Amartya Sen maintains similarly that addressing injustices can and should be done without referring to an overarching theory of justice for orientation.[85]

---

[81] Raymond B. Marcin, "Gandhi and Justice," *Logos* 7.3 (2004): 17–30.

[82] Bernard Yack suggests this as one possible interpretation of Judith Shklar's argument for putting injustice first. See his "Putting Injustice First: An Alternative Approach to Liberal Pluralism," *Social Research* 66.4 (Winter 1999): 1103–1120.

[83] *Leviathan* 15, 1–2.

[84] Elaine Scarry, *On Beauty and Being Just* (Princeton, NJ: Princeton University Press, 1999).

[85] Amartya Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009).

I suggest that injustice may be fruitfully regarded as taking precedence over justice, in a number of ways. It is likely not terribly controversial to say, to begin with, that practically, claims of injustice precede the establishment of formal institutions of justice and, indeed, the identification of systems of laws as embodiments of "justice." This is certainly the case if we look, for example, at the modern history of human rights, the conception at the core of most cosmopolitan theories of justice. Since the codification of a basic set of human rights that emerged from the political struggles of the eighteenth, nineteenth, and early twentieth centuries in the Universal Declaration of Human Rights, as Philip Alston points out, new putative rights have continued to emerge. These claims, including so-called Third Generation rights, are predictable responses to evolving cultural understandings and changing social and technological conditions, and they are not declared by UN authorities as logical requirements of human dignity; rather, they arise as social movements that aim to procure remedies for perceived injustices. These rights-claims need not all be thought to be equally valid, and indeed how an authority such as the UN might practice "quality control" is the problem Alston addresses.[86] At the same time, there is no reason to think that all those who encounter injustice are in a position to take action against it, since one effect of persistent ill-use is to deprive victims of a voice.[87] My point here is simply that the process of modifying our picture of the requirements of justice is often, if not always, driven by the sort of experiences of harm or exploitation or oppression – in short, wrongful treatment – that generate rights claims in the first place.[88] And this points to an asymmetry, explaining why, as D.D. Raphael points out, "[h]armful action" – in other words, injustice – "is a more basic concern for justice and morality in general than is beneficial action; that is why a primordial code like the Ten Commandments gives prominence to prohibitions and why the Golden Rule first appears in its negative form, 'Do not unto others what you would not wish to be done unto you.'"[89]

---

[86] Philip Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control," *American Journal of International Law* 78 (1984): 607–621.

[87] Pierre Bourdieu et al., *The Weight of the World: Social Suffering in Contemporary Society*, Priscilla Parkhurst Ferguson, trans. (Stanford, CA: Stanford University Press, 2000).

[88] Iris Marion Young, "Five Faces of Oppression," in Lisa Heldke and Peg O'Connor, eds, *Oppression, Privilege, and Resistance* (Boston, MA: McGraw-Hill, 2004).

[89] D.D. Raphael, *Concepts of Justice* (Oxford: Clarendon Press, 2001), p. 243.

This suggests a second point: injustice is prior to justice in an epistemological sense. We know justice through our experience of injustice. Axel Honneth is one of the comparatively few thinkers who have produced a phenomenological study of the processes through which experiences of various harms organize feelings of shame, anger, and indignation into perceptions of disrespect and injustice.[90] Honneth shows how movements for social justice emerge as responses to widely shared perceptions of injustice that arise when the lower classes, unschooled in philosophical or academic categories for articulating moral experiences, respond in ways that are "not motivated by positively formulated moral principles" but are rather responses to violations of intuitive expectations of respect.[91] Now, it is true that pain or damage is not in itself *harm*, that is, *wrongful* suffering at the hands of another. Phenomenologically, hurts or ills must be experienced (1) as occasioned by human agency before they can be distinguished from misfortunes or accidents[92] and then (2) as contravening how we apprehend that we ought to have been treated before they become, further, identifiable as injustices. But our implicit, rudimentary sense of what is our due stands out, and becomes refined, primarily through its breach. The wisdom of a positive grasp of justice – of what is right – is built, at least in part, on the experience of being wronged.

We can see this relation as informing, too, the Aristotelian theory of justice as a mean. After all, a mean is defined not positively but negatively, as a midpoint triangulated between two extremes; it is hence dependent on those extremes or vices in a way that is not reciprocal. In the case of particular justice, moreover, a primary vice is identified as crucial to locating justice, namely *pleonexia* – the vice of "grasping for more," or seeking to take more of the good than is one's proper share. (Aristotle allows, rather less vociferously, the proposition that taking less

---

[90] Axel Honneth, *Disrespect: The Normative Foundations of Critical Theory* (Cambridge: Polity Press, 2007). Honneth draws in part on the earlier but somewhat dogmatic treatment of this theme by the social historian Barrington Moore, *Injustice: The Social Bases of Obedience and Revolt* (White Plains, NY: M.E. Sharpe, 1978). The past few decades have also produced a literature on justice research in psychology which likewise examines the phenomenological links between disrespect, injustice, and anger: for an overview, see Dale T. Miller, "Disrespect and the Experience of Injustice," *Annual Review of Psychology* 52 (February 2001): 527–53.

[91] Honneth, *Disrespect*, p. 71.

[92] Distinguishing injustices from mistakes is the task at the center of Judith Shklar's well-known *The Faces of Injustice* (New Haven, CT: Yale University Press, 1990).

than one's share can also be unjust).[93] It is the injustice of greediness, in short, that provides the backdrop necessary for recognizing what is just.

I do not mean to imply here that justice may be thought of as wholly dependent on some prior grasp of injustice. Indeed, I think it is much more plausible that justice and injustice inform and define one another mutually through some sort of dialectical relation.[94] My contention, rather, is that inasmuch as there is an empirical component to our knowledge of and thinking about justice, it is more likely to be traceable initially to feelings of wrongness and injustice than to some independently accessible idea of what is just.

There is a further sense, finally, in which we might posit the precedence of injustice – namely, in terms of its logical priority vis-à-vis the idea of justice. The question of how justice and injustice should be defined – whether they are opposites, inseparable from one another, or even one – stretches back at least to the opposing discourses of Anaximander and Heraclitus. Elizabeth Wolgast has provided an influential modern version of the view that injustice provides the basis for the idea of justice and not the other way around.[95] It is illusory, in her view, to think that justice reliably points to some static, "logically prior, harmonious state of affairs," from which injustice digresses.[96] She argues, for example, that the image of justice as involving a scale that can be brought back into balance is misguided because measures taken to attain retribution for a wrong, such as punishment, cannot undo the wrong: it simply "becomes a permanent part of the universe."[97] How, then, should we think of justice? Wolgast notes, further, that where injustice is a sharp

---

[93] Aristotle, *Nicomachean Ethics*, Robert Bartlett and Susan Collins, trans. (Chicago, IL: University of Chicago Press, 2011), Book V, chaps 1, 2, and 9; also p. 309.

[94] William Connolly's observation on the ex post facto character of justice is interesting here. In *The Ethos of Pluralization* (Minneapolis, MN: University of Minnesota Press, 1995), he muses on how the dialectic through which conceptions of justice are revised "always functions best as a retrospective description of movements that have already migrated from a place under-justice to a place on the register of justice/injustice." In his account, justice itself depends upon cultivation of an ethos of critical responsiveness to difference that exceeds it (p. 186).

[95] Elizabeth Wolgast, *The Grammar of Justice* (Ithaca, NY: Cornell University Press, 1987). For an argument that "the concept of injustice wears the trousers, so that any satisfactory account of justice must be a negative account," see Ewin, "On Justice and Injustice," p. 202.

[96] Wolgast, *Grammar of Justice*, p. 127.

[97] Ibid., p. 126.

notion, what would remedy it – that is, justice – is often fuzzy.[98] Indeed, she concludes, justice cannot be pinned down in a theory: it is contingent, drawing its character from the context of the injustice that activates it. Taking a leaf from Wittgenstein, she proposes that justice is best thought of as a grammatical expression of a passion that expresses abhorrence and the imperative to pursue a corrective response to wrong or injury – a response that, far from being predetermined by a set ideal of justice, is essentially indefinite in character.[99] Hers is a view that consolidates the practical, epistemological-experiential, and conceptual theses on the priority of injustice.[100]

What is at stake with regard to the understandings of justice one employs in approaching matters of constitutive justice? Such presuppositions will, naturally, foreclose some options and prefigure others when it comes to reasoning about criteria for justifiable boundaries, exclusions, and limitations of identity. Likewise, a focus on the centrality of injustice points away from an ideal, universal, a priori construction of justice from which recipes for restoring justice can be readily derived. The sorts of considerations I have presented here recommend a starting point for elaborating a constitutive conception of justice that departs from some of the characteristic patterns associated with *distributivist* models, including the tendency to take fixed boundaries for granted and to think in terms of center-periphery relations. By way of contrast, I would suggest, analysis of the dynamics of claims of justice in regard to questions of boundaries is likely to cast the central procedural concern of theories of constitutive justice in terms of the question of how to justify exclusions from the political or moral community.[101] Accordingly, a theory of constitutive justice should start with a critical analysis of the experience of wrongful exclusion – of persons or groups that plausibly

[98] Ibid., p. 134.

[99] Ibid., p. 144.

[100] For additional theses about how injustice can be understood in distinctive ways that are not premised on negating an independent ideal of justice, see Young's analysis of oppression and domination in "Five Faces of Oppression"; and Patchen Markell's argument that injustice is an expression of a human desire to subordinate others as a way to avoid or evade our finitude and temporality, in his *Bound by Recognition* (Princeton, NJ: Princeton University Press, 2003), pp. 17–24.

[101] Cf. Deborah Fitzmaurice, "Justice, Practical Reason and Boundaries," in Percy B. Lehning and Albert Weale, eds, *Citizens, Democracy, and Justice in the New Europe* (London: Routledge, 1997), pp. 15–33. See also the proposal from Bas Schotel, *On the Right of Exclusion: Law, Ethics, and Immigration Policy* (London: Routledge, 2011).

profess to have been unduly *denied* membership and its prerogatives. An account of justice that is constructed on this basis is likely to lend itself to articulation in terms of non-domination and to take as its primary focus the treatment of the dispossessed, the disenfranchised, the alienated, and the excluded. Instructive in this regard is the analysis of what Jacques Rancière calls "political dissensus about the part-taking in the common of the community."[102] I will have more to say about this idea in the concluding chapter (Chapter 7).

I have argued here that theories of constitutive justice will be incomplete without an account of agency, some understanding of how social boundaries are produced, and a grasp of the character and workings of justice in social affairs. Beyond that, I have tried to make a case for my view that a suitable theory will acknowledge the central role of social agency in boundary-making processes and will recognize the epistemological and practical priority of claims of injustice over ideas of justice. However, I still must spell out in greater detail my own commitments regarding the question of constitutive justice. I turn to that endeavor in the final chapter.

[102] Jacques Rancière, "Who Is the Subject of the Rights of Man?" in Ian Balfour and Eduardo Cadava, eds, *And Justice for All? The Claims of Human Rights* (Durham, NC: Duke University Press, 2004), pp. 297–310, at 306. Rancière's proposal is supported by Ian Shapiro's democratic-theoretical account of justice. Shapiro, arguing against both Rawls's theory and those of contextualists such as MacIntyre and Walzer, emphasizes the importance of *dissensus* in ordering principles of justice. See his "Three Ways to Be a Democrat," *Political Theory* 22.1 (1994): 124–51; and his *Democratic Justice* (New Haven, CT: Yale University Press, 1999).

7
Toward a Theory of Constitutive Justice

In the preceding chapters, I have tried to show that there is something to be gained if we can clarify how the boundaries of communities of justice might themselves be deemed just or unjust. I have suggested that this sort of question brings into focus a novel variety of justice, one distinct from the classical faces of distributive and corrective justice. My primary purpose in this book has been to inaugurate enquiry into what I have called constitutive justice by demonstrating the cogency of the category, identifying its characteristic questions, introducing some working conceptual tools for addressing them, and outlining an agenda for further research. In that sense, I have been presenting a descriptive theory of constitutive justice.

David Schmidtz likens the constellation of various elements of justice to a neighborhood, remarking that "a *theory* of justice is a map of the neighborhood," one that will evolve and be modified in line with the varying purposes of those who wish to represent the neighborhood, but one that will always remain incomplete and open to revision.[1] A descriptive theory of constitutive justice can be thought of as a means of presenting, or representing, the normative field in which borders, boundaries, and memberships are established, in a manner designed to make it more navigable and to relate it to the broader landscape of justice.

An important part of this task is identifying pitfalls and blind spots that theories of constitutive justice should seek to avoid or overcome. The Westphalian nation-state imaginary, for example, embodies a set of assumptions about the proper scope of justice that have been undermined and called into question by the shifting political and theoretical

[1] David Schmidtz, *Elements of Justice* (Cambridge: Cambridge University Press, 2006), pp. 3–4 and 227.

vistas of the past decades. It is, normatively, questionable whether territorial and membership boundaries need or ought to coincide as this model implies. At the same time, there is a spatial dimension to justice that has frequently been ignored. Boundaries, and borders, are not static but always on the move.[2] When it comes to distributive justice, one can also speak of a "distributivist imaginary" that is ripe for challenge.[3] It need not be presumed, for example, that the receipt or denial of "goods," understood as objects of distribution, is what is chiefly at stake in relations of justice.[4] Finally, the metaphors of justice, which so often take a commercial form – for example, when we speak of what we *owe* others or of *paying* someone back – deserve special scrutiny for the patterns of thought that they invoke.

Developing such a "model of" the field of constitutive justice is certainly a worthy goal in itself. I maintain, however, that we can also ask for, and expect, a theory of constitutive justice to provide us with a "model for" the ongoing construction that is proceeding there apace.[5] Working with the elements I have described in the last chapter, normative theories of constitutive justice will construct arguments regarding appropriate criteria for fixing the scope and scale of communities, perhaps emphasizing fair procedures for the establishment of boundaries, perhaps focusing instead on just results in terms of inclusions and exclusions. Full-fledged accounts will address issues associated with both the founding of communities and the ongoing tasks of boundary alterations and revisions. They will discuss theoretical problems that include the relation between universal principles and the ethics of special relations, such as patriotic ties. And, if they are worth their salt, they will explore applications to issues of the day, such as immigration policy, ethnic separatism, and the drafting of constitutions.

Having already given an indication, in the course of the foregoing critiques, analyses, and arguments, of where I stand on a number of the key questions associated with constitutive justice, I undertake in this final chapter to fill in the broad outlines of my own constructive theory.

---

[2] Ronnie Lippens, "Imagining Justice at the Cradle of Modernity: Re-Visiting Huizinga," in Ronnie Lippens, ed., *Imagining Boundaries of Justice: Social and Legal Justice across Disciplines* (Oxford: Hart Publishing, 2004), p. 162.

[3] So argues Nancy Fraser in *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2009), p. 3.

[4] Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice*, Jeffrey Flynn, trans. (New York: Columbia University Press, 2012), pp. 3–4.

[5] I invoke here Clifford Geertz's distinction between "models of" and "models for" from *The Interpretation of Cultures* (New York: Basic Books, 1973), pp. 93–94.

The just-war model

For an apt model for a theory of constitutive justice we could do worse than to look at another area in which justice encounters its limits: the arena of moral reasoning about war. Just war theory is the traditional moniker for ethical accounts (1) of when conflicts and injuries might justifiably be responded to with lethal force (*jus ad bellum*) and (2) of moral limitations on the conduct of fighting (*jus in bello*). Just war theories address the problem of how to respond in ethical terms to situations in which the normal features of moral life, including especially prohibitions on killing, are abrogated.[6] In that sense, they represent an attempt to uphold a semblance of order in the face of moral chaos, by extending the domain of justice into spaces and situations outside the bounds of normal civil life, in a way that modifies the idea of justice itself. We see here a parallel to the task of constitutive justice, and more parallels reward our further examination.

The theory of just war has been developed over the last couple of millennia, evolving along with the major cultural and technological shifts that mark human history. With roots in Greek thought and the Roman *bellum justum*, just-war thinking has taken the form of limitations, both moral and legal, on occasions and forms of warfare. It was modified crucially by the church fathers – most significantly by Augustine, who is sometimes styled the father of just war theory – as well as by later Christian thinkers such as Thomas Aquinas, Francisco de Vitoria, and Hugo Grotius,[7] but it has run through streams in Jewish and

---

[6] The most influential contemporary presentation of just war theory remains Michael Walzer's *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977). Other useful titles are Richard B. Miller, *Interpretations of Conflict: Ethics, Pacifism, and the Just-War Tradition* (Chicago, IL: University of Chicago Press, 1991); Brian Orend, *The Morality of War* (Orchard Park, NY: Broadview Press, 2006); G. Scott Davis, *Warcraft and the Fragility of Virtue: An Essay in Aristotelian Ethics* (Moscow, ID: University of Idaho Press, 1992); Jean Bethke Elshtain, ed., *Just War Theory* (Oxford: Basil Blackwell, 1992); Michael Howard et al., eds, *The Laws of War: Constraints on Warfare in the Western World* (New Haven, CT: Yale University Press, 1994); Richard Norman, *Killing, Ethics, and War* (Cambridge: Cambridge University Press, 1995); and Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009).

[7] For influential studies of the history of Christian thought on war, see Roland H. Bainton, *Christian Attitudes Toward War and Peace: A Historical Survey and Critical Re-Evaluation* (New York: Abingdon Press, 1960); James Turner Johnson, *Ideology, Reason and Limitation of War: Religious and Secular Concepts, 1200–1740* (Princeton, NJ: Princeton University Press, 1975); James Turner Johnson, *Just War*

Muslim thinking about war as well.[8] Analogs can also be identified in other traditions.[9] One of the striking aspects of this body of thought is how it has emerged from different religious, philosophical, and cultural milieus to produce a relatively coherent and widely acknowledged set of propositions, which in modern times have been codified in international accords of various descriptions, including the Geneva Conventions and the UN Charter. For my purposes, for reasons that will become clear below, it is especially noteworthy that the theory of just war, although it has been a theological account for most of its career, has been successfully translated into a largely "secular" idiom which does not rely on religious assumptions.

Another notable aspect of the just war theory is its fairly stable normative structure. For centuries, expositors of the theory have advanced and debated two interrelated yet distinct lists of rules or laws or precepts regarding the morality of war. The first of these, widely known as *jus ad bellum* criteria, has concerned justificatory grounds for taking up arms in the first place and has included principles such as just cause, legitimate authority, and last resort. The second set of *jus in bello* rules articulates moral requirements, such as proportionality and non-combatant immunity, bearing on the actual conduct of war. Together, these two sets of principles are best understood as providing not so much a checklist as a framework of criteria that properly shape deliberation and debate about the rights and wrongs of the political use of force.

What makes just war theory instructive when it comes to constitutive justice? An initial point of contact is supplied by the circumstance that communities have often been shaped by war, and thus, questions about the justice of boundaries of moral communities can be linked to discourse about the morality of war. One might defensibly think that

---

Tradition and the Restraint of War: A Moral and Historical Inquiry (Princeton, NJ: Princeton University Press, 1981); and John Howard Yoder, *When War Is Unjust: Being Honest in Just-War Thinking* (Maryknoll, NY: Orbis, 1996).

[8] See J. Patout Burns, ed., *War and Its Discontents* (Washington, DC: Georgetown University Press, 1996); Robert Eisen, *The Peace and Violence of Judaism: From the Bible to Modern Zionism* (Oxford: Oxford University Press, 2011); Sohail H. Hashmi, ed., *Just Wars, Holy Wars, and Jihads: Christian, Jewish, and Muslim Encounters and Exchanges* (Oxford: Oxford University Press, 2012); John Kelsay, *Arguing the Just War in Islam* (Cambridge, MA: Harvard University Press, 2009); and Terry Nardin, ed., *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton, NJ: Princeton University Press, 1998).

[9] Sohail H. Hashmi and Steven P. Lee, *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives* (Cambridge: Cambridge University Press, 2004).

under some conditions, it could be justifiable to shape and delimit a political community – say, imperial Japan at the time of World War II – through the application of just force. Alternatively, of course, a pacifist or devotee of nonviolent resistance might dissent from the premise that war can be justified and conclude that the drawing of boundaries through lethal force is always objectionable. The use to which I am putting just war theory here does not require taking a position on that issue, however: I am simply noting that war, as one means of boundary-making, is subject to questions of constitutive justice that may overlap with just-war considerations. This points us, however, to a stronger connection: just war theory is not a free-standing moral doctrine; rather, it is intimately bound up with foundational political questions about the moral character of sovereignty, the grounds of political legitimacy, and the measures and sacrifices that they entail.[10] As we saw in Chapter 3, constitutive justice, especially through its embroilment in paradoxes of founding, shares this feature.

Another illuminating point of contact concerns the historicity of justice. Indeed, my description of just war theory as a stable combination of two sets of criteria tells only half of the story. For one thing, the specific just-war criteria have evolved and changed over time. Thus, to take the *jus ad bellum* for example, new principles, such as the conception of right intention introduced by Augustine, have established themselves; new interpretations have evolved, as in the shift of conceptions of just cause from grounds such as punishment or conversion to essentially defensive purposes; and new applications such as humanitarian intervention have gained acceptance.[11] More to the point, in recent years, a third part has been added to the two traditional parts of the theory sketched above, as advancing understandings of conflict transformation and political reconciliation have underscored the need for an additional set of "*jus post bellum*" principles that set out criteria for ending conflict and establishing just terms of peace.[12] It is on similar

[10] Joseph E. Capizzi, *Politics, Justice, and War: Christian Governance and the Ethics of War* (Oxford: Oxford University Press, 2015) highlights this point.

[11] See Heinz-Gerhard Justenhoven and William A. Barbieri Jr., eds, *From Just War to Modern Peace Ethics* (Berlin: de Gruyter, 2012).

[12] This modification of just war theory to a tripartite structure has not been universally accepted, but it has gained widespread support even as expositors have disagreed about the specific requirements of a *jus post bellum*. See Brian Orend, "Justice after War," *Ethics and International Affairs* 16.1 (2002): 43–56; and Carsten Stahn et al., eds, *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: Oxford University Press, 2014).

grounds – namely, evolving historical insights and practices – that I am arguing that the classical categories of justice should be revised to make room for a theory of constitutive justice.

A final point that recommends just-war criteria as a sort of model for my own theory of constitutive justice stems from the way in which just-war discourse mediates between universalist concerns and particularist moralities. I have argued that normative disputes about boundaries, membership, and moral status should not be regarded as resolvable in terms of a single overarching, totalizing global theory, but that there is a transcommunal "space of reasons" (to use Wilfrid Sellars's term) in which comparatively universal and rather more contextual factors inform and condition each other. This is something like what just-war reasoning attempts to do as it injects general, aspirationally universal norms such as "legitimate authority" or "proportionality" into settings in which the cultural colorations that the norms receive are likely to vary among different parties (even taking into account the workings of hypocrisy and bad faith endemic to large-scale conflict). Cultures and societies predictably diverge in their ideas about the values engaged by war, such as honor or dignity, even as they assume that these values have validity that extends beyond their borders. This circumstance makes just war theory a viable, if hardly foolproof, theoretical apparatus for generating moral support for legal and political limitations on violence in the name of justice. Something like this is probably the most that a theory of constitutive justice can sensibly aspire to do.

With just war theory as a model, what contours might a theory of constitutive justice take on? In broad terms, the theory of just war operates on several levels. We can distinguish between (1) core themes or values, (2) principles or "middle axioms"[13] that they inform, and (3) more specific rules or legal requirements in which they issue. Whereas just war turns on a specific account of corrective or commutative justice that is shaped dialectically in conjunction with a notion of peace, constitutive justice as I conceive of it draws on central motifs of responsibility, equilibrium, and non-domination. I will say something about each of these themes before taking up the matter of middle axioms.

[13] For a discussion of the debate surrounding middle axioms and a defense of their relevance, see Willis Jenkins, *The Future of Ethics: Sustainability, Social Justice, and Religious Creativity* (Washington, DC: Georgetown University Press, 2013), pp. 130–33.

Cardinal values: responsibility, equilibrium, non-domination

The transcommunal accounts I canvassed in Chapter 5, the reader will recall, advanced different organizing concepts as the basis for just boundaries. "Social connection" (for Iris Marion Young), "common good" (for Alessandro Ferrara), and the "all-affected" or "all-subjected" relation (for Nancy Fraser) are all features that help characterize the normative grounding that properly constitutes communities of justice, even if they are subject to various limitations that I identified above. What I want to propose is that *responsibility* is the ethical relation that best grounds moral and political communities. Where firm relations of responsibility obtain, it is fitting to speak of a context of justice. There, too, middle axioms can be employed to undergird judgments about how to meet demands of responsibility and, in a different sense, to cultivate responsibility.

I concede that my approach trades on some ambiguities that are built into the family of meanings that cluster around the term *responsibility*. In the last chapter, I noted a distinction between causal responsibility and responsibility in the sense of accountability, but a number of additional senses could be identified. Consider H.L.A. Hart's well-known scenario:

> As a captain of the ship, X was *responsible* for the safety of his passengers and crew. But on his last voyage he got drunk every night and was *responsible* for the loss of the ship with all aboard. It was rumoured that he was insane, but the doctors considered that he was *responsible* for his actions. Throughout the voyage he behaved quite *irresponsibly*, and various incidents in his career showed that he was not a *responsible* person. He always maintained that the exceptional winter storms were *responsible* for the loss of the ship, but in the legal proceedings brought against him he was found criminally *responsible* for his negligent conduct, and in separate civil proceedings he was held legally *responsible* for the loss of life and property. He is still alive and he is morally *responsible* for the deaths of many women and children. [14]

Encapsulated here are contexts in which *responsible* means, respectively: "duty-bearing," "causally at fault," "capable of exercising agency,"

[14] H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (Oxford: Oxford University Press, 2008), p. 211. Emphasis added.

"exhibiting virtues of reliability and good judgment," "being a material or effective cause," "legally culpable," "liable or accountable," and "worthy of moral censure." And this collection of meanings is hardly exhaustive. For my purposes, some additional senses come into play. People find themselves in justicial relations of responsibility when they: (1) encounter and experience one another in settings in which moral calls or imperatives become routinized; (2) are interdependent in that their well-being is contingent on the acts or forbearances of others in a reciprocal way; (3) are bound through relations of language that make their conduct intelligible to others and make them mutually answerable, in the sense of called to respond to queries and justify their actions or decisions to refrain from acting;[15] or (4) become able to invoke a "we" that implies common knowledge, collective sensibilities, and a shared narrative context. We say variously of people in such relations that they are capable of being responsive to one another, responsible to one another, responsible for one another.

When Iris Young suggested that "[o]ur responsibility derives from belonging together with others in a system of interdependent processes of cooperation and competition through which we seek benefits and aim to realize projects," she did not quite name the sense to which I refer, in that responsibility does not derive from social connectedness; it inheres in it or even constitutes it.[16]

Where such relations exist, the language of justice finds a purchase, in a nuanced way that reflects the interwoven senses of responsibility since the language of justice itself harbors similarly intertwined meanings. If we phrase the rule of justice as "to each his or her due," we employ a term, "due," that is etymologically bound up with "duty" and invokes the sense of responsibility that accompanies obligation, the imperative to respond to the claim of the other. Likewise, if we render *suum cuique* as "to each his or her own," in "own" we find a term that not only doubles as an adjective and a verb but also exhibits a close kinship to the verb "to owe," once more pointing us to the idea of a debt for which we are responsible. Additionally, we can view the *bounds* of justice in like fashion: for "bounds" can be read as marking the extent of our "bonds," in a sense traceable to not only to the unity reflected in the

[15] Something like this thesis is the central thrust of Rainer Forst's important study *The Right to Justification*.

[16] Iris Marion Young, *Responsibility for Justice* (Oxford: Oxford University Press, 2011), p. 105. Her concern is with political responsibility to respond to injustices and effect change.

German word *Bund*, but to the literal tie of the old French "band" and to the figurative sense of ligature – that is, obligation – that attaches to it. These connections betray a moral phenomenology underlying these words in which justice finds roots and limits in relations of response and responsibility.[17]

If, as I am suggesting, the complex notion of responsibility identifies a core motif of justice and thus provides a conceptual key for identifying the types of relations on which constitutive justice – the justice of boundaries, membership, and moral status – is premised, then we can look to it to point us in the direction of practical considerations about what sorts of boundaries and boundary-making are justifiable, much in the same way that conceptions of corrective justice (and, as Vitoria put it, wrongs received) control and inform just-war criteria. Alongside this value is, however, a second motif that, in my view, helps us in the task of identifying just boundaries, and this is the notion of equilibrium.

One of the most time-honored metaphors associated with justice is the idea of achieving balance, or equipoise, through the use of a scale. I suggest that this image carries important insights into how justice works through its various forms, including constitutive justice. What is "balanced" with respect to justice will vary, according to the type and object of justice concerned: commutative justice aims at a parity of value exchanged between parties, and balance in just punishments might entail a rough offsetting of harms, while for distributive justice, balance may involve an equitable apportionment of goods and burdens of some sort among many subjects. Although the image of the scale can suggest measurement, righting a scale is often a matter of feel, not an exact science. Though the process is an approximate business, it is accompanied by an expectation that there is a point of equilibrium that can be struck or at least approached. So what might equilibrium involve with respect to constitutive justice: in what ways might we seek boundaries or constituencies that embody a just balance? With respect to the shaping of polities or communities of justice, we are talking about finding a medium among conflicting claims regarding membership and belonging, moral status, and relations to territory. Striking that balance is what it will mean to give prospective members their due. Devising procedures that can be used to perform this task is, perhaps, the key function of an account of constitutive justice, and how this is done will always be a contextual affair.

[17] Even, one could add, as responsibility hinges reciprocally on justice and justification.

At another level, the goal of equilibrium takes the form of that *balancing of disparate sources of ethical guidance* which is the stock in trade of practical reasoning. Competing sources of value or authority and empirical beliefs must either be reconciled with one another or offset if a viable plan of action is to be found. This is the sort of task that John Rawls and others have had in mind in speaking of "reflective equilibrium" as an aim for social-philosophical discourse. Rawls used the term to signal his expectation – some would say hope – that in the efforts of a society to craft agreement about political justice a place of rest might be found at which a range of judgments and intuitions have been considered, thought through, and attuned to one another as much as feasible so that a sort of coherent position emerges. "Wide" and even "full" equilibrium for him denoted a collective stasis achieved after considering not only a given system of convictions, principles, judgments, and experiences but rather the full panoply of competing standpoints regarding the character of justice.[18] It is important to point out that Rawls envisioned the process of reflective equilibrium as confined within the boundaries and among the citizens of a given well-ordered society. I do not, however, see any inherent reason why the method, or something like it, could not be applied to the problem of just boundaries itself, in a manner open to all prospective members.

What I am suggesting, then, is that equilibrium be understood to be an overarching objective that informs justifications of constitutive arrangements. I envision this goal as linking just conditions for the constitution of "communities of justice" with recursive processes seeking balancing points in relation to several sets of countervailing tendencies or forces: universalist as opposed to particularist (e.g., nationalist) scales of justice; historical instances of injustice versus new "facts on the ground"; competing territorial claims; and individual and communal appeals for recognition.[19]

---

[18] John Rawls, *Justice as Fairness: A Restatement*, Erin Kelly, ed. (Cambridge, MA: Harvard University Press, 2001), pp. 29–31.

[19] As an example of the kind of balancing that I mean, Paul Ricoeur speaks of the need to gauge, in the creation of a judiciary, a "just distance" that mediates between the parties in court and the representatives of the state in a way that breaks the link between justice and vengeance. See his *Reflections on the Just*, David Pellauer, trans. (Chicago, IL: University of Chicago Press, 2007), pp. 158, 166, 224. The task strikes me as analogous to the task for constitutive justice of hitting on appropriate boundaries. Ricoeur adds: "Before any formalization, any universalization, any procedural treatment, the quest for justice is for a just distance among all human beings. This just distance is a mean between the too little distance belonging to so many dreams of a fusion of emotions and the excess of distance that underlies arrogance, distrust, and hate of the stranger as someone unknown" (p. 61).

The imperative to foster such processes of equilibrium, I argue, directs us to criteria of constitutive justice – middle axioms – in the form of principles such as solidarity and subsidiarity. I will have more to say about these shortly. These criteria, which are revisable in the sense, I think, that Rawls intended with his conception of reflective equilibrium, find their place in a theory that is contextual, pluralistic, and attuned to the moral phenomenology attending communal formation.

There is a third primary value that I endorse that takes its shape from the specific kind of problem that is addressed by constitutive justice. As I suggested in the previous chapter, injustice is the key, the entry point, for understanding justice, and in constitutive matters, the distinctive sort of injustice involved has to do with wrongful exclusions that deprive some of power or resources, with misframings that disadvantage some to the benefit of others, with denials of membership and status that undermine identity. The characteristic harm of constitutive injustice, in short, is a rejection or rupture bound up with consequences that can be described collectively as *domination*. It follows that an important normative ethical ideal for constitutive justice is the value of non-domination.

We have encountered the notion of non-domination in the accounts of Iris Marion Young and James Bohman that were discussed in Chapter 5. In fact, non-domination is a conception that has acquired a significant coterie of commentators in recent years, primarily as a foundational commitment of neo-republican theory.[20] Of course, accounts of non-domination depend on the understanding of domination that is being negated, and these thinkers differ, not surprisingly, on what

[20] Philip Pettit has been a prominent interpreter of non-domination; see especially his *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997). Other important voices on this topic are Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998); and Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2008). For an argument that justice consists in the minimization of domination, see Frank Lovett, *A General Theory of Domination and Justice* (Oxford: Oxford University Press, 2010). See also Cécile Laborde and John Maynor, eds, *Republicanism and Political Theory* (Oxford: Blackwell, 2008); and Fabian Schuppert, *Freedom, Recognition, and Non-Domination: A Republican Theory of (Global) Justice* (Dordrecht: Springer, 2014). I presented a fuller account of non-domination in *Ethics of Citizenship: Immigration and Group Rights in Germany* (Durham, NC: Duke University Press, 1998), pp. 112–46.

they take domination to be.[21] For my purposes, domination denotes at root *the experience of subjugation to the power of others*. There are a few crucial distinguishing features that mark the conditions of domination in this sense.[22] The first is that relations of domination produce specific kinds of effects that consist not only of damage or violence of various sorts but also of impediments to self-esteem and self-mastery. In this respect, subjugation implies the compromise of one's dignity through the displacement of control, and this effect of disempowerment or disenfranchisement can be individual or collective. The second is that conditions of domination must be associated with human agency; this need not mean, however, that domination is direct or intentional or that it is perpetrated by readily identifiable individuals.[23] Rather, and in keeping with the discussion of agency in Chapter 6, domination can be mediated by groups or social structures: what is decisive is, initially, that it results from actions that might have been otherwise and, further, that it might be changed and remedied through purposive action. The third feature, finally, is that to qualify as domination, exercises of power must be wrongful or abusive in a relevant sense. Only under this qualification does differential or disadvantageous treatment become illicit discrimination or harm. What turns subordination or subjection into subjugation, with its connotation of illicitness and arbitrariness, will be partially contingent and context-dependent, but in the theory I have

[21] Young, for example, distinguished domination, which she understood as in essence disempowerment or institutional conditions inhibiting people's self-determination, from oppression, which she further broke down analytically under the headings of exploitation, marginalization, powerlessness, cultural imperialism, and violence; for my purposes, however, each of these could be taken as a potential manifestation of domination. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), pp. 39–65. See also her "Self-Determination as Non-Domination: Ideals Applied to Palestine/Israel," *Ethnicities* 5.2 (2005): 139–59.

[22] Cf. Ian Shapiro's discussion of domination and his argument that non-domination, as a "normative ideal," is "the bedrock of justice," in his "On Non-Domination," *University of Toronto Law Journal* 62.3 (Summer 2012): 293–335.

[23] This point distinguishes my view from those of, for example, Pettit and Lovett, both of whom insist that domination can be intentional and traceable to only the acts of specific individuals. For an excellent discussion of how domination can be manifested in dimensions of action that go beyond an explicit will to control and mastery, see Sharon R. Krause, "Beyond Non-Domination: Agency, Inequality, and the Meaning of Freedom," *Philosophy and Social Criticism* 39.2 (2013): 1–22.

presented regarding constitutive relations, domination will generally involve a violation of the skeins of responsibility that ground communities of justice. These parameters help mark out the sort of relations and structures that the value of non-domination seeks to counter.

It is perhaps unsurprising, given the premium that republicanism has traditionally placed on shared civic values and societal closure, that the republican thinkers who have lionized non-domination as an important value or requirement for protecting freedom and equality have almost uniformly ignored its relevance to constitutive questions regarding borders and the bounds of membership. It is rather more unexpected that democratic theorists such as Iris Young and Ian Shapiro have not made this connection. The exception here is James Bohman, whose argument that borders and boundaries should be democratized draws in part, as we saw, on a concern about the potential for borders to allow some *demoi* to dominate others. Bohman is on the right track, from my perspective, but we can certainly say more about how the value of non-domination bears on matters of boundary-making and the constitution of communities. The crucial point is to be aware of how borders themselves can impose domination on individuals and groups as well as other *demoi*. Stateless persons are only an extreme example of how exclusion from political communities manifests domination: other potential cases include divisions of family members and rejections of dual or multiple citizenship, the drawing of boundaries that sunder existing communities, and rejections of at least some irredentist campaigns or ethnic separatist movements. Broadly, non-domination has two areas of ramification regarding constitutive questions. First, it guides boundary questions that involve prospective members, relations with out-groups, and negotiations of where and how "internal" and "external" are distinguished in the first place. Second, non-domination applies to internal questions such as the constellation of the groups that are accorded status in a society and how the relations among them are managed, formally and informally. Are groups required to assimilate? Are they entitled to limited exercises of autonomy? And so on. With the values of responsibility, equilibrium, and non-domination in place, it is time to turn to a survey of the middle axioms that I see those primary motifs as upholding.

Middle axioms

The meat of a normative framework such as just war theory lies in the principles or criteria that mediate between cardinal values and

the specific precepts or maxims developed in response to, and in turn applied to, particular practices or cases. In the approach I am proposing, intermediate criteria that flow in various ways from the values of responsibility, equilibrium, and non-domination comprise a network of normative considerations that pressure, shape, and constrain judgments about how to pursue and uphold constitutive justice in practice. There are three features of the list of criteria that I wish to advance that deserve preliminary commentary. First, it will not escape the attention of some readers that the principles I enumerate happen also to be found in the body of Catholic social thought, either in that tradition's account of just war theory or in the broader discourse of Catholic social teaching explicitly developed over the past century and a quarter as an ethical system that addresses the moral questions attending modern societies. This congruence, while not incidental, should not be taken as an endorsement of any of the specifically theological propositions associated with Catholic social ethics. Rather, I note that the principles in question are by no means the exclusive preserve of Catholic philosophy, and I maintain additionally that they enjoy a cogency that is by and large independent of their specifically religious formulations. Further, I would argue, Catholic social thought grounds a political theory that combines premises regarding natural or human rights, freedom, equality, and respect for persons in measures and combinations that make it comparable with, and a worthy interlocutor for, alternative accounts associated with republicanism, liberalism, libertarianism, critical theory, or democratic pragmatism.

This circumstance is related to a second feature regarding my list: the criteria I cite are not minted expressly for my purposes, but rather, they are already established; and whatever their provenance, they have to a greater or lesser degree become globalized and passed into the moral vocabulary attached to humanity. They are again comparable in this respect to the fundamental principles of just war theory, including the notions of *jus ad bellum* and *jus in bello*, which, as Michael Walzer pointed out in his landmark treatise *Just and Unjust Wars*, have passed from largely religious historical expressions into the patrimony of international law.[24] The claim underlying Walzer's point is that there is a very widely shared set of perceptions about justice in regard to war that can help structure internal as well as cross-cultural normative debates. I am making a similar supposition here.

[24] Walzer, *Just and Unjust Wars*, pp. 21, 44–45.

Nonetheless – and here we come to the third feature – even if the principles it evokes are familiar, this framework as a whole is not etched in stone and must remain open to the emergence of new common perceptions. In this respect, it modifies our pictures of the workings of justice in much the same way that the recent emergence of a *jus post bellum* has supplemented the traditional just-war framework, not by inventing new criteria but by repurposing established principles. My list of criteria for debates about constitutive justice includes eight maxims.

(1) *Practice solidarity*: Solidarity refers to both the grounds and the project of social cohesion.[25] It has a normative dimension with roots in classical notions of civic friendship and Christian conceptions of fraternity and charity, and an influential articulation in social theory largely attributable to Émile Durkheim's work. As a principle of constitutive justice, it embodies the notion that where a sense of community arises as manifested especially in the willingness of members to make sacrifices for one another and the group as a whole, it should be respected by formal boundaries. Solidarity in this sense is rooted in the value of responsibility.[26] Practically, this maxim means that borders and memberships should be crafted in a manner that both acknowledges and promotes the "principle of mutual responsibility between the individual and society, where

[25] Perhaps the most influential recent treatment of solidarity is Hauke Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community*, Jeffrey Flynn, trans. (Cambridge, MA: MIT Press, 2005). Brunkhorst's concern is mainly with modern democratic solidarity and its potential for promoting cosmopolitan democracy, but he also offers a useful discussion of the evolution of the concept from classical times on (although oddly, Heinrich Pesch's early twentieth-century Catholic movement of solidarism is wholly absent). A valuable collection is Kurt Bayertz, ed., *Solidarity* (Dordrecht: Kluwer, 1999); see also David Heyd, "Justice and Solidarity: The Contractarian Case Against Global Justice," *Journal of Social Philosophy* 38.1 (Spring 2007): 112–30. On solidarity in the global setting, see Craig J. Calhoun, "Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere," *Public Culture* 14.1 (Winter 2002): 147–71; Fuyuki Kurasawa, *The Work of Global Justice: Human Rights as Practices* (Cambridge: Cambridge University Press, 2007), especially pp. 157–93; and Carol Gould's discussion of "transnational solidarities" in her *Interactive Democracy: The Social Roots of Global Justice* (Cambridge: Cambridge University Press, 2014).

[26] For Max Scheler, solidarity consisted of relations of "co-responsibility" (*Mitverantwortlichkeit*) among members of a community, or indeed all of humankind. Max Scheler, *Formalism in Ethics and Non-formal Ethics of Values*, Manfred Frings and Roger Funk, trans. (Evanston, IL: Northwestern University Press, 1973), pp. 534–38.

each individual vouches for the community and the community vouches for each individual."[27] This may mean honoring preexisting patterns of social cohesion or acknowledging that new formations of solidarity – for example, surrounding a liberation movement – have succeeded over time in establishing themselves.[28]

(2) *Uphold the common good*: It is intrinsic to the nature of boundaries, borders, membership criteria, and other objects of constitutive justice that they are components of social structures. For this reason, their creation and regulation is properly guided by considerations of the common good rather than putatively pre-social (or natural) individual rights. The notion of the common good, understood generically as the requirements for ordering a political community in such a way as to conduce to its well-being and the flourishing of its members, has roots in Plato and Aristotle and has long been a staple of natural law and republican theory. Historically, the common good was a value associated with, and confined to, the *polis*, monarchy, republic, nation-state, or comparable limited political body of the day; but twentieth-century developments in particular have seen an expansion of talk of the common good in an international or even global direction.[29] The result is a layering of conceptions of common good – global, international, regional, national, local, and so on – in a manner that opens up opportunities to apply the logic of the common good to constitutive questions about relevant communal units: The good common to whom? What boundaries might best conduce to the good of the communities they define? As we saw, too, in the discussion of Ferrara's judgment theory of justice in Chapter 5, it may be feasible to argue that the capacity of a particular constellation of people to evince a common good not only may be the product of formal boundaries but might serve as a basis or ground for drawing such boundaries in the first place.

(3) *Foster subsidiarity*: As a principle for how best to allocate authorities and competencies in governance, the principle of subsidiarity – which can claim classical roots and influential expressions in the

[27] Kurt Bayertz, "Four Uses of 'Solidarity,'" in Bayertz, *Solidarity*, p. 3.

[28] On solidarity as a mode of social action, see Avery Kolers, "Dynamics of Solidarity," *Journal of Political Philosophy* 20.4 (2012): 365–83.

[29] For a discussion of this development in both Catholic thought and German- and English-language political theory, see William A. Barbieri Jr., "Beyond the Nations: The Expansion of the Common Good in Catholic Social Thought," *The Review of Politics* 63.4 (Fall 2001): 723–54.

thought of Althusius, John Stuart Mill, Abraham Lincoln, and the Catholic social tradition – has significantly influenced recent debates about federalism and the structuring of the European Union.[30] It is sometimes presented simply as an imperative for decentralization. More properly, however, it should be thought of as a brief for "right-sizing," a requirement that the tasks acquitted by people in political community be assigned to the levels and types of organization best suited to acquit them. In this process, the idea of subsidiarity places the burden of proof squarely on claims for centralization, even as it maintains that a variety of important functions must be retained by higher authorities. According to its logic, if it is inefficient and a diminution of local agency to arrogate, say, trash pick-up procedures to a central state authority, it is likewise improper to devolve, for instance, citizenship and naturalization competencies to local communities. Although subsidiarity, once again, has traditionally been applied within the context of unitary states and thus has not been applied to boundary issues, its two-way logic and its recent invocation in discussions of global justice yield some useful proposals once the principle is brought to bear on constitutive questions.[31] On the one hand, it supports the proposition that cases of disputes over the justness of boundaries or memberships of states might be referred to higher instances within a system of layered polities, in the form of judicial authorities associated with regional, interstate, or even global orders. On the other hand, it supports the pluralization of scopes of membership away from the exclusivity of state-based citizenship, along the lines suggested by devotees of the "all-affected" or "all-subjected" principles or by the responsibility-based model that I am proposing.

(4) *Promote participation*: As an ideal of social philosophy, participation pinpoints the idea that there is a symbiotic relation between

[30] Aspects of the history and current application of the principle of subsidiarity are addressed in Michelle Evans and Augusto Zimmermann, eds, *Global Perspectives on Subsidiarity* (Dordrecht: Springer, 2014). On the relationship between subsidiarity and federalism, see the essays in James E. Fleming and Jacob T. Levy, eds, *Federalism and Subsidiarity: Nomos LV* (New York: New York University Press, 2014).

[31] For a discussion of the relevance of subsidiarity in the global setting and an argument that "more defensible versions of subsidiarity do not provide normative legitimacy to the state-centric aspects of the global order," see Andreas Føllesdal, "Subsidiarity and the Global Order," in Evans and Zimmermann, eds, *Global Perspectives*, pp. 207–20.

vibrant, flourishing societies and active, empowered members; moreover, it expresses the Aristotelian ethos regarding the importance of social and civic engagement to personal well-being. Modern interpretations of the ideal often associate it with the practice of democratic citizenship, not merely with reference to voter participation but rather in the more expansive sense of active engagement in public affairs and the shaping of common life.[32] In that mode, participation is a necessary counterpart to the idea of subsidiarity. More broadly, participation also applies to the ability to provide for oneself, to exercise control over one's destiny and to contribute to the well-being of others as well: in this context, participation comes to denote effective agency in general and serves as a corollary to the principles of solidarity and the common good. With respect to constitutive questions, as we have seen, both civic and personal empowerment can be undermined by exclusions through borders or limitations on membership, and the promotion of participation may therefore militate in favor of redrawing or otherwise modifying boundaries. Moreover, a case can certainly be made that the value of participation is directly served by any steps toward the democratization of borders and like divides.

(5) *Prioritize the poor*: One of the time-honored themes of justice that dates back to the Hebrew Bible is the notion that responding to the plight of the poor, marginalized, or dispossessed is of especial concern to the righteous person. In modern times, this moral sentiment has been embodied in certain conceptions of social or (re-) distributive justice. Catholic social doctrine, for example, has built into its account of justice a commitment to a "preferential option for the poor," while liberalism offers the distant cousin of John Rawls's difference principle, which endorses only those socioeconomic inequalities that are "to the greatest benefit of the least advantaged members of society."[33] Again, even contemporary versions of a preference for the poor tend to concern themselves with the

[32] Mark E. Warren, "What Can Democratic Participation Mean Today," *Political Theory* 30.5 (October 2002): 677–701. For an argument that endorses an interpretation of participation in terms of the republican value of non-domination over an "ethical," Aristotelian reading, see Cillian McBride, "Democratic Participation, Engagement, and Freedom," *British Journal of Politics and International Relations* 15.4 (November 2013): 493–508.

[33] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 5–6.

internal dynamics of polities or, in the case of global justice theories, inequalities among states. When such a maxim of justice is adapted to the constitutive context, however, it can address the differential effect that exclusions tend to have on the socially and economically weakest putative members or prospective immigrants. My suggestion here is not that existing political communities should somehow be obliged to open their borders to the poorest of the poor. What I am proposing instead is something like the principle of affirmative action, the notion that all else being equal, a preference may justly be accorded to a disadvantaged group. Because exclusion itself is a form of disadvantage, in membership or boundary disputes, the initial presumption should be in favor of those who seek inclusion, and the burden of proof should be on discrediting their case. And where equivalent cases for inclusion can be made by multiple applicants but conditions plausibly limit the feasible scope for admission, constitutive justice should entail prioritizing the case of the poorest or least well-off. Such a principle serves the value of non-domination and supports the principle of participation.

(6) *Acknowledge comparative justice*: Some unjust forms of disadvantage produced by boundaries have less to do with poverty than with dehumanization or "othering." This problem is addressed to some extent by a principle historically known in the theory of just war as comparative justice. This consideration was introduced into the tradition of just-war thinking by Francisco de Vitoria, who, noting the difficulty for mere mortals of adjudicating between the conflicting claims of justice frequently encountered on both sides of conflicts, insisted on the importance of exercising due diligence in considering the grievances of opponents and exhibiting humility in the assertion of one's own righteousness. Part of the purpose of this exercise was to head off the tendency, known sometimes to accompany absolute certainty regarding the justness of one's cause, to condemn enemies as evil out of hand, deny their humanity, and engage in excessive violence against them.[34] Practicing comparative justice in regard to

[34] On the history of comparative justice, see James Turner Johnson, *Ideology, Reason, and the Limitation of War*, pp. 185–95. The relevant passages in Vitoria include *Relectio de Indis*, I.3.5, and *De Jure Belli*, quest. 2, art. 1.1, and quest. 2, art. 4.2; in Francisco de Vitoria, *Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991). A discussion of current interpretations of the principle can be found in Steven P. Lee, *Ethics and War: An Introduction* (Cambridge: Cambridge University Press, 2012), pp. 104–107.

the constitution of communities of justice is important because of the dangers of similarly discounting or excluding the points of view of those accorded outsider or second-class citizen status. Miranda Fricker addresses this issue as "epistemic injustice," the practice of systematically devaluing the credibility and capacity to know of certain groups or classes of others; and the corrective virtues she proposes of "testimonial justice" – the discipline of self-correcting for one's epistemic prejudices – and "hermeneutical justice" – a commitment to compensating for the hermeneutical marginalization of others – largely coincide with the logic of comparative justice.[35] Stuart Hampshire likewise supports this idea, asserting that there is only one universally valid principle of justice – "hear the other side" – and insisting that honoring this principle is essential to upholding the value of non-domination.[36] Useful techniques for analyzing the processes through which enemies or the weak are marginalized and constituted as "other," and for discerning and taking into account their repressed perspectives, have been developed by Michel de Certeau under the banner of "heterology."[37] In this spirit, procedures for constituting communal boundaries and memberships should include a requirement that mandates close attention to the viewpoints of potential members and – in light of the dialectical character of inclusion/exclusion – also outsiders.

(7) *Maintain proportionality*: Proportionality is another ancient principle of just-war thinking and social philosophy generally. Its core is the requirement that the costs, burdens, or ills that attend a potential course of action should not outweigh the benefits that it can be reasonably expected to bring. Ushered into the realm of constitutive ethics, the criterion of proportionality can then be brought to bear on the wrongs or harms and the gains associated with the drawing of boundaries and the favoring of some potential models of membership and organization over others. It then mandates that a sort of balancing be built into constitutive procedures and practices: in this respect, it is an application of the value of equilibrium. What sorts of positives and negatives factor into the ledger? As with

[35] Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford: Oxford University Press, 2007).
[36] Stuart Hampshire, *Justice Is Conflict* (Princeton, NJ: Princeton University Press, 1999).
[37] Michel de Certeau, *Heterologies: Discourse on the Other*, Brian Massumi, trans. (Minneapolis, MN: University of Minnesota Press, 1986).

just war theory, in which proportionality is bound up individually with several discrete processes of judgment (*jus ad bellum, jus in bello, jus post bellum*), the principle of proportionality will be concerned with different sorts of objects in connection with different aspects of the constitution of communities. For example, with respect to the bounds of political membership, the goods of civic solidarity rooted in linguistic or ethnic homogeneity or the maintenance and protection of established cultural traditions might enter into one side of the scales while the loss of the economic contributions of the excluded or the harms to their capacity for participation might go into the other. Judgments about borders will invoke other values and disvalues and decisions about the terms on which to include minorities will invoke still others. Rousseau's thought usefully illustrates how proportionality can be applied in multiple contexts. He argued in one setting, for example, that states should be "neither too large for good government, nor too small for self-maintenance"; elsewhere, he averred that with respect to territorial borders, "[t]he right relation is that the land should suffice for the maintenance of the inhabitants, and that there should be as many inhabitants as the land can maintain," before adding that "No fixed relation can be stated between the extent of territory and the population that are adequate one to the other."[38]

(8) *Cultivate sustainability*: Rousseau's dictum about territory points in the direction of a final middle axiom that involves a concept that is only now coming into its own as a principle of social ethics. Sustainability embodies the idea that a balance should be maintained between human communities and the land they occupy and that nurturing this equilibrium is a matter of justice not only at present but also with respect to future generations. In the context of constitutive justice, sustainability stands for the proposition that ecological factors must rightfully be taken into account in attempts to justify borders or boundaries of various types. A couple of overarching factors buttress this claim. One is the pressing character of environmental degradation and global warming and the fact that how communities are constituted can affect these processes for good or ill: indeed, the very notion of population control has become a staple topic in environmental ethics. The other, an ancient notion rooted in biblical and patristic thought that has recently been revived by Mathias Risse and others, is the idea of the common ownership

[38] *Social Contract,* bk. II, chaps 9 and 10.

of the earth.[39] Risse, as we saw in Chapter 2, argues that work on global justice needs to take into account the tradition, modeled for example by Grotius and Pufendorf, of reasoning about the grounds according to which the global commons might be divided into polities or owned privately. The implication of these two factors together is that there is a kind of ecological mortgage attached to territorial boundaries. Those prospective models of political community that best incorporate genuine stewardship of the land and its resources bolster their claim to constitutive justice accordingly.[40]

The criteria that form the basis of these maxims, as I have emphasized, invoke the primary values of responsibility, equilibrium, and non-domination in various combinations and measures. They thus interlock with and reinforce one another, and together, I suggest, they form a reasonably cohesive framework – one comparable to that provided by just war theory – within which to mount arguments and assess claims about constitutive justice: about the justness of actual and proposed means of delimiting communities of justice. Their overall thrust is to validate conceptions of community that correspond to established or incipient webs of responsibility, delineating fields of common goods so as to minimize the domination of persons and groups. Just boundaries track ties of civic friendship or solidarity, and they are characterized by an intuitive balance of competing interests regarding inclusion and the assignment of memberships and competencies to different levels of social organization. The framework includes certain procedural features, stipulating that just boundaries emerge when epistemic distortions are compensated for, values and disvalues for proposed solutions are weighed, the weak and marginalized enjoy a presumption in their favor, and overall judgments are revised and refined through a discursive process of reflective equilibrium. Inasmuch as the boundaries in question involve physical borders or territorial sovereignty, their justness is to be assessed in part with respect to their ecological ramifications.

This "just boundaries" theory builds on elements outlined in Chapter 6 in constructing an overall theory of constitutive justice. Taking political

[39] Risse argues that the idea of global ownership need not depend on biblical warrants or patristic interpretations of the "universal destination of earthly goods," and he argues that Grotius and Locke found that the proposition was demonstrated adequately by reason alone (*On Global Justice*, pp. 89–90).

[40] This is an implication of the main argument of Avery Kolers's groundbreaking study *Land, Conflict, and Justice: A Political Theory of Territory* (Cambridge: Cambridge University Press, 2009).

communities as its primary point of reference, it recognizes that a wide range of structural, political, and discursive modes of boundary-making combine in complex ways to shape political geographies, delineate memberships, and inform our thinking and imagining about them. It takes into account, moreover, how different modes of social agency are implicated in the processes through which borders and boundaries arise, necessitating that we make nuanced judgments about responsibility and accountability in regard to the constitution of communities. Its provisions regarding non-domination, participation, the priority of the poor, and comparative justice reflect an outlook that acknowledges the precedence of injustice in the order of justice.

Beyond its middle axioms, what specific rules or precepts does this theory produce? How can it be applied in practice to specific problems? Because of its strongly contextual nature, it is difficult to formulate fixed practical directives supported by the theory. Rather, as a framework for debate, my approach anticipates a variety of differing judgments while attempting to identify parameters and constraints of ethical argument about constitutive issues. As an illustration of how it works, I present some rough and ready sketches of how my framework might produce principled perspectives on questions that deal with three types of constitutive matters: territorial disputes, secession movements, and immigration policy.

Territory and constitutive justice

One ineliminable aspect of constitutive questions revolves around the relationship between communities of justice and territory. Indeed, a harbinger of the advent of the discourse of constitutive justice is the emergence in recent years of lively debates about the nature and basis of territorial rights, the ethics of territorial boundaries, and appropriate relations between political communities and land. Before wading into the territorial implications of the theory of constitutive justice that I have sketched, it is necessary to note some central features of these discussions.

The central topic in debates about the ethics of territory has been the character of territorial rights.[41] There is fairly broad agreement, among

[41] My discussion here addresses contributions by Paulina Ochoa Espejo, "People, Territory, and Legitimacy in Democratic States," *American Journal of Political Science* 58.2 (April 2014): 466–78; Thomas Christiano, "A Democratic Theory of Territory and Some Puzzles about Global Democracy," *Journal of Social Philosophy* 37.1 (Spring 2006): 81–107; Anna Stilz, "Nations, States, and Territory," *Ethics* 121.3 (April 2011): 572–601; Anna Stilz, "Why Do States Have Territorial Rights?"

Anglo-American political philosophers at least, that rights to territory entail at least three elements: control of resources on the designated land, jurisdiction in the sense of control over a system of legal justice, and regulation of borders and admission of persons. The debate encompasses several interlocking questions: Can people possess rights to territory in general, and if so, on what grounds? What sorts of entities – aggregates of individuals, peoples, or states – might possess them? In what ways are rights to territory comparable to ownership or the possession of property? How might rights to specific territories be established initially, especially in light of the historical conception of the common ownership of the earth? What relevance might historical events have to territorial claims? On what grounds might others be excluded from participating in the exercise of territorial rights?

In response to this web of questions, three broad lines of argument have gained widespread recognition, associating the basis for territorial rights with, respectively, ownership of land, the foundation of group identity, or the administration of order. The first of these rationales builds on Locke's ideas about the acquisition of property, positing that the state – acting either as a representative of individual members who have acquired land or as a sort of collective agent that can itself establish ownership – can build up the right to exercise control over a specific landscape by settling it and transforming it in particular ways that add value to it. The second view roots territorial rights in the thick attachments that can form over time between peoples, nations, or religious communities and their physical environs, which can become bound up with the identity of the group in both material and symbolic ways. The basis for territorial rights, on the third view, is the promise of a state to ensure the rule of law or the practice of democracy in a given area; the claim to jurisdiction is thus tied to the state's claim to political legitimacy.

I will not rehearse here the various criticisms that exponents of these respective views have made of one another. For my purposes, it is more relevant to focus on some general limitations to this debate. One has

---

International Theory 1.2 (2009): 185–213; A. John Simmons, "On the Territorial Rights of States," *Noûs* 35 (2001): 300–26; David Miller, "Territorial Rights: Concept and Justification," *Political Studies* 60 (2012): 252–68; Kolers, *Land, Conflict, and Justice*; Tamar Meisels, *Territorial Rights* (Dordrecht: Springer, 2005); Lea Ypi, "Territorial Rights and Exclusion," *Philosophy Compass* 8.3 (2013): 241–53; and Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press, 2012).

to do with the relatively simplistic conception of territory employed in many of these arguments. To begin with, "territory" is a deceptively simple term that masks a complex interplay of historical, cultural, and philosophical factors. The fact that political theorists long neglected to think in a concerted way about territory has been only partly remedied by recent forays into the topic, since these as a rule have persisted in envisioning territory as a mostly uncomplicated concept that denotes a slice of land demarcated on the generally homogeneous and inert surface of the earth and set under the control of a particular political group.[42] A more nuanced conception of territory emerges from the work of some human geographers, who (1) emphasize that territory is but one, distinctively modern, way of thinking about bounded political space (that happens to be integrally related to an equally modern conception of sovereignty); (2) note that it can be understood differently in different cultural and religious settings;[43] and (3) suggest that it be thought of as a "political technology" that combines technologies for measuring land and controlling terrain.[44] Geographers are sensitive to the role that conceptions of territory play in "b/ordering" space in ways that reflect underlying political interests and agendas. They are attuned, that is, to the implication of the concept of territory itself in processes of boundary-making. The political processes that shape ideas and practices connected with territory are informed, further, by territorial imaginaries – specific prereflective ways of envisioning what territories are and how territoriality works.[45] The confluence of geography and justice, as we noted above, produces perspectives – for example, spatial

[42] An exception here is William Connolly, who applies his characteristic subtlety and nuance to the relation between democracy and territoriality in his *The Ethos of Pluralization* (Minneapolis, MN: University of Minnesota Press, 1995), pp. 135–61.

[43] Especially James D. Sidaway et al., "Translating Political Geographies," *Political Geography* 23 (2004): 1037–49. For some additional perspectives on territorial control and property, see David Miller and Sohail H. Hashmi, eds, *Boundaries and Justice: Diverse Ethical Perspectives* (Princeton, NJ: Princeton University Press, 2001); and Allen Buchanan and Margaret Moore, eds, *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003).

[44] See the exchange between Stuart Elden, "Land, Terrain, Territory," *Progress in Human Geography* 34.6 (2010): 799–817; and Marco Antonsich, "Rethinking Territory," *Progress in Human Geography* 35.3 (2010): 422–25.

[45] On territorial imaginaries, see Jeremy Larkins's innovative study *From Hierarchy to Anarchy: Territory and Politics Before Westphalia* (New York: Palgrave Macmillan, 2009). Some argue that the establishment of a territorial imaginary premised on the coextension of nations and states has been a source of significant conflict in the modern era.

justice[46] or environmental justice[47] – that help show how the shaping of territory can produced landscapes that are differentiated with respect to injustices. In addition, finally, it is important to be attuned to ways in which territory is not simply administered and acted on by political communities but also helps shape groups themselves, contributing to their identity and consistency.[48] Partly for this reason, and in light of the contingent nature of the term, constitutive justice includes a level of inquiry concerned with how territory itself is constituted conceptually.

Another feature of the prevalent ethical discourse about territory is its at best modest ecological sensibility. The logic of Lockean acquisition, with its conception that people accrue rights to land by settling it, mixing their labor with it and thus improving it, turns on an unapologetically anthropocentric conception of value. The same can be said of the idea that nations, or comparable groups, generate lasting attachments to the land they occupy by productively using the land in ways that increase its value. Both views depend on an estimation of the value of land in terms of rewards for human effort or the satisfaction of human need and desires – as opposed, for instance, to the health of habitats or the sustainability of ecosystems. Avery Kolers's theory of territorial justice, which attributes land rights to "ethnogeographic communities" that incorporate environmental sustainability into their patterns of land use, is an exception to this pattern of broad disregard of the ecological ramifications of territorial claims. Even his theory, though, turns finally on conceptions of value and "plenitude" rooted in the goods that land provides to the humans who settle or otherwise depend on it.[49]

---

[46] Edward Soja, *Seeking Spatial Justice* (Minneapolis, MN: University of Minnesota Press, 2010). Soja – working with the premises that (1) we are all spatial as well as social and temporal beings, (2) space is socially produced and can therefore be socially changed, and (3) the spatial and the social dialectically shape one another – argues that a critical spatial perspective can help identify and address injustices in how socially valued resources and opportunities (e.g., access to public transportation, jobs, or parks) are distributed in space.

[47] See, e.g., Robert D. Bullard, ed., *The Quest for Environmental Justice: Human Rights and the Politics of Pollution* (San Francisco, CA: Sierra Club, 2005); and Christopher G. Boone et al., "Parks and People: An Environmental Justice Inquiry in Baltimore, Maryland," *Annals of the Association of American Geographers* 99.4 (2009): 767–87.

[48] A classic statement of this relation is Wendell Berry, *Home Economics* (New York: North Point Press, 1987).

[49] Kolers, *Land, Conflict, and Justice*, p. 8. There is not necessarily anything objectionable about this stance. However, a theory of justice should arguably provide reasons for excluding goods for nonhuman entities from its understanding of the value of territory even as it should include rationales for excluding other humans from laying claim to the resources or other goods a territory contains.

The view I advance is animated in part by the proposition that the ethics of territorial control revolves not only around rights but also around responsibilities, and that these rights and responsibilities take into their compass not only humans but also other ecological entities that might be thought to possess intrinsic moral value. My perspective does not, however, eschew the important human goods that are bound up with the natural world we inhabit. Indeed, I endorse one of the normative threads that winds through the ownership and identity rationales for territorial rights, a thread that highlights the human experience of sinking roots into a particular landscape. There is a phenomenology of settling, and of rooted presence, that plays a crucial role in grounding ethical claims to belong on certain terrains and within certain boundaries. This phenomenological relation is reflected in various legal, ethical, and political expressions that signal our recognition that relations to territory have an important temporal dimension and convey our understanding that place-rights accrue over time. Thus, we speak of squatters' rights – or "adverse possession," in the language of the law – to denote our recognition that one can accumulate over time a legitimate entitlement to property originally possessed by others. Another legal precept, the "rule against perpetuities," by ensuring that property cannot be held permanently from beyond the grave, likewise recognizes that rights to control over land can dissipate or expire. The idea that rooted habitation of territory generates entitlements to it similarly informs the doctrine in international law of *uti possidetis juris*, which is applied to ensure that the territory demarcated by old colonial boundaries becomes the possession of newly decolonized states, rather than a *terra nullius* that might be claimed and contested by foreign powers.[50] German-language juridical systems employ the idea that one acquires rights of residence by establishing one's *Lebensmittelpunkt* – the center of one's life, materially and existentially – in a given place. Even the controversial notion of "creating facts on the ground," cynically deployed by Israeli policymakers who advocate the expansion of settlements in their conflict with Palestinians, is premised on the insight that establishing physical settlements alters the moral, and hence political, calculus over time regarding claims to territory. The phenomenon of progressive human connection to place, though, must be balanced by

[50] For an extended discussion of the role of this principle in contemporary international conflicts and debates, see Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (Montreal, QC: McGill-Queen's University Press, 2002).

an awareness of responsibilities to biotic entities and duties of sustainability, as well as by a recognition of the value of non-domination in the parceling of territorial rights.

Within my proposed framework of constitutive justice, then, which criteria come into play in an account of just assignments of territory? Territorial attachment and control is given a specific cast when viewed in terms of *responsibility* as the basis for communities of justice. From an ecologically minded standpoint, relations of responsibility define not only appropriate bounds of membership, but appropriate relations to terrain. This perspective brings the principle of sustainability into the foreground, with its insistence that territorial divisions serve to balance human and biotic well-being, and its acknowledgment that the common ownership of material goods affords sovereign groups a sort of ecological mortgage rather than absolute rights of disposal over the resources and denizens of a landscape.

It follows from this picture that ethically viable communities will be ones that conceive of and aim to promote the common good in terms of something like Aldo Leopold's seminal formulation of a land ethic – that is, an expansion of the boundaries of ethical community to include soil, water, and other species.[51] They will also, accordingly, be communities that practice solidarity within this broader context. The principle of subsidiarity, meanwhile, arguably provides a basis for questioning whether nation-state sovereignty is necessarily the best model for institutionalizing collective administration of territory or whether more layered, localized models might be more just. The criterion of participation, for its part, endorses the key insight of administration-based theories of territorial rights by valuing those formations of land use that most empower the members of communities of justice.

If communities of justice that have undergone a settling process over time and practiced a land ethic in a given region may be understood to have accrued a prima facie set of rights and responsibilities there, these will still need to be balanced with the needs of others, and especially the poor and disadvantaged, in keeping with the criteria of proportionality and the option for the poor. The problem described by some territorial rights theorists that involves populations that are uniquely disadvantaged when they lose their homeland to rising sea levels or other ecological disasters provides an example of the sort of scenario that might require revisions to the entitlements of settled groups

[51] His classic formulation is in Aldo Leopold, *A Sand County Almanac: And Sketches Here and There* (London: Oxford University Press, 1949).

elsewhere.[52] Conflicts that result from these or other sorts of scenarios will furthermore engage the principle of comparative justice. In connection with this criterion, Kolers makes a compelling point when he notes that "because land has particular value and partly constructs the people who live on it … [a global] theory of distributive justice that treated land as a uniform good to be distributed according to a unitary principle would be mistaken."[53] Rather, judgments of comparative justice will be contingent, weighing particular, historical processes of settling against the interests of others in avoiding domination while trying to correct for the epistemic biases they are likely to contain.

What sorts of concrete conclusions might the framework that I have presented support regarding, say, the Israeli–Palestinian conflict? Given the complexity of the history and the competing claims involved, a worthy response would require a much more thoroughgoing analysis and argumentation than can be supported by my sketch here. One thing I can say, however, is that the argument Kolers provides in response to this case fits fairly well within the ethical parameters I have outlined. Rejecting conventional proposals for either a single "cosmopolitan state" or a two-state solution, he endorses instead either a confederation model that comprises separate ethnogeographic regions administered by Zionists, Palestinians, and Bedouins or, that failing, a partitioning into three small states – one for each group – whereby some of the territory controlled by the Palestinian and Bedouin states would be shared.[54] Apart from its sensitivity to the dynamics of settling and its focus on ecological sustainability, it is a striking feature of his account that it recognizes the claims – and indeed the distinctive common good – of a marginalized group, the Bedouin, who are usually ignored in territorial debates. Beyond these central points, Kolers's proposed territorial constellations both seem to fall within the field staked out by my framework, centrally acknowledging the importance of sustainable patterns of land use and phenomenological ties to the land while honoring a cardinal value of non-domination. Where a proposal fully cognizant of the issues of constitutive justice might depart from his is with respect to the politics of boundary-making, where additional consideration needs to be given to the interplay between topography, symbolic sites such as Masada,

[52] Mathias Risse, "The Right to Relocation: Disappearing Island Nations and Common Ownership of the Earth," *Ethics and International Affairs* 23.3 (2009): 281–300; and Cara Nine, "Ecological Refugees, States Borders, and the Lockean Proviso," *Journal of Applied Philosophy* 27.4 (2010): 359–75.
[53] Kolers, *Land, Conflict, and Justice*, p. 107.
[54] Ibid., pp. 189–216.

and the construction of communal boundaries;[55] and regarding certain ecological features like water rights, where, for example, the extension of the Jordan river watershed into Egypt, Jordan, Syrian, and Lebanon could be argued to create relations of responsibility and justice.

Secession and constitutive justice

The wave of ethnic separatist movements following the collapse of communism around the world ignited a vigorous debate about the morality of secession that revolves around issues of constitutive justice much as the discussion of territorial rights does. Indeed, although philosophers have only recently begun to explore the links between secession and territoriality, it is clear that the two themes are closely related since the breakup of states usually at stake with secession entails a reassessment of patterns of territorial control.

The complex of issues surrounding the prospect of secession interweaves ethical questions with political and legal concerns. The primary question concerns when and with what justifications a particular subcommunity or group might validly claim the right to withdraw from a state to establish its own state or join another political community. Under what conditions might the members of a polity agree among themselves to a sort of consensual, amicable divorce? Alternatively – and it is here that much of the ethical debate is focused – when might a group establish a claim to unilaterally depart? And when might a political separation generate a case for the justifiable use of force or even require enforcement from outside powers? Should, in certain circumstances – for example, the establishment of a multinational state – a right to secede be built into a political community's very constitution?[56]

---

[55] On the shifting and contested significance of Masada for Jewish and Israeli identity, see Yael Zerubavel, *Recovered Roots: Collective Memory and the Making of Israeli National Tradition* (Chicago, IL: University of Chicago Press, 1995); Nachman Ben-Yehuda, *The Masada Myth: Collective Memory and Mythmaking in Israel* (Madison, WI: University of Wisconsin Press, 1995); and Theodore Sasson and Shaul Kelner, "From Shrine to Forum: Masada and the Politics of Jewish Extremism," *Israel Studies* 13.2 (2008): 146–63.

[56] Here, the central point of debate seems to be whether such a provision would predictably lead to a politics of destructive provocation and premature divorce or whether it might be adequately safeguarded to prevent such an outcome through, for example, requirements of super-majorities and waiting periods. For opposing views, see Cass Sunstein, "Constitutionalism and Secession," *University of Chicago Law Review* 58 (1991): 633–70; and Andrew Shorten, "Constitutional Secession Rights, Exit Threats, and Multinational Democracy," *Political Studies* 62 (2014): 99–115.

What stake do regional actors or the international community have in prospective secessions, and how should the issue be addressed in international law?

On the central question of moral grounds for secession, liberal political philosophers largely subscribe to a typology that identifies three main lines of argument. One classic conception, carrying resonances with the nineteenth-century ethos of revolutionary nationalism championed by Giuseppe Mazzini, holds that certain communities of destiny – nations, specifically, or peoples – possess an inherent right to exercise political autonomy and territorial control, and they are thus entitled, if they wish, to recuse themselves from any other political arrangements in which they find themselves in order to form their own sovereign states.[57] A second, democratic view – one that can claim John Stuart Mill as a forebear – attributes the same sort of entitlement to any political association that can legitimately promise to parlay the rights to individual autonomy of its members into effective collective self-determination.[58] The third view draws on the ancient logic of just-war reasoning, invoking the criteria of just cause and last resort in portraying secession as a remedial measure that sometimes provides the only solution to grievous injustices inflicted on an identifiable group – injustices that, by evincing the failure of the sovereign to discharge the most basic duties of governance, legitimate the creation of alternative arrangements.[59] These distinct rationales, it is worth pointing out, are not necessarily mutually exclusive, and it is certainly possible to envisage cases – the Kurds in northern Iraq come to mind, for example – where they complement one another.[60]

---

[57] Walzer's discussion employs this reasoning in *Just and Unjust Wars*. See also David Miller, *On Nationality* (New York: Clarendon Press, 1995); and Margaret Moore, "The Ethics of Secession and a Normative Theory of Nationalism," *Canadian Journal of Law and Jurisprudence* 13.2 (July 2000): 225–50.

[58] Harry Beran, "A Liberal Theory of Secession," *Political Studies* 32.1 (March 1984): 21–31; Daniel Philpott, "In Defense of Self-Determination," *Ethics* 105 (1995), 352–85; Christopher Heath Wellman, *A Theory of Secession: The Case for Political Self-Determination* (Cambridge: Cambridge University Press, 2005).

[59] The most prominent proponent of this approach is Allen Buchanan. See his *Secession: The Legitimacy of Political Divorce From Fort Sumter to Lithuania and Quebec* (Boulder, CO: Westview Press, 1991). See also Wayne Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession in the Multinational State* (Oxford: Oxford University Press, 2006); and Lea Brilmayer, "Secession and Self-Determination: A Territorial Interpretation," *Yale Journal of International Law* 16 (1991): 177–202.

[60] See Margaret Moore's excellent discussion of the Iraqi case in "The Ethics of Secession and Postinvasion Iraq," *Ethics and International Affairs* 20.1 (2006): 55–78.

These trajectories have each been refined and qualified in various ways by their exponents, but they nonetheless remain vulnerable to some basic criticisms. One set of criticisms concerns their practicability, and detractors question whether these rationales are (1) adequately aware of the destructive forces that can be unleashed in state breaking; (2) overly optimistic about the prospects for new states to establish their sovereignty and protect their residents; (3) sufficiently attentive to the difficulties of applying the blunt principles of secessionist rationales to the highly complex contexts in which such movements arise; or (4) fully aware of the problems involved in attempting to appropriate or reassign territory in a world where it is in high demand.[61] This last concern points to a more theoretical lacuna that involves the pressing yet unmet need to integrate thinking about secession with normative theory that addresses related problems such as territorial rights and the ethics of the use of force. It is also not clear how the logic of the democratic and national justifications in particular might be constrained: the former raises the specter of a series of recursive secessions, while the latter opens up the possibilities of an epidemic of claimants to the right of national self-determination. This perplexity moves us in the direction of a set of criticisms specifically germane to the standpoint of constitutive justice.

Because theories of secession aim at a new regime of self-determination, it is incumbent on them to direct their arguments toward the question of how that "self" is defined. This, however, has thus far been a weak point in the debate as a whole, with little attention being directed in nationalist accounts to the more ethically troubling dimensions of nation-building; or in remedial accounts to the problematic aspects of defining a political entity through injustices and persecution; or in democratic or "plebiscitary" accounts to the tricky ramifications of the *demos* problem. This tendency is compounded by a broad reliance on a Westphalian territorial imaginary that assumes a map of homogeneous territory to be divided under separate sovereign entities, in a manner that tacitly forecloses other ways of assigning territorial privileges and responsibilities. And finally, by focusing primarily on the needs and prerogatives of secessionist groups, the preeminent theories embody a bias against the perspectives and claims of others with interests in prospective secessions, be they fellow citizens, neighboring political communities, or the international community at large.

---

[61] Some of these concerns are expressed, for example, in Donald Horowitz, "The Cracked Foundations of the Right to Secede," *Journal of Democracy* 14.2 (April 2003): 5–17.

In response to these sorts of concerns, a constitutive perspective recasts the question of political secession in several ways. It draws more attention, first of all, to the issues of justice involved in the processes of boundary-making and of framing that seed and nurture separatist disputes, recognizing that they are prior to the questions of corrective justice emphasized by remedial theories of secession.[62] Addressing secessionist concerns, it follows, may be pursued by reconstructing or reinterpreting group boundaries in a way that undercuts perceptions of the need for divorce.[63] Second, the central value of non-domination that is emphasized by my conception of constitutive justice is distinct from, and less expansive than, the idea of self-determination in ways that favor solutions that stop short of outright secession, including local autonomy, shared sovereignty, and, perhaps, transnational forms of political membership and democratic engagement. This invokes a third point: to focus on constitutive justice is to invite critique of the entrenched nation-state principle of territoriality and consideration of alternative models of fashioning jurisdictions, designating memberships, and assigning control of terrain.

The middle axioms of my approach weight evaluations of prospective secessions in additional ways. For instance, it will add to the normative case for a proposed secession if and inasmuch as it can be plausibly argued that a political divorce would both draw on and further develop existing ties of solidarity, and both express and augment the participatory capacity within the seceding population, in ways that at least offset the anticipated costs of a breakup. Some additional criteria imply constraints with a wider scope: secessionists will aid their cause insofar as they can reasonably claim that a separation will be conducive to the

[62] As Nancy Fraser notes, problems of framing are readily exacerbated by failures of redistribution and recognition, but they nonetheless constitute a distinctive type of injustice. See her "Reframing Justice in a Globalizing World," *New Left Review* 36 (2005): 1–19. Beyond this point of difference, there are certain affinities – notably, the centrality of experiences of injustice and the analogies to just war theory – between remedial theories and the approach to constitutive justice that I have presented here.

[63] Margaret Moore, for example, drawing on the research in Linda Colley, *Britons: Forging a Nation 1707–1837* (London: Pimlico, 1992), hypothesizes that separatism flourished in Ireland, and not in the other nations comprising the United Kingdom, primarily because of the privileging of Protestantism in British identity in the eighteenth and nineteenth centuries (Moore, "The Ethics of Secession and Postinvasion Iraq," p. 61). This suggests that a more equitable or inclusive casting of Britishness might well have produced different historical outcomes.

common good and will be beneficial to the least advantaged, not only of the political entity to which they aspire but more importantly of the one they wish to leave. Procedurally, the principle of comparative justice militates in favor of the judgment that processes for resolving claims for secession, be they plebiscitary or judicial, should build in consideration of the important interests – regarding, say, irredentist unification, or security, or international order – of outside actors, including neighboring states and international organizations. Likewise, the notion of subsidiarity encourages the peaceful resolution of separatist claims by those immediately involved but supports mediation by higher – that is, regional or even global – agencies where this proves infeasible. That is an important point because it carries with it the implication that even a just cause for secession does not of itself generate a *casus belli*, a justification for the use of force: rather, it places separatist conflicts within a transnational institutional context within which uses of force would have to be rationalized. Lastly, as my discussion of territorial rights suggests, the ethics of secession from the vantage of constitutive justice can be expected to favor solutions that advocate balanced and proportionate, as opposed to harshly gerrymandered, configurations of terrain and that reflect ecologically sustainable uses of land.

One can see, I think, how these criteria together might support the secession of South Sudan not long ago while likewise judging that the recent Scottish decision not to secede was a just, and wise, outcome. On the whole, the view of secession that flows from the constitutive perspective I have articulated is conservative, rather than permissive, in tenor. The same cannot be said of a constitutive justice-based approach to questions of mobility, migration, and political membership, however.

Immigration and constitutive justice

As I recounted in Chapter 4, a debate about the ethics of migration, prompted largely by Michael Walzer's seminal work on membership and justice in the early 1980s, has since unfolded against a shifting backdrop marked by the fall of the Iron Curtain, advancing processes of regional organization, various armed conflicts and humanitarian crises, and ongoing economic globalization. Such developments have shaped the "push" and "pull" factors that, from a sociological or economic point of view, drive patterns of migration. They have also prompted adjustments in the legal institutions that constrain migration and mediate the tension between the widely recognized human right to freedom of

movement and the established prerogative of states to control admissions to their territory and citizenry.

Within this context, philosophers and political theorists have staked out a set of ethical topics having to do with the rights and wrongs of limitations on border crossings, extended residency, and social and political membership for migrants.[64] To view this field of debate from the standpoint of constitutive justice is to place emphasis on a foundational question that is rarely broached: how can borders be justified in the first place? More specifically, can fortified, hard boundaries that limit outsiders from entering a given community – the sort of boundaries established most often, historically, by force – be legitimized ethically? If so, for which sorts of communities and with respect to which outlines might they be imposed? Who – which power or authority – might rightfully be expected to make such judgments? And to whom should they be thought obligated to provide a justification? Taken together, these questions call into question the tendency of much of the immigration ethics debate to cast the relevant questions in terms, primarily, of boundary incursions.

Instead of focusing on these cardinal points, however, discussions of the morality of migration revolve around mainly secondary issues that have to do broadly with the question of the extent to which borders should be "open" or "closed." These designations preside over distinct debates about (1) the numbers of immigrants who should be allowed in; (2) the relevance of distinctions among different types of migrants such as refugees, asylum seekers, family members, and sharers of ethnic or national identity; and (3) the relative weight to be given to "internal" normative interests, such as safeguarding economic well-being or political institutions or national identity, versus "external" considerations

[64] The most discriminating analysis of this debate is Joseph H. Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013). I draw here also on Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000); Linda Bosniak, *The Alien and the Citizen: Dilemmas of Contemporary Membership* (Princeton, NJ: Princeton University Press, 2006); Christopher Heath Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (Oxford: Oxford University Press, 2011); Chandran Kukathas, "The Case for Open Immigration," in *Contemporary Debates in Applied Ethics*, Andrew I. Cohen and Christopher Heath Wellman, eds (Malden, MA: Blackwell Publishing, 2005), pp. 207–220; Mathias Risse, "On the Morality of Immigration," *Ethics and International Affairs* 22 (2008): 25–33; Michael Blake, "Immigration, Jurisdiction, and Exclusion," *Philosophy and Public Affairs* 41.2 (Spring 2013): 103–30; and Ryan Pevnick, *Immigration and the Constraints of Justice* (Cambridge: Cambridge University Press, 2014).

such as the promotion of universal human rights or global justice. An additional set of issues concerns immigration in particular, as opposed to migration in general. At issue here are the appropriate terms and conditions for admitting people not just into a territory but into membership in a populace, either in the sense of formal citizenship or through some form of "social citizenship" consisting of limited, de facto rights and privileges for established, resident aliens.[65] Finally, there are questions of international economic equity raised, for example, by immigration policies that aim to recruit the best and brightest away from less developed countries, and there are questions about even the just use of force or deception in the face of unjust migration policies.[66]

The positions on the current debate occupy a rough spectrum ranging from strongly exclusivist or "closed" border positions rooted in various forms of nationalism or protectionism, to thoroughly inclusivist or "open-border" stances that draw on utilitarian or libertarian premises. Exclusivist arguments generally take for granted the premise that it is legitimate for territorial powers to exclude outsiders, and devote themselves to explicating specific rationales for delimiting admissions in the name of the established group.[67] Imposing closure on the community is necessary in order to preserve the integrity of the nation, as nationalists aver; or to safeguard the security of the institutions of governance, according to statists; or to provide the cultural homogeneity necessary for civic virtue, as republicans claim; or to establish the spirit of solidarity requisite to democratic politics, as populists assert; or to guarantee the prosperity of the economy, as protectionists have it. Inclusivist arguments, by contrast, subordinate the value of closure to other considerations: individual rights to mobility or to acquire property, in the case of libertarians; or the principle of equality of respect and economic well-being, for some global justice theorists; or the efficiency of global markets and freedom of movement, for utilitarians; or the claims of all subjected to a particular set of policies to have a say regarding them, as some democratic theorists insist.

---

[65] The term "social citizenship" was pioneered in T.H. Marshall's influential essay "Citizenship and Social Class," in his *Citizenship and Social Class and Other Essays* (Cambridge: Cambridge University Press, 1950).

[66] Javier Hidalgo, "Resistance to Unjust Immigration Restrictions," *Journal of Political Philosophy*, published online January 15, 2015: 1–21.

[67] An exception is Christopher Heath Wellman's argument about freedom of association in "Immigration and Freedom of Association," *Ethics* 119 (2008): 109–141; but see also the critical response of Sarah Fine, "Freedom of Association Is Not the Answer," *Ethics* 120.2 (2010): 338–56.

It is, as I have noted, a shortcoming of the positions across the spectrum that they generally neglect to link their arguments for or against exclusion with a critique of the debate's underlying normative assumptions about borders and closure. There are a couple of other respects in which the framing of the discussion weakens the force of the respective claims. One is a tendency to transfer the burden of moral argument to shaky and tendentious empirical claims: thus, assertions that "the boat is full" or that the national identity is being diluted or that the immigrants are taking "our" jobs, or that the tide of free trade will raise all boats are thought by some decisively to resolve ethical disagreements about migration. The other is a reliance on categories associated with the nation-state model that hinder an appreciation of how forces of globalization – or "glocalization" – are rapidly shifting modes of association, economic organizations, and structures of governance in ways that complicate borders and institutions of membership.[68]

The framework I have offered of criteria of constitutive justice does not, I reiterate, present a single blueprint for a just immigration policy, but it does offer a rich endorsement of certain directions in which migration justice might be said to bend. Its tenor, as I intimated, is more permissive than conservative. A central theme implied by the core values in my theory is that it is unjust to establish or revise boundaries without taking into account the interests of those whose exclusion might plausibly be claimed to subject them to domination or to rupture relations of mutual responsibility. What it means concretely to take their interests into account is not predetermined: this might imply automatic political inclusion, or the necessity of consulting them in decisions about boundaries, or a duty to justify exclusions to them, or an obligation to compensate them for any lost benefits of membership. Still, in general, this formula reflects that all such people need be considered part of the community of justice in some effective sense.

One consequence of a constitutive approach will be to question normative assumptions regarding the desirability of a monolithic system of bordered memberships that correspond to nation-states. The layered conception of the common good and the principle of subsidiarity indeed each weigh in on behalf of differentiated and overlapping

[68] Peter W. Higgins, in his *Immigration Justice* (Edinburgh: Edinburgh University Press, 2013), emphasizes, for example, that commentators on the ethics of immigration often rely on accounts of states that vastly overrate their ability to engage in "purely self-regarding conduct" while underrating the extent to which they are vulnerable to the decisions of others (p. 2).

forms of membership and mobility, as reflected, at least in part, in the varied rights, responsibilities, and access associated with European citizenship. Within this broad picture, additional criteria come to bear: importantly, for example, migration policies should be aimed to at once acknowledge and build up relations of solidarity – a commitment that would likely support family reunification as well as admission of others exhibiting this virtue.[69] Similarly, such policies should promote participation and empowerment for those deeply affected by them: this might entail, for example, giving local political rights to foreign residents and ensuring that full enfranchisement become the norm for permanent residents; additionally, it might support the incorporation of collective rights for minority groups that have established a presence in a given society.[70]

Some of the criteria in the framework that I have sketched militate in favor of comparatively inclusive attitudes toward migration. A preference for the poor, for example, would tend to overturn those current policies aimed at selectively recruiting professionals and investors, instead allowing need, along with international equity, to become a leading factor in admissions. To this, the principle of comparative justice might be interpreted to add a procedural presumption in favor of the case of outsiders applying for admission, along with a healthy skepticism regarding empirical claims invoked as grounds for constraints on immigration. At the same time, this principle also implies the need to take into account the claims and interests of sending nations, a consideration which might equally be invoked to encourage acceptance of refugees or to discourage recruitment programs contributing to "brain drain."[71] Further constraints on migration, finally, might be justified with respect to the principle of proportionality, which seeks to balance the benefits and costs of prospective shifts of population as well as the duties and rights associated with admission to citizenship; and the principle of sustainability, which demands that migration be steered, where possible, in such a way as to reduce environmental degradation

[69] France's recent extension of immediate citizenship to a migrant from Mali who, at considerable risk to himself, helped hide victims from the anti-Semitic attacker of a Jewish supermarket seems an implicit endorsement of this principle. See Maryline Baumard, "Lassana Bathily, 'héros' du supermarché cacher, naturalisé français," *Le Monde*.fr, January 21, 2015.

[70] I present such a case in *Ethics of Citizenship*.

[71] For a pair of normative assessments of brain drain and its implications for emigration policy, see Gillian Brock and Michael Blake, *Debating Brain Drain: May Governments Restrict Emigration?* (Oxford: Oxford University Press, 2015).

and promote ecological integrity. These latter two principles serve the cardinal constitutive value of equilibrium, which aims, roughly, at a sort of stasis or "balanced reciprocity"[72] sought, as I suggested above, through counterpoising a variety of values (*transnational* versus *particular* dimensions of justice, or *historical* versus *current-existential* claims of justice), social forces (*individual* versus *communal* agency, or "*push*" versus "*pull*" factors affecting migration), performances (rights and respect for receiving communities, including acceptance of the legal and political order, versus linguistic adaptation for migrants, or openness to intercultural dialogue for both), and constructions of boundaries (competing territorial claims, or contested definitions of group identity). This overall process is complex, contingent, and highly uncertain: those difficulties notwithstanding, it is guided by the hope of locating areas of "fit" through which instances of injustice and domination in the ongoing constitution of communities of justice can be minimized. It is possible to read some of the major revisions of political memberships in recent decades – the layering in of a sort of European citizenship modeled on a notion of subsidiarity, or the political divorce creating South Sudan, or the ongoing recalibration of independence and autonomy in the Balkans, or even the painful process toward some sort of political entity for Palestinians – as halting steps in this direction.

Coda

In this book, I have argued that the contemporary unfolding of ethical awareness about the dynamics of large-scale forms of human political, social, and cultural organization has revealed a gap, a blind spot in our perceptions and reasoning in regard to the time-honored notion of justice. I have endeavored to show the relevance, indeed the urgency, of a set of distinctive ethical challenges that relate to how we delineate borders, define identities, establish memberships, and in general create boundaries, proposing that we recognize these issues as matters of constitutive justice – that is, moral problems of a specific Protean character that cannot be effectively subsumed under traditional categories such as distributive or commutative justice. Although I view constitutive justice as a novel category that embodies a new perspective on social ethics, I certainly do not labor under the misapprehension that no one else is concerned with constitutive problems; rather, I have tried to show that a

[72] The phrase is David Johnston's, from *A Brief History of Justice* (Oxford: Wiley-Blackwell, 2011), pp. 30–33.

number of the most creative political and ethical thinkers writing today are wrestling implicitly with these sorts of questions. My aim has been to help buttress such efforts by providing a sort of map of the ethical field as well as a set of conceptual tools for analyzing how what I have termed "communities of justice" are constituted and emended.

I recognize that this sort of diagnostic foray and mapping exercise, while useful, is incomplete in the absence of some more constructive indication of how I think problems of constitutive justice might best be tackled, or at least engaged. For that reason I have provided a discussion of what I take to be general elements that any theory of constitutive justice should take into account; and furthermore, I have proffered an outline of my own normative framework, modeled loosely on the structure, if not the premises, of just war theory. I am under no illusions that the criteria of constitutive justice I have presented will be found compelling by all or will produce ready answers to all the sticky and complex ethical questions thrown up by the political boundaries and social divides through which we shape our world. This is but the first word, not the last. I do hope, though, that this work will help prompt further focused attention to the rights and wrongs of how we categorize each other and how we perceive, inform, and determine the fields within which we think about justice: I hope that it will aid us in bringing justice to bear on its own foundations.

Bibliography

Abbey, Ruth. "Back to Baczko," *European Journal of Political Theory.* 5.3 (July 2006): 355–64.

Abbott, Andrew. "Things of Boundaries," *Social Research.* 62.4 (Winter 1995): 857–82.

Abizadeh, Arash. "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders" *Political Theory.* 36.1 (February 2008): 37–65.

Ackerman, Bruce. *Social Justice and the Liberal State*. New Haven, CT: Yale University Press, 1980.

Addams, Jane. *Democracy and Social Ethics*. New York: Macmillan, 1905.

Agamben, Giorgio. "What Is a People?" in Vincenzo Binetti and Cesare Casarino, trans. *Means Without Ends: Notes on Politics*. Minneapolis, MN: University of Minnesota Press, 2000. 29–36.

Allen, Danielle. *Talking to Strangers: Anxieties of Citizenship Since 'Brown vs. Board of Education.'* Chicago, IL: University of Chicago Press, 2004.

Alston, Philip. "Conjuring Up New Human Rights: A Proposal for Quality Control," *American Journal of International Law.* 78 (1984): 607–21.

Amin, Ash. "Regions Unbound: Towards a New Politics of Place," *Geografiska Annaler.* 86B.1 (March 2004): 33–44.

Anderson, Benedict. *Imagined Communities: Reflections on the Origins and Spread of Nationalism*. London: Verso, 1983.

An-Na'im, Abdullahi. *Muslims and Global Justice*. Philadelphia, PA: University of Pennsylvania Press, 2010.

Antonsich, Marco. "Rethinking Territory," *Progress in Human Geography.* 35.3 (2010): 422–25.

Appiah, Kwame Anthony. *The Ethics of Identity.* Princeton, NJ: Princeton University Press, 2007.

Aquinas, Thomas. *Summa Theologiae*. Cambridge: Blackfriars, 1964–1973.

Arendt, Hannah. *The Origins of Totalitarianism.* New York: Harcourt, Brace and Co., 1951.

Arendt, Hannah. "Collective Responsibility," in James Bernhauer, ed. *Amor Mundi*. Dordrecht: Martinus Nijhoff, 1987. 43–50.

Arendt, Hannah. *The Human Condition,* 2nd ed. Chicago, IL: University of Chicago Press, 1998.

Aristotle. *Nicomachean Ethics*. Robert Bartlett and Susan Collins, trans. Chicago, IL: University of Chicago Press, 2011.

Aristotle. *Nicomachean Ethics*. David Ross, trans. Oxford: Oxford University Press, 1980.

Aristotle. *Politics,* 2nd ed. Carnes Lord, trans. Chicago, IL: University of Chicago Press, 2013.

Armstrong, Chris. *Global Distributive Justice: An Introduction.* Cambridge: Cambridge University Press, 2012.

Armstrong, John. *Nations Before Nationalism*. Chapel Hill, NC: University of North Carolina Press, 1982.

Asad, Talal. *Formations of the Secular: Christianity, Islam, Modernity.* Stanford, CA: Stanford University Press, 2003.

Assmann, Aleida and Jan Assmann. *Schrift und Gedächtnis: Beiträge zur Archäologie der literarischen Kommunikation*. München: Fink, 1987.

Assmann, Aleida and Linda Shortt, eds. *Memory and Political Change*. London: Palgrave Macmillan, 2011.

Augustinus, Aurelius. *City of God*. Henry Bettenson, trans. London: Penguin, 2003.

Bainton, Roland H. *Christian Attitudes Toward War and Peace: A Historical Survey and Critical Re-Evaluation*. New York: Abingdon Press, 1960.

Barbieri, William. "Beyond the Nations: The Expansion of the Common Good in Catholic Social Thought," *The Review of Politics*. 63.4 (Fall 2001): 723–54.

Barbieri, William. "Comparative Ethics and the Ethics of Comparison: Or, Why a Diet of Apples and Oranges Is Good for Us," *International Philosophical Quarterly*. 41.3 (2001): 285–303.

Barbieri, William. "Ethics and the Narrated Life," *Journal of Religion*. 78 (1998): 361–86.

Barbieri, William. *Ethics of Citizenship: Immigration and Group Rights in Germany.* Durham, NC: Duke University Press, 1998.

Barry, Brian and Robert E. Goodin, eds. *Free Movement: Ethical Issues in the Transnational Migration of People and of Money.* University Park: Pennsylvania State University Press, 1992.

Baumard, Maryline. "Lassana Bathily, 'héros' du supermarché cacher, naturalisé français," *Le Monde.fr* (January 21, 2015).

Bayertz, Kurt. "Four Uses of 'Solidarity,'" in Kurt Bayertz, ed. *Solidarity*. Dordrecht: Kluwer, 1999. 3–28.

Beitz, Charles R. *Political Theory and International Relations*. Princeton, NJ: Princeton University Press, 1979.

Beitz, Charles R. "International Liberalism and Distributive Justice: A Survey of Recent Thought," *World Politics*. 51.2 (1999): 269–96.

Belton, Kristy. "The Neglected Non-Citizen: Statelessness and Liberal Political Theory," *Journal of Global Ethics*. 7.1 (2011): 59–71.

Benhabib, Seyla. "Democracy and Difference: Reflections on the Metapolitics of Lyotard and Derrida," *Journal of Political Philosophy.* 2 (1994): 1–23.

Benhabib, Seyla. *The Claims of Culture: Equality and Diversity in the Global Era.* Princeton, NJ: Princeton University Press, 2002.

Benhabib, Seyla. "On the Alleged Conflict between Democracy and International Law," *Ethics and International Affairs*. 19.1 (2005): 85–100.

Benhabib, Seyla. *Another Cosmopolitanism.* Oxford: Oxford University Press, 2006.

Benjamin, Walter. "Critique of Violence," in Peter Demetz, ed., Edmund Jephcott, trans. *Reflections: Essays, Aphorisms, Autobiographical Writings*. New York: Schocken, 1986. 277–300.

Ben-Yehuda, Nachman. *The Masada Myth: Collective Memory and Mythmaking in Israel*. Madison, WI: University of Wisconsin Press, 1995.

Beran, Harry. "A Liberal Theory of Secession," *Political Studies*. 32.1 (March 1984): 21–31

Berg, Manfred and Bernd Schaefer, eds. *Historical Justice in International Perspective: How Societies Are Trying to Right the Wrongs of the Past.* Cambridge: Cambridge University Press, 2009.

Berger, Stefan et al. *Narrating the Nation: Representations in History, Media, and the Arts*. New York: Berghahn Books, 2008.
Berry, Wendell. *Home Economics*. New York: North Point Press, 1987.
Bhabha, Homi, ed. *Nation and Narration*. London: Routledge, 1990.
Blake, Michael. "Immigration, Jurisdiction, and Exclusion," *Philosophy and Public Affairs*. 41.2 (Spring 2013): 103–30.
Blake, Michael. *Debating Brain Drain: May Governments Restrict Emigration?* Oxford: Oxford University Press, 2015.
Bohman, James. *Democracy across Borders: From Dêmos to Dêmoi*. Cambridge, MA: MIT Press, 2007.
Bohman, James and Matthias Lutz-Bachmann. *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*. Cambridge, MA: MIT Press, 1997.
Boltanski, Luc. *Distant Suffering: Morality, Media, and Politics*. Cambridge: Cambridge University Press, 1999.
Boltanski, Luc and Laurent Thévenot. *On Justification: Economies of Worth*. Princeton, NJ: Princeton University Press, 2006.
Boone, Christopher et al. "Parks and People: An Environmental Justice Inquiry in Baltimore, Maryland," *Annals of the Association of American Geographers*. 99.4 (2009): 767–87.
Booth, Wayne C. *The Company We Keep: An Ethics of Fiction*. Berkeley, CA: University of California Press, 1988.
Booth, William J. "Foreigners: Insiders, Outsiders and the Ethics of Membership," *The Review of Politics*. 59.2 (Spring 1997): 259–92.
Bosniak, Linda. *The Alien and the Citizen: Dilemmas of Contemporary Membership*. Princeton, NJ: Princeton University Press, 2006.
Bourdieu, Pierre et al. *The Weight of the World: Social Suffering in Contemporary Society*. Priscilla Parkhurst Ferguson, trans. Stanford, CA: Stanford University Press, 2000.
Bowker, Geoffrey C. and Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences*. Cambridge, MA: MIT Press, 1999.
Brandom, Robert. "The Structure of Desire and Recognition," *Philosophy and Social Criticism*. 33.1 (2007): 127–50.
Brilmayer, Lea. "Secession and Self-Determination: A Territorial Interpretation," *Yale Journal of International Law*. 16 (1991): 177–202.
Brock, Gillian and Harry Brighouse, eds. *The Political Philosophy of Cosmopolitanism*. Cambridge: Cambridge University Press, 2005.
Brock, Gillian. *Global Justice: A Cosmopolitan Account*. Oxford: Oxford University Press, 2009.
Brown, Peter G. and Henry Shue, eds. *Boundaries: National Autonomy and Its Limits*. Totowa, NJ: Rowman and Littlefield, 1981.
Brown, Wendy. "Sovereignty and the Return of the Repressed," in David Campbell and Morton Schoolman, eds. *The New Pluralism: William Connolly and the Contemporary Global Condition*. Durham, NC: Duke University Press, 2008. 250–72.
Brown, Wendy. *Walled States, Waning Sovereignty*. New York: Zone Books, 2010.
Bruner, Jerome. "The Narrative Construction of Reality," *Critical Inquiry*. 18.1 (August 1991): 1–21.
Brunkhorst, Hauke. *Solidarity: From Civic Friendship to a Global Legal Community*. Jeffrey Flynn, trans. Cambridge, MA: MIT Press, 2005.

Buchanan, Allen. *Secession: The Legitimacy of Political Divorce from Fort Sumter to Lithuania and Quebec*. Boulder, CO: Westview Press, 1991.
Buchanan, Allen and Margaret Moore, eds. *States, Nations, and Borders: The Ethics of Making Boundaries*. Cambridge: Cambridge University Press, 2003.
Bullard, Robert D., ed. *The Quest for Environmental Justice: Human Rights and the Politics of Pollution*. San Francisco: Sierra Club, 2005.
Burns, J. Patout., ed. *War and Its Discontents*. Washington, DC: Georgetown University Press, 1996.
Buruma, Ian. "China in Cyberspace," *New York Review of Books*. 46.17 (November 1999): 9–11.
Butler, Judith. *Frames of War: When Is Life Grievable?* London: Verso, 2009.
Calhoun, Craig J. "Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere," *Public Culture*. 14.1 (Winter 2002): 147–71.
Canovan, Margaret. *Nationhood and Political Theory*. Brookfield: Edward Elgar, 1996.
Capizzi, Joseph E. *Politics, Justice, and War: Christian Governance and the Ethics of War*. Oxford: Oxford University Press, 2015.
Carens, Joseph. *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness*. Oxford: Oxford University Press, 2000.
Carens, Joseph. *The Ethics of Immigration*. Oxford: Oxford University Press, 2013.
Carney, James J. *Rwanda Before the Genocide: Catholic Politics and Ethnic Discourse in the Late Colonial Era*. Oxford: Oxford University Press, 2013.
Carr, David. *Time, Narrative, and History*. Bloomington, IN: Indiana University Press, 1991.
Catherwood, Christopher. *Churchill's Folly: How Winston Churchill Created Modern Iraq*. New York: Carroll & Graf, 2004.
de Certeau, Michel. *Heterologies: Discourse on the Other*. Brian Massumi, trans. Minneapolis, MN: University of Minnesota Press, 1986.
Chouliaraki, Lilie. "The Mediation of Suffering and the Vision of a Cosmopolitan Public," *Television & New Media*. 9.5 (September 2008): 371–91.
Christiano, Thomas. "A Democratic Theory of Territory and Some Puzzles about Global Democracy," *Journal of Social Philosophy*. 37.1 (Spring 2006): 81–107.
Cohen, Jean. "Changing Paradigms of Citizenship and the Exclusiveness of the Demos," *International Sociology*. 14 (1999): 245–68.
Cole, Phillip. *Philosophies of Exclusion: Liberal Political Theory and Immigration*. Edinburgh: Edinburgh University Press, 2000.
Coleman, Jules L. and Sarah K. Harding. "Citizenship, the Demands of Justice, and the Moral Relevance of Political Borders," in Warren F. Schwartz, ed. *Justice in Immigration*. Cambridge: Cambridge University Press, 1995. 18–62.
Coles, Robert. *The Call of Stories: Teaching and the Moral Imagination*. Boston, MA: Houghton Mifflin, 1989.
Collingwood, R.G. *The New Leviathan: Or Man, Society, Civilization and Barbarism*. Oxford: The Clarendon Press, 1942.
Connolly, William. *The Ethos of Pluralization*. Minneapolis, MN: University of Minnesota Press, 1995.
Connolly, William. "The Ethos of Sovereignty," in Austin Sarat et al., eds. *Law and the Sacred*. Stanford, CA: Stanford University Press, 2007. 135–54.

Corbridge, Stuart. "Marxisms, Modernities, and Moralities: Development Praxis and the Claims of Distant Strangers," *Environment and Planning D: Society and Space*. 11.4 (1993): 449–72.

Cover, Robert. "The Folktales of Justice: Tales of Jurisdiction," *Capital University Law Review*. 14 (1985): 179–203.

Cowan, Jane K., Marie-Bénédicte Dembour, and Richard A. Wilson, eds. *Culture and Rights: Anthropological Perspectives*. Cambridge: Cambridge University Press, 2001.

Cripps, Elizabeth. "Collectivities without Intent," *Journal of Social Philosophy*. 42.1 (Spring 2011): 1–20.

Crites, Stephen. "The Narrative Quality of Experience," *Journal of the American Academy of Religion*. 39.3 (1971): 291–311.

Curta, Florin, ed. *Borders, Boundaries and Ethnogenesis: Frontiers in Late Antiquity and the Middle Ages*. Washington, DC: Brepols Publishers, 2006.

Dahl, Robert. *Democracy and Its Critics*. New Haven, CT: Yale University Press, 1989.

Dallmayr, Fred. "'Asian Values' and Global Human Rights," *Philosophy East and West*. 52.2 (2002): 173–89.

Dallmayr, Fred, ed. *Comparative Political Theory: An Introduction*. New York: Palgrave Macmillan, 2010.

Davis, G. Scott. *Warcraft and the Fragility of Virtue: An Essay in Aristotelian Ethics*. Moscow, ID: University of Idaho Press, 1992.

Derrida, Jacques. "Declarations of Independence," *New Political Science*. 7.1 (1986): 7–15.

Derrida, Jacques. "Force of Law: The 'Mystical Foundation of Authority,'" in Drucilla Cornell et al., eds. *Deconstruction and the Possibility of Justice*. New York: Routledge, 1992. 3–67.

Derrida, Jacques. "The Last of the Rogue States: The 'Democracy to Come,' Opening in Two Turns," *South Atlantic Quarterly*. 103.2–3 (2004): 323–41.

Derrida, Jacques. *The Beast and the Sovereign*, vol. I. Michel Lisse et al., eds, Geoffrey Bennington, trans. Chicago, IL: University of Chicago Press, 2009.

Derrida, Jacques and Anne Dufourmantelle. *Of Hospitality*. Rachel Bowlby, trans. Stanford, CA: Stanford University Press, 2000.

Dewey, John. *The Public and Its Problems*. Chicago, IL: Swallow Press, 1927.

Dillon, Michael. "Another Justice," *Political Theory*. 27 (1999): 155–75.

Domínguez, Virginia R. *People as Subject, People as Object: Selfhood and Peoplehood in Contemporary Israel*. Madison, WI: University of Wisconsin Press, 1989.

Douglas, Mary. *How Institutions Think*. London: Routledge and Kegan Paul, 1987.

Downing, Lisa and Libby Saxton. *Film and Ethics: Foreclosed Encounters*. London: Routledge, 2010.

Dubow, Jessica and Richard D. Steadman-Jones, "Linguistic cosmopolitans: Arendt, Čapek, Orwell," *Journal of European Studies*. 43.2 (2013): 119–40.

Dupré, Louis and William O'Neill, S.J. "Social Structures and Structural Ethics," *The Review of Politics*. 51.3 (Summer, 1989): 327–44.

Dupré, Louis. *Passage to Modernity: An Essay in the Hermeneutics of Nature and Culture*. New Haven, CT: Yale University Press, 1993.

Dupré, Louis. *The Enlightenment and the Intellectual Foundations of Modern Culture*. New Haven, CT: Yale University Press, 2004.

Durkheim, Émile. *The Division of Labor in Society*. London: Collier Macmillan, 1983.

Dworkin, Ronald. *Law's Empire*. Cambridge, MA: Harvard University Press, 1986.
Eisen, Robert. *The Peace and Violence of Judaism: From the Bible to Modern Zionism*. Oxford: Oxford University Press, 2011.
Eisenstadt, S.N. "Multiple Modernities," *Daedalus* 129.1 (2000): 1–29.
Elden, Stuart. "Land, Terrain, Territory," *Progress in Human Geography*. 34.6 (2010): 799–817.
Elshtain, Jean Bethke, ed. *Just War Theory*. Oxford: Basil Blackwell, 1992.
Englard, Izhak. *Corrective and Distributive Justice: From Aristotle to Modern Times*. Oxford: Oxford University Press, 2009.
Erman, Eva. "The Boundary Problem and the Ideal of Democracy," *Constellations*. 21.4 (2014): 535–46.
Espejo, Paulina Ochoa. "People, Territory, and Legitimacy in Democratic States," *American Journal of Political Science*. 58.2 (April 2014): 466–78.
Evans, Michelle and Augusto Zimmermann, eds. *Global Perspectives on Subsidiarity*. Dordrecht: Springer, 2014.
Ewin, R.E. "On Justice and Injustice." *Mind*. 79.314 (1970): 200–16.
Ferrara, Alessandro. *The Democratic Horizon: Hyperpluralism and the Renewal of Political Liberalism*. Cambridge: Cambridge University Press, 2014.
Ferrara, Alessandro. "Two Notions of Humanity and the Judgment Argument for Human Rights," *Political Theory*. 31 (2003): 392–420.
Ferrara, Alessandro. *The Force of the Example: Explorations in the Paradigm of Judgment*. New York: Columbia University Press, 2008.
Ferrara, Alessandro. *Justice and Judgment: The Rise and the Prospect of the Judgment Model in Contemporary Political Philosophy*. London: SAGE, 1999.
Festenstein, Matthew. *Pragmatism and Political Theory: From Dewey to Rorty*. Chicago, IL: University of Chicago Press, 1997.
Festenstein, Matthew. "Dewey's Political Philosophy," Edward N. Zalta, ed. *The Stanford Encyclopedia of Philosophy*. (Spring 2014) URL: http://plato.stanford.edu/archives/spr2014/entries/dewey-political
Fine, Sarah. "Freedom of Association Is Not the Answer," *Ethics*. 120.2 (2010): 338–56.
Fitzmaurice, Deborah. "Justice, Practical Reason and Boundaries," in Percy B. Lehning and Albert Weale, eds. *Citizens, Democracy, and Justice in the New Europe*. London: Routledge, 1997. 15–33.
Fleischacker, Samuel. *A Short History of Distributive Justice*. Cambridge, MA: Harvard University Press, 2004.
Fleming, James E. and Jacob T. Levy, eds. *Federalism and Subsidiarity: Nomos LV*. New York: New York University Press, 2014.
Føllesdal, Andreas. "Subsidiarity and the Global Order," in Evans and Zimmermann, *Global Perspectives*. Dordrecht: Springer, 2014. 207–20.
Forsdyke, Sara L. "Exile, Ostracism and the Athenian Democracy," *Classical Antiquity*. 9 (2000): 232–63.
Forst, Rainer. *Contexts of Justice: Political Philosophy Beyond Liberalism and Communitarianism*. John M.M. Farrell, trans. Berkeley, CA: University of California Press, 2002.
Forst, Rainer. *The Right to Justification: Elements of a Constructivist Theory of Justice*. Jeffrey Flynn, trans. New York: Columbia University Press, 2012. 3–4.
Forsythe, David P. and Patrice C. McMahon, eds. *Human Rights and Diversity: Area Studies Revisited*. Lincoln: University of Nebraska Press, 2003.

Frank, Jason. *Constituent Moments: Enacting the People in Postrevolutionary America*. Durham, NC: Duke University Press, 2010.

Fraser, Nancy and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange*. New York: Verso, 2003.

Fraser, Nancy. "Reframing Justice in a Globalizing World," *New Left Review*. 36 (2005): 1–19.

Fraser, Nancy. *Scales of Justice: Reimagining Political Space in a Globalizing World*. New York: Columbia University Press, 2009.

French, Peter A. and Mitchell R. Haney. "Changes in Latitudes, Changes in Attitudes," in Peter A. French and Jason A. Short, eds. *War and Border Crossings*. Lanham, MD: Rowman and Littlefield, 2005. 121–41.

Fricker, Miranda. *Epistemic Injustice: Power and the Ethics of Knowing*. Oxford: Oxford University Press, 2007.

Friese, Heidrun, ed. *Identities: Time, Difference, and Boundaries*. New York: Berghahn, 2002.

Frohock, Fred M. *Bounded Divinities: Sacred Discourses in Pluralist Democracies*. New York: Palgrave Macmillan, 2006.

Fulbrook, Mary. *German National Identity After the Holocaust*. Cambridge: Polity Press, 1999.

Garner, Robert. *A Theory of Justice for Animals: Animal Rights in a Nonideal World*. Oxford: Oxford University Press, 2013.

Gautney, Heather et al. *Democracy, States, and the Struggle for Social Justice*. New York: Routledge, 2008.

Geertz, Clifford. *The Interpretation of Cultures*. New York: Basic Books, 1973.

Gellner, Ernest. *Nations and Nationalism*. Oxford: Basil Blackwell, 1983.

Gibbs, Robert. "Philosophy and Law: Questioning Justice," in Edith Wyschogrod and Gerald P. McKenny, eds. *The Ethical*. Oxford: Blackwell, 2003. 101–16.

Gibney, Mark, ed. *Open Borders? Closed Societies? The Ethical and Political Issues*. New York: Greenwood Press, 1988.

Gilbert, Margaret. *On Social Facts*. London: Routledge, 1989.

Gilligan, Carol. *In a Different Voice*. Cambridge, MA: Harvard University Press, 1982.

Goodin, Robert E. "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy and Public Affairs*. 35.1 (2007): 40–68.

Goodin, Robert E. "Globalizing Justice," in David Held and Mathias Koenig-Archibugi, eds. *Taming Globalization: Frontiers of Governance*. London: Polity Press, 2003.

Gosepath, Stefan. "The Global Scope of Justice," *Metaphilosophy*. 32.1–2 (2001): 135–59.

Gould, Carol. *Interactive Democracy: The Social Roots of Global Justice*. Cambridge: Cambridge University Press, 2014.

Green, Sarah. "A Sense of Border: The Story So Far," in Thomas Wilson and Hastings Donnan, eds. *The Blackwell Companion to Border Studies*. Oxford: Blackwell, 2012. 573–92.

Gregory, Derek. *Geographical Imaginations*. Cambridge: Blackwell, 1994.

Grotius, Hugo. *De jure belli ac pacis*. Clark: The Lawbook Exchange, 2005.

Guterl, Matthew Pratt. *The Color of Race in America, 1900–1940*. Cambridge, MA: Harvard University Press, 2002.

Habermas, Jürgen. *Between Facts and Norms*. William Rehg, trans. Cambridge, MA: MIT Press, 1996.
Habermas, Jürgen. "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" trans. William Rehg, *Political Theory.* 29 (2001): 766–81.
Habermas, Jürgen. *Justification and Application*. Cambridge, MA: MIT Press, 1993.
Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge, MA: MIT Press, 1996.
Habermas, Jürgen. *The Inclusion of the Other: Studies in Political Theory.* Cambridge, MA: MIT Press, 1998.
Hammar, Tomas. *Democracy and the Nation State: Aliens, Denizens, and Citizens in a World of International Migration*. Aldershot: Avebury, 1990.
Hampshire, Stuart. *Justice Is Conflict*. Princeton, NJ: Princeton University Press, 1999.
Hart, H.L.A. *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. Oxford: Oxford University Press, 2008.
Harvey, David. *Cosmopolitanism and the Geographies of Freedom*. New York: Columbia University Press, 2009.
Hashmi, Sohail H. and Steven P. Lee, *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives*. Cambridge: Cambridge University Press, 2004.
Hashmi, Sohail H, ed. *Just Wars, Holy Wars, and Jihads: Christian, Jewish, and Muslim Encounters and Exchanges*. Oxford: Oxford University Press, 2012.
Hauerwas, Stanley. "The Self as Story: Religion and Morality from the Agent's Perspective," *Journal of Religious Ethics*. 1.1 (1973): 73–85.
Haydar, Bashshar. "Extreme Poverty and Global Responsibility," *Metaphilosophy.* 36.1–2 (2005): 240–53.
Hayek, Friedrich A. *Law, Legislation, and Liberty, Volume II: The Mirage of Social Justice*. Chicago, IL: University of Chicago Press, 1976.
Hegel, Georg W.F. *Natural Law: The Scientific Ways of Treating Natural Law, Its Place in Moral Philosophy, and Its Relation to the Positive Sciences of Law*. Philadelphia, PA: University of Pennsylvania Press, 1975.
Heinze, Eric. *The Concept of Injustice*. London: Routledge, 2013.
Held, David. "Principles of Cosmopolitan Order," in Brock and Brighouse, *Political Philosophy of Cosmopolitanism.* Cambridge: Cambridge University Press, 2005. 19–25.
Held, Virginia. *Rights and Goods: Justifying Social Action*. Chicago, IL: University of Chicago Press, 1984.
Herbst, Jeffrey. "In Africa, What Does It Take to Be a Country?" *Washington Post*, January 2, 2004, A21.
Herman, Barbara. "Morality Unbounded," *Philosophy and Public Affairs*. 36.4 (2008): 326–58.
Heyd, David. "Justice and Solidarity: The Contractarian Case Against Global Justice," *Journal of Social Philosophy.* 38.1 (Spring 2007): 112–30.
Hidalgo, Javier. "Resistance to Unjust Immigration Restrictions," *Journal of Political Philosophy.* 15 January 2015: 1–21.
Higgins, Peter W. *Immigration Justice*. Edinburgh: Edinburgh University Press, 2013.
Hobsbawm, Eric and Terence Ranger, eds. *The Invention of Tradition*. Cambridge: Cambridge University Press, 1983.

Höffe, Otfried. *Political Justice: Foundations for a Critical Philosophy of Law and the State*. J.C. Cohen, trans. London: Polity, 1994.
Höffe, Otfried. "Erwiderung," in Wolfgang von Kersting, ed. *Gerechtigkeit als Tausch? Auseinandersetzung mit der politischen Philosophie Otfried Höffes*. Frankfurt: Suhrkamp, 1997. 331–56.
Höffe, Otfried. *Vernunft und Recht: Bausteine zu einem interkulturellen Rechtsdiskurs*. Frankfurt: Suhrkamp, 1996.
Höffe, Otfried. *Gerechtigkeit: Eine philosophische Einführung*. Munich: C.H. Beck, 2001.
Höffe, Otfried. *Democracy in an Age of Globalisation*. Dirk Haubrich and Michael Ludwig, trans. Dordrecht: Springer, 2007.
Holmes, Stephen. "Precommitment and the Paradox of Democracy," in Jon Elster and Rune Slagstad, eds. *Constitutionalism and Democracy*. Cambridge: Cambridge University Press, 1988. 195–240.
Honig, Bonnie. *Democracy and the Foreigner*. Princeton, NJ: Princeton University Press, 2001.
Honig, Bonnie. *Emergency Politics: Paradox, Law, Democracy*. Princeton, NJ: Princeton University Press, 2009.
Honneth, Axel and Hans Joas. *Social Action and Human Nature*. Raymond Mayer, trans. Cambridge: Cambridge University Press, 1989.
Honneth, Axel. *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. Cambridge, MA: MIT Press, 1996.
Honneth, Axel. *Disrespect: The Normative Foundations of Critical Theory*. Cambridge: Polity Press, 2007.
Hope, Simon. "The Circumstances of Justice," *Hume Studies*. 36.2 (2010): 125–48.
Horowitz, Donald. "The Cracked Foundations of the Right to Secede," *Journal of Democracy*. 14.2 (April 2003): 5–17.
Howard, Michael et al., eds. *The Laws of War: Constraints on Warfare in the Western World*. New Haven, CT: Yale University Press, 1994.
Hubin, D. Clayton. "The Scope of Justice," *Philosophy and Public Affairs*. 9 (1979): 3–24.
Hume, David. *Enquiries Concerning Human Understanding and Concerning the Principles of Morals*, 3rd ed. L.A. Selby-Bigge and P.H. Nidditch, eds. Oxford: Oxford University Press, 1975.
Hume, David. *A Treatise of Human Nature*, David Fate Norton and Mary J. Norton, eds. Oxford: Oxford University Press, 2001.
Huntington, Samuel P. *The Clash of Civilizations and the Remaking of World Order*. New York: Grove, 1996.
Hurley, Susan L. "Rationality, Democracy, and Leaky Boundaries: Vertical vs. Horizontal Modularity," in Ian Shapiro and Casiano Hacker-Cordón, eds. *Democracy's Edges*. London: Cambridge University Press, 1999. 273–93.
Hurley, Susan L. *Natural Reasons*. Oxford: Oxford University Press, 1989.
Ignatieff, Michael. *Blood and Belonging: Journeys into the New Nationalism*. New York: Farrar, Straus and Giroux, 1994.
Ivison, Duncan. "Political Community and Historical Injustice," *Australasian Journal of Philosophy*. 78.3 (2000): 360–73.
Jaspers, Karl. *The Question of German Guilt*. E.B. Ashton, trans. New York: Capricorn, 1961.

Jeffrey, Alex. "Geography of Justice," *Oxford Bibliographies*. (March 2015) URL: http://www.oxfordbibliographies.com/view/document/obo-9780199874002/obo-9780199874002–0055.xml

Jenkins, Willis. *The Future of Ethics: Sustainability, Social Justice, and Religious Creativity*. Washington, DC: Georgetown University Press, 2013.

Jensen, Lionel M. *Manufacturing Confucianism: Chinese Traditions and Universal Civilization*. Durham, NC: Duke University Press, 1997.

Johnson, James Turner. *Ideology, Reason and Limitation of War: Religious and Secular Concepts, 1200–1740*. Princeton, NJ: Princeton University Press, 1975.

Johnson, James Turner. *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*. Princeton, NJ: Princeton University Press, 1981.

Johnston, David. *A Brief History of Justice*. Oxford: Wiley-Blackwell, 2011.

Jones, Charles. *Global Justice: Defending Cosmopolitanism*. Oxford: Oxford University Press, 1999.

Julius, A.J. "Nagel's Atlas," *Philosophy and Public Affairs*. 34.2 (2006): 176–92.

Justenhoven, Heinz-Gerhard, and William A. Barbieri Jr., eds. *From Just War to Modern Peace Ethics*. Berlin: de Gruyter, 2012.

Keane, John. *Global Civil Society?* Cambridge: Cambridge University Press, 2003.

Kelsay, John. *Arguing the Just War in Islam*. Cambridge, MA: Harvard University Press, 2009.

Kingwell, Mark. *A Civil Tongue: Justice, Dialogue, and the Politics of Pluralism*. University Park, PA: Pennsylvania State University Press, 1995.

Kleingeld, Pauline. *Kant and Cosmopolitanism: The Philosophical Idea of World Citizenship* Cambridge: Cambridge University Press, 2012.

Kolers, Avery. "Dynamics of Solidarity," *Journal of Political Philosophy*. 20.4 (2012): 365–83.

Kolers, Avery. *Land, Conflict, and Justice: A Political Theory of Territory*. Cambridge: Cambridge University Press, 2009.

Krause, Sharon R. "Beyond Non-Domination: Agency, Inequality, and the Meaning of Freedom," *Philosophy and Social Criticism*. 39.2 (2013): 1–22.

Kukathas, Chandran. "The Case for Open Immigration," in Andrew I. Cohen and Christopher Heath Wellman, eds. *Contemporary Debates in Applied Ethics*. Malden: Blackwell Publishing, 2005. 207–20.

Kurasawa, Fuyuki. *The Work of Global Justice: Human Rights as Practices*. Cambridge: Cambridge University Press, 2007.

Kymlicka, Will. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Clarendon Press, 1995.

Laborde, Cécile. *Critical Republicanism: The Hijab Controversy and Political Philosophy*. Oxford: Oxford University Press, 2008.

Laborde, Cécile and John Maynor, eds. *Republicanism and Political Theory*. Oxford: Blackwell, 2008.

Laitinen, Arto. "On the Scope of 'Recognition': The Role of Adequate Regard and Mutuality," in Hans-Christoph Schmidt am Busch and Christopher Zurn, eds. *The Philosophy of Recognition: Historical and Contemporary Perspectives*. Plymouth: Lexington Books, 2010. 319–42.

Lalonde, Suzanne. *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis*. Montreal, QC: McGill-Queen's University Press, 2002.

Langlois, Anthony J. *The Politics and Justice of Human Rights: Southeast Asia and Universalist Theory*. Cambridge: Cambridge University Press, 2001.

Larkins, Jeremy. *From Hierarchy to Anarchy: Territory and Politics Before Westphalia*. New York: Palgrave Macmillan, 2009.

Larmore, Charles. *The Autonomy of Morality.* Cambridge: Cambridge University Press, 2008.

Lee, Steven P. *Ethics and War: An Introduction*. Cambridge: Cambridge University Press, 2012.

Lehning, Percy B., ed. *Theories of Secession*. London: Routledge, 1998.

Leibniz, Gottfried Wilhelm. *Political Writings*. Patrick Riley, ed. Cambridge: Cambridge University Press, 1996.

Leopold, Aldo. *A Sand County Almanac: And Sketches Here and There*. London: Oxford University Press, 1949.

Lippens, Ronnie. "Imagining Justice at the Cradle of Modernity: Re-Visiting Huizinga," in Ronnie Lippens, ed. *Imagining Boundaries of Justice: Social and Legal Justice across Disciplines*. Oxford: Hart Publishing, 2004.

List, Christopher and Philip Pettit. *Group Agency: The Possibility, Design, and Status of Corporate Agents*. Oxford: Oxford University Press, 2011.

Longman, Timothy. "Identity Cards, Ethnic Self-Perception, and Genocide in Rwanda," in Jane Caplan and John Torpey, eds. *Documenting Individual Identity: The Development of State Practices in the Modern World*. Princeton, NJ: Princeton University Press, 2001. 345–58.

Loughlin, Martin and Neil Walker, eds. *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford: Oxford University Press, 2007.

Lovett, Frank. *A General Theory of Domination and Justice*. Oxford: Oxford University Press, 2010.

Lovin, Robin W. and Frank Reynolds. *Cosmogony and Ethical Order: New Studies in Comparative Ethics*. Chicago, IL: University of Chicago Press, 1985.

Lu, Catherine. "Colonialism as Structural Injustice: Historical Responsibility and Contemporary Redress," *The Journal of Political Philosophy*. 19.3 (2011): 261–81.

MacIntyre, Alasdair C. *After Virtue: A Study in Moral Theory*. Notre Dame, IN: University of Notre Dame Press, 1984.

MacIntyre, Alasdair C. *Whose Justice? Which Rationality?* Notre Dame, IN: University of Notre Dame Press, 1989.

Marcin, Raymond B. "Gandhi and Justice," *Logos*. 7.3 (2004): 17–30.

Markell, Patchen. *Bound by Recognition*. Princeton, NJ: Princeton University Press, 2003.

Marshall, T.H. "Citizenship and Social Class," in T.H. Marshall, *Citizenship and Social Class and Other Essays*. Cambridge: Cambridge University Press, 1950.

Mason, Andrew. *Community, Solidarity, and Belonging: Levels of Community and Their Normative Significance*. Cambridge: Cambridge University Press, 2000.

Masuzawa, Tomoko. *The Invention of World Religions: Or, How European Universalism Was Preserved in the Language of Pluralism*. Chicago, IL: University of Chicago Press, 2005.

May, Larry. *The Morality of Groups: Collective Responsibility, Group-Based Harms, and Corporate Rights*. Notre Dame, IN: University of Notre Dame Press, 1987.

May, Larry. *Genocide: A Normative Account*. Cambridge: Cambridge University Press, 2010.

Meister, Robert. *After Evil: A Politics of Human Rights*. New York: Columbia University Press, 2010.

Menke, Christoph. "The Self-Reflection of Law and the Politics of Rights," *Constellations*. 18.2 (2011): 124–34.
McBride, Cillian. "Democratic Participation, Engagement, and Freedom," *British Journal of Politics and International Relations*. 15.4 (November 2013): 493–508.
McKim, Robert and Jeff McMahan, eds. *The Morality of Nationalism*. Oxford: Oxford University Press, 1997.
McMahan, Jeff. *Killing in War*. Oxford: Oxford University Press, 2009.
Meisels, Tamar. *Territorial Rights*. Dordrecht: Springer, 2005.
Merleau-Ponty, Maurice. *Phenomenology of Perception*. London: Routledge, 2014.
Meyer, Lukas. *Historische Gerechtigkeit*. Berlin: Walter de Gruyter, 2005.
Michelman, Frank. *Brennan and Democracy*. Princeton, NJ: Princeton University Press, 1999.
Migdal, Joel S., ed. *Boundaries and Belonging: States and Societies in the Struggle to Shape Identities and Local Practices*. Cambridge: Cambridge University Press, 2004.
Miller, Dale T. "Disrespect and the Experience of Injustice," *Annual Review of Psychology*. 52 (February 2001): 527–53.
Miller, David. *Social Justice*. Oxford: Oxford University Press, 1979.
Miller, David. *On Nationality*. Oxford: Clarendon Press, 1995.
Miller, David. *Citizenship and National Identity*. Cambridge: Polity Press, 2000.
Miller, David. "Territorial Rights: Concept and Justification," *Political Studies*. 60 (2012): 252–68.
Miller, David and Sohail H. Hashmi, eds. *Boundaries and Justice: Diverse Ethical Perspectives*. Princeton, NJ: Princeton University Press, 2001.
Miller, Richard B. *Interpretations of Conflict: Ethics, Pacifism, and the Just-War Tradition*. Chicago, IL: University of Chicago Press, 1991.
Moellendorf, Darrel. *Cosmopolitan Justice*. Boulder, CO: Westview Press, 2002.
Moore, Barrington. *Injustice: The Social Bases of Obedience and Revolt*. White Plains, NY: M.E. Sharpe, 1978.
Moore, Margaret. *Britons: Forging a Nation 1707–1837*. London: Pimlico, 1992.
Moore, Margaret, ed. *National Self-Determination and Secession*. Oxford: Oxford University Press, 1998.
Moore, Margaret. "The Ethics of Secession and a Normative Theory of Nationalism," *Canadian Journal of Law and Jurisprudence*. 13.2 (July 2000): 225–50.
Moore, Margaret. "The Ethics of Secession and Postinvasion Iraq," *Ethics and International Affairs*. 20.1 (2006): 55–78.
Mouffe, Chantal. *The Democratic Paradox*. London: Verso, 2000.
Murdoch, Iris. *The Sovereignty of Good*. London: Routledge & Kegan Paul, 1970.
Murphy, Nancey C. and George F.R. Ellis. *On the Moral Nature of the Universe: Theology, Cosmology, and Ethics*. Minneapolis, MN: Fortress Press, 1996.
Mylonas, Harris. *The Politics of Nation-Building: Making Co-Nationals, Refugees, and Minorities*. Cambridge: Cambridge University Press, 2012.
Nagel, Thomas. "The Problem of Global Justice," *Philosophy and Public Affairs*. 33.2 (2005): 113–47.
Nardin, Terry, ed. *The Ethics of War and Peace: Religious and Secular Perspectives*. Princeton, NJ: Princeton University Press, 1998.
Näsström, Sofia. "The Challenge of the All-Affected Principle," *Political Studies*. 59.1 (March 2011): 116–34.
Nine, Cara. "Ecological Refugees, States Borders, and the Lockean Proviso," *Journal of Applied Philosophy*. 27.4 (2010): 359–75.

Nine, Cara. *Global Justice and Territory.* Oxford: Oxford University Press, 2012.
Norman, Richard. *Killing, Ethics, and War.* Cambridge: Cambridge University Press, 1995.
Norman, Wayne. *Negotiating Nationalism: Nation-Building, Federalism, and Secession in the Multinational State*. Oxford: Oxford University Press, 2006.
Nozick, Robert. *Anarchy, State, and Utopia*. New York: Basic Books, 1974.
Nussbaum, Martha C. *Love's Knowledge: Essays on Philosophy and Literature*. Oxford: Oxford University Press, 1992.
Nussbaum, Martha C. et al. *For Love of Country: Debating the Limits of Patriotism.* Boston, MA: Beacon, 1996.
Nussbaum, Martha C. *Frontiers of Justice: Disability, Nationality, Species Membership*. Cambridge, MA: The Belknap Press, 2006.
O'Donovan, Oliver. *The Ways of Judgment*. Grand Rapids, MI: Wm. B. Eerdmans, 2005.
O'Neill, Onora. *Towards Justice and Virtue: A Constructive Account of Practical Reasoning*. Cambridge: Cambridge University Press, 1996.
O'Neill, Onora. "Justice and Boundaries," in Christine Chwaszcza and Wolfgang Kersting, eds. *Politische Philosophie der internationalen Beziehungen*. Frankfurt: Suhrkamp, 1998. 502–22.
O'Neill, Onora. *Bounds of Justice*. Cambridge: Cambridge University Press, 2000.
O'Neill, Shane. *Impartiality in Context: Grounding Justice in a Pluralist World.* Albany, NY: SUNY Press, 1997.
Offe, Claus. "'Homogeneity' and Constitutional Democracy: Coping with Identity Conflicts through Group Rights," *Journal of Political Philosophy.* 6 (1998): 115–18.
Okin, Susan Moller. *Justice, Gender, and the Family.* New York: Basic Books, 1989.
Olsaretti, Serena, ed. *Desert and Justice*. Oxford: Clarendon Press, 2003.
Olson, Kevin. "Paradoxes of Constitutional Democracy," *American Journal of Political Science*. 51.2 (2007): 330–43.
Orend, Brian. "Justice after War," *Ethics and International Affairs*. 16.1 (2002): 43–56.
Orend, Brian. *The Morality of War.* Orchard Park, NY: Broadview Press, 2006.
Pan, Philip P. "New National Identity Emerges in Taiwan," *Washington Post*, January 2, 2004, A13, A18.
Parfit, Derek. *Reasons and Persons*. Oxford: Clarendon Press, 1984.
Parijs, Philippe. *Linguistic Justice for Europe and the World.* Oxford: Oxford University Press, 2011.
Perry, Ronen. "The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory," *Tennessee Law Review.* 73.2 (2006): 177–236.
Persson, Ingmar. "A Basis for (Interspecies) Equality," in Paola Cavalieri and Peter Singer, eds. *The Great Ape Project: Equality Beyond Humanity.* New York: St. Martin's, 1993. 183–93.
Pettit, Philip. *Republicanism: A Theory of Freedom and Government*. Oxford: Oxford University Press, 1997.
Pevnick, Ryan. *Immigration and the Constraints of Justice*. Cambridge: Cambridge University Press, 2014.
Philpott, Daniel. "In Defense of Self-Determination," *Ethics*. 105 (1995): 352–85.
Philpott, Daniel. *Just and Unjust Peace: An Ethic of Political Reconciliation*. New York: Oxford University Press, 2012.

Pieper, Josef. *The Four Cardinal Virtues*. Notre Dame, IN: University of Notre Dame Press, 1966.
Plato. *Republic*. G.R.F. Ferrari, ed., Tom Griffith, trans. Cambridge: Cambridge University Press, 2000.
Pogge, Thomas. "Cosmopolitanism and Sovereignty," *Ethics*. 103 (October 1992): 48–75.
Pogge, Thomas. "Moral Universalism and Global Economic Justice," *Politics, Philosophy, and Economics*. 1.1 (2002): 29–58.
Polkinghorne, Donald. *Narrative Knowing and the Human Sciences*. Albany, NY: SUNY Press, 1988.
Pope, Stephen J. "Aquinas on Almsgiving, Justice, and Charity: An Interpretation and Reassessment," *The Heythrop Journal*. 32.2 (1991): 167–91.
Provost, Rene, ed. *Mapping the Legal Boundaries of Belonging: Religion and Multiculturalism from Israel to Canada*. Oxford: Oxford University Press, 2014.
Quine, W.V.O. *The Ways of Paradox and Other Essays*. New York: Random House, 1966.
Radzik, Linda. *Making Amends: Atonement in Morality, Law, and Politics*. Oxford: Oxford University Press, 2009.
Rancière, Jacques. *Dis-Agreement: Politics and Philosophy*. Julie Rose, trans. Minneapolis, MN: University of Minnesota Press, 1999.
Rancière, Jacques. "Who Is the Subject of the Rights of Man?" in Ian Balfour and Eduardo Cadava, eds. *And Justice for All? The Claims of Human Rights*. Durham, NC: Duke University Press, 2004. 297–310.
Raphael, D.D. *Concepts of Justice*. Oxford: Clarendon Press, 2001.
Rawls, John. *A Theory of Justice*. Cambridge, MA: Harvard University Press, 1971.
Rawls, John. *Political Liberalism*. New York: Columbia University Press, 1993.
Rawls, John. *The Law of Peoples*. Cambridge, MA: Harvard University Press, 1999.
Rawls, John. *Justice as Fairness: A Restatement*. Erin Kelly, ed. Cambridge, MA: Harvard University Press, 2001.
Rescher, Nicolas. *Paradoxes: Their Roots, Range, and Resolution*. Chicago, IL: Open Court, 2001.
Ricoeur, Paul. *Time and Narrative*, vols. 1–3. Kathleen McLaughlin and David Pellauer, trans. Chicago, IL: University of Chicago Press, 1984, 1985, 1988.
Ricoeur, Paul. *Oneself as Another*. Kathleen Blamey, trans. Chicago, IL: University of Chicago Press, 1992.
Ricoeur, Paul. "Autonomie et Vulnérabilité," in Antoine Garapon and Denis Salas, eds. *La Justice et le Mal*. Paris: Odile Jacobs, 1997.
Ricoeur, Paul. "Aesthetic Experience," in Kathleen Blamey, trans. *Critique and Conviction: Conversations with François Azouvi and Marc de Launay*. Cambridge: Polity Press, 1998.
Ricoeur, Paul. "The Plurality of Instances of Justice," in David Pellauer, trans. *The Just*. Chicago, IL: University of Chicago Press, 2000. 76–93.
Ricoeur, Paul. *Le Juste 2*. Paris: Editions Esprit, 2001.
Ricoeur, Paul. *Memory, History, Forgetting*. Chicago, IL: University of Chicago Press, 2004.
Ricoeur, Paul. *The Course of Recognition*. Cambridge, MA: Harvard University Press, 2005.
Ricoeur, Paul. *Reflections on the Just*. David Pellauer, trans. Chicago, IL: University of Chicago Press, 2007.

Risse, Mathias. "On the Morality of Immigration," *Ethics and International Affairs*. 22 (2008): 25–33.

Risse, Mathias. "The Right to Relocation: Disappearing Island Nations and Common Ownership of the Earth," *Ethics and International Affairs*. 23.3 (2009): 281–300.

Risse, Mathias. *On Global Justice*. Princeton, NJ: Princeton University Press, 2012.

Rogers, Melvin L. "Introduction: Revisiting the Public and Its Problems," *Contemporary Pragmatism*. 7.1 (2010): 1–7.

Rorty, Richard. "Human Rights, Rationality and Sentimentality," in Stephen Shute and Susan Hurley, eds. *On Human Rights: The Oxford Amnesty Lectures 1993*. New York: Basic Books, 1993. 111–34.

Rousseau, Jean-Jacques. "Of the Social Contract, Book II," in Steven M. Cahn, ed., Charles M. Sheroverj, trans. *Classics of Modern Political Theory*. New York: Oxford University Press, 1997.

Rovane, Carol. *The Bounds of Agency: An Essay in Revisionary Metaphysics*. Princeton, NJ: Princeton University Press, 1997.

Ruggie, John Gerard. "Territoriality and Beyond: Problematizing Modernity in International Religions," *International Organization*. 47 (1993): 139–74.

Rüthers, Bernd. *Das Ungerechte an der Gerechtigkeit—Fehldeutungen eines Begriffs,* 3rd ed. Tübingen: Mohr Siebeck, 2009.

Sack, Robert. *Homo Geographicus*. Baltimore, MD: Johns Hopkins University Press, 1997.

Said, Edward. *Orientalism*. New York: Pantheon, 1978.

Sainsbury, R.M. *Paradoxes,* 3rd ed. Cambridge: Cambridge University Press, 2009.

Sandel, Michael. *Liberalism and the Limits of Justice*. Cambridge: Cambridge University Press, 1982.

Sangiovanni, Andrea. "Global Justice, Reciprocity, and the State," *Philosophy and Public Affairs*. 35.1 (2007): 3–39.

Sassen, Saskia. *The Global City: New York, London, Tokyo*. Princeton, NJ: Princeton University Press, 1991.

Sassen, Saskia. *Territory, Authority, Rights: From Medieval to Global Assemblages*. Princeton, NJ: Princeton University Press, 2006.

Sasson, Theodore and Shaul Kelner, "From Shrine to Forum: Masada and the Politics of Jewish Extremism," *Israel Studies*. 13.2 (2008): 146–63.

Scarry, Elaine. *On Beauty and Being Just*. Princeton, NJ: Princeton University Press, 1999.

Scheffler, Samuel. *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*. Oxford: Oxford University Press, 2001.

Scheler, Max. *Formalism in Ethics and Non-formal Ethics of Values*. Manfred Frings and Roger Funk, trans. Evanston, IL: Northwestern University Press, 1973.

Schmidt, Volker. "The Politics of Justice and the Paradox of Justification," *Social Justice Research*. 11.1 (1998): 3–19.

Schmidtz, David. *Elements of Justice*. Cambridge: Cambridge University Press, 2006.

Schmitt, Carl. *The Concept of the Political: Expanded Edition*. George Schwab, trans. Chicago, IL: University of Chicago Press, 2007.

Schotel, Bas. *On the Right of Exclusion: Law, Ethics, and Immigration Policy*. London: Routledge, 2011.

Schuck, Peter H. and Rogers Smith. *Citizenship without Consent: Illegal Aliens in the American Polity.* New Haven, CT: Yale University Press, 1985.
Schuppert, Fabian. *Freedom, Recognition, and Non-Domination: A Republican Theory of (Global) Justice*. Dordrecht: Springer, 2014.
Sellars, Wilfrid. *Science and Metaphysics: Variations on Kantian Themes*. London: Routledge & K. Paul, 1968.
Searle, John. *The Construction of Social Reality.* New York: Free Press, 1995.
Sen, Amartya. "Justice Across Borders," in Pablo de Greiff and Ciaran Cronin, eds. *Global Justice and Transnational Politics*. Cambridge: Cambridge University Press, 2002. 37–52.
Sen, Amartya. "The Boundaries of Justice," *New Republic*. 242.20 (December 14, 2011): 23–26.
Sen, Amartya. *The Idea of Justice*. Cambridge, MA: Harvard University Press, 2009.
Shachar, Ayelet. *The Birthright Lottery: Citizenship and Global Inequality.* Cambridge, MA: Harvard University Press, 2009.
Shapcott, Richard. *Justice, Community, and Dialogue in International Relations*. Cambridge: Cambridge University Press, 2001.
Shapiro, Ian. "Three Ways to Be a Democrat," *Political Theory.* 22.1 (1994): 124–51.
Shapiro, Ian. *Democratic Justice.* New Haven, CT: Yale University Press, 1999.
Shapiro, Ian. "On Non-Domination," *University of Toronto Law Journal*. 62.3 (Summer 2012): 293–335.
Shapiro, Ian and Casiano Hacker-Cordón, eds. *Democracy's Edges*. Cambridge: Cambridge University Press, 1999.
Shavit, Uriya. *The New Imagined Community: Global Media and the Construction of National and Muslim Identities of Migrants*. Brighton: Sussex Academic, 2009.
Shklar, Judith. *The Faces of Injustice.* New Haven, CT: Yale University Press, 1990.
Shorten, Andrew. "Constitutional Secession Rights, Exit Threats, and Multinational Democracy," *Political Studies*. 62 (2014): 99–115.
Sidaway, James D. et al. "Translating Political Geographies," *Political Geography.* 23 (2004): 1037–49.
Simmons, A. John. "On the Territorial Rights of States," *Noûs*. 35 (2001): 300–26.
Sinclair, R.K. *Democracy and Participation in Athens*. Cambridge: Cambridge University Press, 1988.
Skinner, Quentin. *Liberty Before Liberalism*. Cambridge: Cambridge University Press, 1998.
Smilansky, Saul. *Ten Moral Paradoxes*. Oxford: Clarendon, 2007.
Smiley, Marion. *Moral Responsibility and the Boundaries of Community: Power and Accountability from a Pragmatic Point of View.* Chicago, IL: University of Chicago Press, 1992.
Smith, Anthony. *The Ethnic Origins of Nations*. Oxford: Blackwell, 1986.
Smith, David M. *Geography and Social Justice*. Oxford: Blackwell, 1994.
Smith, David M. *Moral Geographies: Ethics in a World of Difference*. Edinburgh: Edinburgh University Press, 2000.
Smith, Rogers M. *Stories of Peoplehood: The Politics and Morals of Political Membership*. Cambridge: Cambridge University Press, 2003.
Smith, Rogers M. "The Principle of Constituted Identities and the Obligation to Include," *Ethics and Global Politics*. 1.3 (2008): 139–53.

Soja, Edward. *Seeking Spatial Justice*. Minneapolis, MN: University of Minnesota Press, 2010.
Somers, Margaret R. "The Narrative Constitution of Identity: A Relational and Network Approach," *Theory and Society*. 23 (1994): 605–49.
Sontag, Susan. *Regarding the Pain of Others*. New York: Farrar, Straus and Giroux, 2003.
Sorensen, Roy. "Epistemic Paradoxes," *The Stanford Encyclopedia of Philosophy. (Spring 2012 Edition)*. Edward N. Zalta, ed. URL = http://plato.stanford.edu/archives/spr2012/entries/epistemic-paradoxes
Spiro, Peter J. "A New International Law of Citizenship," *American Journal of International Law*. 105.4 (2011): 694–746.
Soysal, Yasemin Nuhoglu. *The Limits of Citizenship: Migrants and Postnational Citizenship in Europe*. Chicago, IL: University of Chicago Press, 1994.
Stahn, Carsten et al., eds. *Jus Post Bellum: Mapping the Normative Foundations*. Oxford: Oxford University Press, 2014.
Stilz, Anna. "Why Do States Have Territorial Rights?" *International Theory*. 1.2 (2009): 185–213.
Stilz, Anna. "Nations, States, and Territory," *Ethics*. 121.3 (April 2011): 572–601.
Stout, Jeffrey. *Ethics after Babel*. Boston, MA: Beacon Press, 1988.
Straus, Scott. *The Order of Genocide: Race, Power, and War in Rwanda*. Ithaca, NY: Cornell University Press, 2006.
Strauss, Anselm. *Mirrors and Masks: The Search for Identity*. Glencoe, IL: Free Press, 1959.
Suber, Peter. *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change*. New York: Peter Lang, 1990.
Sullivan, William M. and Will Kymlicka, eds. *The Globalization of Ethics: Religious and Secular Perspectives*. Cambridge: Cambridge University Press, 2007.
Sullivan, Winnifred Fallers. *The Impossibility of Religious Freedom*. Princeton, NJ: Princeton University Press, 2007.
Sunstein, Cass. "Constitutionalism and Secession," *University of Chicago Law Review*. 58 (1991): 633–70.
U.S. Census Bureau. "Overview of Race and Hispanic Origin: 2010." URL: http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf
Talisse, Robert B. *Democracy and Moral Conflict*. Cambridge: Cambridge University Press, 2009.
Tan, Kok-Chor. *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism*. Cambridge: Cambridge University Press, 2004.
Tan, Kok-Chor. *Justice, Institutions, and Luck*. Oxford: Oxford University Press, 2012.
Taylor, Charles. *Philosophy and the Human Sciences: Philosophical Papers 2*. Cambridge: Cambridge University Press, 1985.
Taylor, Charles. "Comparison, History, Truth," in Frank Reynolds and David Tracy, eds. *Myth and Philosophy*. Albany, NY: SUNY Press, 1990. 37–56.
Taylor, Charles. "Modern Social Imaginaries," *Public Culture*. 14.1 (Winter 2002): 91–124.
Taylor, Charles. *Modern Social Imaginaries*. Durham, NC: Duke University Press, 2004.
Taylor, Charles. *A Secular Age*. Cambridge, MA: Harvard University Press, 2007.
Taylor, Charles et al. *Multiculturalism and "The Politics of Recognition."* Princeton, NJ: Princeton University Press, 1992.

Teitel, Ruti. *Transitional Justice*. New York: Oxford University Press, 2000.
Theiss-Morse, Elizabeth. *Who Counts as an American? The Boundaries of National Identity*. Cambridge: Cambridge University Press, 2009.
Thompson, Janna. *Taking Responsibility for the Past: Reparation and Historical Justice*. London: Polity, 2002.
Thompson, Janna. *Intergenerational Justice: Rights and Responsibilities in an Intergenerational Polity*. London: Routledge, 2009.
Thompson, Michael. "What Is It to Wrong Someone? A Puzzle About Justice," in R. Jay Wallace et al., eds. *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*. Oxford: Clarendon Press, 2004. 333–84.
Thorley, John. *Athenian Democracy*. New York: Routledge, 1996.
Tietz, Udo. *Die Grenzen des Wir*. Frankfurt: Suhrkamp, 2002.
Tilly, Charles. "Social Boundary Mechanisms," *Philosophy of the Social Sciences*. 34.2 (2004): 211–36.
Tilly, Charles. *Identities, Boundaries, and Social Ties*. London: Paradigm Publishers, 2005.
Tomasi, John. *Liberalism Beyond Justice: Citizens, Society, and the Boundaries of Political Theory*. Princeton, NJ: Princeton University Press, 2001.
Torpey, John, ed. *Politics and the Past: On Repairing Historical Injustices*. Lanham, MD: Rowman and Littlefield, 2003.
Tuan, Yi-Fu. *Space and Place: The Perspective of Experience*. Minneapolis, MN: University of Minnesota Press, 1977.
Tuomela, Raimo. *The Philosophy of Sociality: The Shared Point of View*. Oxford: Oxford University Press, 2007.
Turpin, Paul. *The Moral Rhetoric of Political Economy: Justice and Modern Economic Thought*. London: Routledge, 2011.
Vanderpool, Eugene. *Ostracism at Athens*. Cincinnati, OH: University of Cincinnati Press, 1970.
Vernon, Richard. *Cosmopolitan Regard*. Cambridge: Cambridge University Press, 2010.
Vernon, Richard. *Historical Redress: Must We Pay for the Past?* London: Continuum, 2012.
de Vitoria, Francisco. *Political Writings*. Anthony Pagden and Jeremy Lawrance, eds. Cambridge: Cambridge University Press, 1991.
Waldron, Jeremy. "Superseding Historic Injustice," *Ethics*. 103.1 (1992): 4–28.
Walker, Margaret Urban. *Moral Repair: Reconstructing Moral Relations After Wrongdoing*. Cambridge: Cambridge University Press, 2006.
Walzer, Michael. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. New York: Basic Books, 1977.
Walzer, Michael. "The Moral Standing of States: A Response to Four Critics," *Philosophy and Public Affairs*. 9.3 (1980): 209–29.
Walzer, Michael. "The Distribution of Membership" in Peter G. Brown and Henry Shue, eds. *Boundaries: National Autonomy and Its Limits*. Totowa, NJ: Rowman and Littlefield, 1981. 1–36.
Walzer, Michael. *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books, 1983.
Walzer, Michael. *Thick and Thin: Moral Argument at Home and Abroad*. Notre Dame, IN: University of Notre Dame Press, 1994.

Walzer, Michael. "Response," in Yitzhak Benbaji and Naomi Sussmann, eds. *Reading Walzer.* New York: Routledge, 2014. 167–72.
Ward, Graham. "History, Belief, and Imagination in Charles Taylor's *A Secular Age*," *Modern Theology.* 26.3 (July 2010): 337–48.
Warner, Michael. *Publics and Counterpublics*. New York: Zone Books, 2002.
Warnke, Georgia. *Justice and Interpretation*. Cambridge, MA: MIT Press, 1993.
Warren, Mark E. "What Can Democratic Participation Mean Today?" *Political Theory.* 30.5 (October 2002): 677–701.
Weber, Max. "Politics as a Vocation," in H.H. Gerth and C. Wright Mills, trans. and eds. *From Max Weber Essays in Sociology.* New York: Oxford University Press, 1946. 77–128.
Wellman, Christopher Heath and Phillip Cole. *Debating the Ethics of Immigration: Is There a Right to Exclude?* Oxford: Oxford University Press, 2011.
Wellman, Christopher Heath. "Immigration and Freedom of Association," *Ethics*. 119 (2008): 109–41.
Wellman, Christopher Heath. *A Theory of Secession: The Case for Political Self-Determination*. Cambridge: Cambridge University Press, 2005.
Whelan, Frederick G. "Prologue: Democratic Theory and the Boundary Problem," in J. Roland Pennock and John W. Chapman, eds. *Liberal Democracy: Nomos XXV*. New York: New York University Press, 1983. 13–47.
White, Harrison C. *Identity and Control: How Social Formations Emerge,* 2nd ed. Princeton, NJ: Princeton University Press, 2008.
White, Rob. *Crimes Against Nature: Environmental Criminology and Ecological Justice*. Portland, OR: Willan Publishing, 2008.
Williams, Melissa S. and Mark E. Warren. "A Democratic Case for Comparative Political Theory," *Political Theory*. 42.1 (2014): 26–57.
Wolgast, Elizabeth H. *The Grammar of Justice*. Ithaca, NY: Cornell University Press, 1987.
Wong, Cara J. *Boundaries of Obligation in American Politics: Geographic, National, and Racial Communities*. Cambridge: Cambridge University Press, 2010.
Wyschogrod, Edith. *An Ethics of Remembering: History, Heterology, and the Nameless Others*. Chicago, IL: University of Chicago Press, 1998.
Yack, Bernard "Putting Injustice First: An Alternative Approach to Liberal Pluralism," *Social Research.* 66.4 (Winter 1999): 1103–20.
Yack, Bernard. "Popular Sovereignty and Nationalism," *Political Theory.* 29.4 (2001): 517–36.
Yack, Bernard. *Nationalism and the Moral Psychology of Community.* Chicago, IL: University of Chicago Press, 2012.
Yoder, John Howard. *When War Is Unjust: Being Honest in Just-War Thinking*. Maryknoll, NY: Orbis, 1996.
Young, Iris Marion. *Justice and the Politics of Difference*. Princeton, NJ: Princeton University Press, 1990.
Young, Iris Marion. *Inclusion and Democracy.* Oxford: Oxford University Press, 2000.
Young, Iris Marion. "Five Faces of Oppression," in Lisa Heldke and Peg O'Connor, eds. *Oppression, Privilege, and Resistance*. Boston, MA: McGraw-Hill, 2004.
Young, Iris Marion. "Self-Determination as Non-Domination: Ideals Applied to Palestine/Israel," *Ethnicities*. 5.2 (2005): 139–59.
Young, Iris Marion. *Responsibility for Justice*. Oxford: Oxford University Press, 2011.

Ypi, Lea. "Territorial Rights and Exclusion," *Philosophy Compass*. 8.3 (2013): 241–53.

Zerubavel, Yael. *Recovered Roots: Collective Memory and the Making of Israeli National Tradition.* Chicago, IL: University of Chicago Press, 1995.

Zurn, Christopher S. "The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy," *Legal Theory.* 16 (2010): 191–227.

Index

Abbey, Ruth, 28n
Abbott, Andrew, 173n
Abizadeh, Arash, 148n
accountability, 38n, 45–46, 82, 162, 164, 198, 214
Ackerman, Bruce, 134n
acquisition of property, 42, 215, 217
Addams, Jane, 140
adverse possession, 218
affiliation, 61, 155
Afghanistan, 1, 32
Africa, 55n, 103
Agamben, Giorgio, 8, 80
agency, 4, 6, 38n, 39, 66, 71, 84, 85, 87, 93–94, 96, 111, 122–23, 125, 128, 131–32, 157, 159, 162–67, 171–72, 174, 182, 184, 191, 198, 203, 208–09
  collective, 157, 163
  corporate, 163
  democratic, 74n
  group, 163, 170, 230
  human, 4, 5, 16n, 32n, 161, 178, 183, 188, 203
  individual, 67, 162, 230
  and Judaism, 159n
  moral, 10, 167–68, 173–74
  narrative accounts of, 157n, 167, 170
  political, 76, 85, 141
  shared, 163
  social, 69, 159, 162–64, 172, 183, 191, 214
aid
  duty to, 68
  humanitarian, 100
  principle of mutual, 95, 97–100, 103–04
aliens, 14, 22, 51, 80, 92, 97, 99, 124, 227, 229
allegiance, 56, 60, 155
  pledges of, 183
Allen, Danielle, 79n
Alston, Philip, 187
Althusius, 208
America, 28
  colonial, 157
  post-revolutionary, 88
  Spanish, 88
An-Na'im, Abdullahi, 105
Anaximander, 189
Anderson, Benedict, 37n, 103, 158, 170–72
anthropology, moral, 57, 109–10, 161
  philosophical, 36, 139–40, 165
  political, 32
apartheid, 45, 166
Aquinas, Thomas, 19–20, 34n, 49, 194
Arendt, Hannah, 37, 48n, 58, 94
Aristotle, 7, 9, 49, 130, 207
  and boundaries, 21–23, 71, 120
  and citizenship, 21–22
  on justice, 12n, 18–21, 39, 114–15, 134
  and *pleonexia*, 188–89
  and slavery, 21, 23, 30, 39, 71
Armstrong, Chris, 58n
asylum, 99, 104
  human right to, 104–05
  political, 99–100, 106n
  seekers, 3, 226
Athens, 22, 29n, 99
Augustine, 30, 57, 194, 196
Australia, racial policies of, 97, 98n
authority, 76, 83–88, 100, 150n, 151, 176, 180, 201
  juridical, 84
  justification of, 72, 74
  paradox of revolutionary, 76, 79
  popular, 9
  principle of legitimate, 195, 197
  sacred sources of, 159n
  sovereign, 81–82
autogenesis, 76, 87, 134
autonomy, 51, 53, 81–82, 111–12, 127–28, 142, 165, 200, 222, 224, 230

Baczko, Bronislaw, 28n, 171n
Balkans, 230
barbarians, 22, 26, 182–83
Bedouin, 220
Beitz, Charles, 2
Belgium, 43
Benhabib, Seyla, 76, 81–82, 109n, 134n
Benjamin, Walter, 73n, 150n
Berlin, 44
  Wall, 178–79
Bernstein, Richard, 186
bioethics, 6
Blake, Michael, 228n
Bohman, James, 10, 143, 146–48, 172, 202, 204
Boltanski, Luc, 27
border controls, 183, 226
border studies, 179
borders, 1, 3, 24–25, 39–47, 55–60, 64, 67, 74, 79, 82, 129, 148, 152, 158, 163, 173–80, 192–93, 197, 204–15, 226–30
  closed, 32–33, 226–27
  democratization of, 148, 209
  just, 155
  Mercatorial, 174
  national, 176, 184
  political, 140, 174
  territorial, 77, 183, 212
Bosniak, Linda, 80
boundaries, 1–9, 15, 21, 24, 28, 31–33, 37–44, 48, 52, 56–67, 71–72, 77, 79, 86, 95, 113–16, 122, 124, 137–44, 152–55, 158–62, 165–66, 171–201, 206–14, 224–31
  communal, 39, 55, 65, 88, 138, 160, 165, 177–78, 211, 221
  and comparative ethics, 26, 155n
  of the *demos*, 67, 82, 141–42
  ethics of, 90, 118, 137
  generic features of, 173–76
  jurisdictional, 51, 141
  of justice, 48, 84, 121, 148–49, 154
  justness of, 31, 39, 41, 44, 55, 71, 86–87, 101–03, 106, 116–18, 132–33, 173, 185, 190, 195, 198–201
  national, 46, 60, 64, 127, 141
  social, 24–25, 155, 176, 178, 191
  state, 40, 43, 60, 125–27
  territorial, 24, 42, 176, 193, 213–19
boundary disputes, 15, 210
boundary negotiations, 153, 180, 204
boundary studies, 175
boundary-making, 10, 44, 48, 52, 63, 69, 80, 159, 161, 173–84, 191, 193, 196, 200, 204, 211, 214, 216, 220, 224
Bratman, Michael, 165
Brighouse, Harry, 60
Brock, Gillian, 8, 60–62, 64, 229n
Brunkhorst, Hauke, 206n
Buchanan, Allen, 155n, 216n, 222n
Buruma, Ian, 44n

Canada, 182n
Caney, Simon, 61
Carens, Joseph, 114n, 226n
caste system, 29, 166
Castells, Manuel, 158
Castoriadis, Cornelius, 28n, 171n
Categorical Imperative, 169
Catholic Church, 166
  on justice, 19–20
Catholic social thought, 5, 19, 64, 205, 208–09
Certeau, Michel de, 172n, 211
charity, 34, 41, 53, 206
children, status of, 21–22, 29
  and collective guilt, 45
  and moral development, 70n
China, 44, 124, 157
choice, versus ethical judgment, 8, 55, 90, 94, 98
Chouliaraki, Lilie, 104n
Christianity, 19n, 27, 34, 53, 71n, 106, 179, 182, 194, 206
circumstances of justice, 9, 16, 109, 118–25
citizenship, 22–25, 39n, 52, 62, 68, 74, 94, 100–03, 108, 110, 145, 147, 155, 181, 208
  as a birthright, 129
  democratic, 209
  European, 102, 229–30
  French, 229n
  Israeli, 159
  multiple, 32, 59, 102, 204

postnational, 176
social (versus formal), 80, 99, 176, 179, 227
world, 56–57
civil society, 120, 127, 131, 133, 135
global, 58, 135, 109n
transnational, 143
civilizations, "clash of," 27, 172, 178
as scale of justice, 27, 57, 102, 115, 171
civitas-building, 158, 181
Cloots, Anacharsis, 57
Cohen, Jean, 177n
Collingwood, R. G., 164
colonialism, 47–48, 166, 182
common good, 9, 25, 30, 130–38, 153, 198, 207, 209, 213, 219–20
commonwealth, 30, 66
Confucianism, 27, 106, 182
Connolly, William, 7n, 74n, 84, 88n, 143n, 189n, 216n
consent, 42, 73–74
constitutions, 13, 21, 25, 32, 52, 72–79, 82–88, 99, 148–50, 193, 221
cosmopolitanism, 5, 28, 41, 56–64, 104, 152, 162, 187
institutional, 125
of Kant, 8, 57
moral, 57, 106, 110–13, 124
political, 57
Cover, Robert, 170n
crimes, 18, 70
against animals and the environment, 59
against humanity, 24, 36, 68
of genocide, 37
war, 46
Cripps, Elizabeth, 170n
Croatia, 132
culture, 57, 74, 82, 91–92, 103, 105, 114n, 116, 145, 160, 171, 181–83, 197
construction of, 37
democratic, 139
of rights, 35
Cyprian, 34n, 64n

democracy, 9–10, 44–52, 72–88, 108–11, 138–50, 175n, 178, 215–16, 222–24
cosmopolitan, 108, 142, 157, 176, 206
and ostracism, 29
democratic theory, 5, 9, 67, 75–77, 88, 139, 142–43, 146, 155, 191n, 204, 227
Derrida, Jacques, 8, 10, 76, 149–52
Descartes, Rene, 36
Dewey, John, 9, 138–43, 146–49
dignity, human, 19, 36, 57, 97, 104–06, 111, 187, 197, 203
Dillon, Michael, 153n
discourse ethics, 50–51, 109, 136, 143
disenfranchisement, 80, 127, 191, 203
dissensus, 191
Djibouti, 43
domination, 190, 202–04, 228–30
Dominguez, Virginia, 79
Douglas, Mary, 165
Dupré, Louis, 36n, 54n
Durkheim, Émile, 163, 165, 206
Dworkin, Ronald, 40n, 154

earth
collective ownership of, 63–64, 212–13, 215
and universal destination of goods, 34n, 213
ecology, 32, 212–13, 217–21, 225, 230
economy, 58, 62, 70, 85, 92, 115, 127–29, 139, 144, 155–58, 180, 225–28
education, 32, 83, 92, 183
egalitarianism
liberal, 27, 41, 101
Egypt, 221
environmental degradation, 212, 229
epistemic privilege, 111, 177n
equality, 18, 23, 37, 41, 107, 110–13, 142, 204–05
human, 16–17, 35, 57, 119–20, 123, 227
of opportunity, 61
socioeconomic, 5
equilibrium, 10, 85, 197, 200–02, 204–05, 211–13, 230
reflective, 48, 154, 201–02
Eritrea, 43
Erman, Eva, 143n

Escher, M.C., 76
Espejo, Paulina Ochoa, 88
ethics, 5, 9, 16, 33, 40, 90, 93, 100, 106, 118, 135, 150, 158, 211, 214, 218, 223–28
  comparative, 26, 155
  discourse, 50, 136, 143
  ecological, 46, 212
  international, 2
  versus morality, 49, 136
  and politics, 48–55
  of special relations, 33, 193
  structural, 54
  visual, 144n
Ethiopia, 43
ethnic cleansing, 55, 183
ethnic separatism, 3, 32, 193, 204, 221
ethnicity, 96, 103, 183
ethnocentrism, 102, 105, 113
ethnogeographic communities, 217, 220
eudaimonism, 130, 135, 138

Europe, 19, 30, 32, 99, 102
  and citizenship, 102, 229–30
European Union, 1, 35, 85, 147, 172, 208
Ewin, R.E., 189n
exclusivism, 30, 227
excommunication, 29, 30n
Falkland Islands War, 43
family, 22–23, 96, 103, 110, 131, 204, 226
  reunification, 96, 100, 103, 229
federalism, 127, 147, 208
Feinberg, Joel, 17n
Ferrara, Alessandro, 9, 130, 132–35, 138, 177n, 198, 207
Festenstein, Matthew, 140n
Fine, Sarah, 227n
Fleischacker, Samuel, 35n
Føllesdal, Andreas, 208n
Forst, Rainer, 114n, 199n
Frank, Jason, 75–76, 80, 88
Fraser, Nancy, 10, 24n, 34n, 143–46, 185, 193n, 198, 224n
freedom, 55, 57, 66, 87, 108, 111, 130–31, 135, 157, 160, 169, 204–05
  of association, 73, 227n
  of movement, 225, 227
  religious, 29, 100, 106
  of the will, 165
French, 80, 200
  citizenship, 229n
  nation, 94, 169
Fricker, Miranda, 185, 211
Friedman, Milton, 65n
friend-enemy distinction, 52–53
friendship, 23, 30
  civic, 206, 213
Frohock, Fred, 83
frontiers, 1, 81, 93, 103
Fulbrook, Mary, 38n

Gandhi, Mohandas, 186
Geertz, Clifford, 193n
gender, 7, 13n, 38n, 55n, 111, 113, 179, 182
Geneva Conventions, 195
genocide, 37, 44, 45, 47
  Rwandan, 165–66
geography, human, 4, 5, 175, 216
  of justice, 143, 175n, 216
  moral, 121
  political, 214
German, 80, 96, 136, 150, 200, 207
  citizenship, 24n, 103
  constitution, 74
  guilt, 163
  nation, 1, 169, 178–80
Gilbert, Margaret, 165
Gilligan, Carol, 38n, 71n
globalization, 3, 5, 20, 35, 58, 67, 128, 139, 143–44, 176, 225, 228
  of English, 113
God, in Augustine, 30, 57
  eclipse of, 35
  and justice 12, 15, 19, 71n, 76n
good, 84, 110, 114–15
  life, 22–23, 49, 136–38
  Samaritan, 104
Goodin, Robert, 138, 145n
Gould, Carol, 145n, 148n, 206n
government, 25, 65, 81, 127–28, 146, 148, 158, 182n, 212
  democratic, 77, 83
  world, 63, 125, 127

Green, T.H., 139
green criminology, 59
Gregory, Derek, 176n
Grotius, Hugo, 19n, 64, 194, 213
guilt, 166
  collective, 45, 163–64
  "metaphysical," 161
Habermas, Jürgen, 8, 24, 49–52, 54, 78n, 134n, 143, 159
Hacker-Cordón, Casiano, 175n
Hampshire, Stuart, 211
Haney, Mitchell, 27
Hart, H.L.A., 198
Harvey, David, 175n
Hashmi, Sohail, 155n, 182n, 216n
Hegel, G.W.F., 9, 130–35
Heidegger, Martin, 27, 171, 176n
Held, David, 111, 142n, 145n, 172
Heraclitus, 189
Herman, Barbara, 54n
hermeneutical phenomenology, 5, 136
hermeneutical turn, 37
heterology, 153, 211
Higgins, Peter W., 228n
history, 82, 91–92, 121, 168–69, 172n, 178, 181, 183
  global, 135
Hobbes, Thomas, 36, 83–84, 97, 130, 186
Höffe, Otfried, 8, 19n, 65–68
Holmes, Stephen, 75
Honig, Bonnie, 73n, 74n
Honneth, Axel, 130–31, 165n, 188
honor, 18, 91, 105, 122, 197
hospitality, 41, 94–95, 150, 152
Hubin, D. Clayton, 120n, 121n
human rights, 23, 24n, 31–32, 35, 42n, 49, 58, 64, 66, 81–82, 85, 97, 100, 103–06, 108, 116, 128, 133, 135, 137, 147–48, 152n, 169, 187, 205, 225, 227
humanitarian intervention, 5, 58, 196
Hume, David, 9, 16n, 109, 119–23, 126–27
Huntington, Samuel, 27, 102, 172
Hurley, Susan, 9, 140–42

identity
  collective, 128, 133, 180
  ethnic, 38, 96, 103, 180–83, 212, 226
imaginary, 85, 162
  distributivist, 33, 193
  secularist, 111
  social, 4, 28–29, 73n, 171–73, 176
  territorial, 216, 223
  universalist, 106–07, 112
  Westphalian, 25, 47, 143, 192, 223
immigration, 3, 5, 11, 33, 51, 62, 64, 81, 94–96, 166, 193, 214, 225–30
impartiality, 16, 39, 41, 49–50, 57, 90, 106, 110–11
inclusion, 1, 3–4, 8, 14, 51, 56, 58, 80–81, 90, 98, 129, 132, 137–38, 146, 148, 152, 158, 160, 162, 189, 193, 210–11, 213, 228
  moral, 32
individualism, 36
  methodological, 60, 109, 162, 164
inequality, 67, 108
injustice, 21, 25n, 37, 58, 67, 71, 111, 113n, 121, 122, 125–27, 143–45, 150–53, 159, 184–91, 202, 217, 222–23, 224n, 230
  epistemic, 211
  epistemological priority of, 10, 131, 188, 191, 214
  hermeneutical, 185
  historical, 11, 15, 42, 45–48, 201
  perceptions of, 10, 186–88, 224
intention, 163
  collective, 132, 164–66, 170n, 172–73
  general, 165
  right, 196
interdependence, 9, 35, 115, 118–23, 127–30, 145, 148, 154
international community, 99, 147, 222–23
international law, 81, 94, 102–02, 135, 205, 218, 222
international relations, 2, 43, 132, 184
Iraq, 1, 32, 44, 74n, 98, 162, 222
irredenta, 1, 32, 47, 183, 204, 225
Islam, 27, 29, 57, 106, 169, 182, 195
Israel, 79, 103, 159n, 182n, 218, 220, 221n
Ivison, Duncan, 48n

Japan, 1, 74n, 196
Jaspers, Karl, 161n
Jenkins, Willis, 198n
Jewish people, 1, 156, 160n
Joas, Hans, 165n
Johnston, David, 25n, 34, 230n
Jordan, 221
Judaism, 34, 194–95
  and law, 29
judgment theory of justice, 9, 132–35, 207
jurisdictions, 24, 29, 51, 58, 64, 141, 215, 224
just war theory, 10, 92n, 194–97, 204–05, 210, 213, 222n, 231
justice, communities of, 6–10, 24n, 31, 40, 52, 86–89, 145, 153–54, 159–60, 173, 198–201, 211–14, 219, 230–31
  commutative, 4, 18–20, 23, 65–70, 96, 100, 197
  distributive, 1–7, 18–20, 23, 35, 55–66, 70, 85, 97–101, 114–15, 131, 193, 200, 220
  divine, 15n, 41, 75
  ecological, 18, 59
  economic, 35, 61, 107
  expletive, 19n
  general concept of, 15–17
  global, 3, 5, 55–65, 106–12, 133, 152, 208, 210, 213, 227
  historical, 5, 10, 44–48, 98
  intergenerational, 18, 46
  political, 21, 23, 25, 41n, 55n, 201
  retributive, 4, 18, 23, 34
  as righteousness, 12, 15
  scope and scale of, 8, 23–32, 56–64, 85, 93, 101, 193
  social, 12–15, 19–20, 34–36, 70
  types of, 17–20, 34, 230

KaNgwane, 43
Kant, Immanuel, 8, 39, 49, 53, 57, 86–87, 122, 130, 133
Kashmir, 43
kinship, 96, 100, 103, 183
Kolers, Avery, 207n, 213n, 217, 220
Krause, Sharon R., 203n
Kurdistan, 1, 55, 132, 158, 222
Kymlicka, Will, 145n
Kyrgyzstan, 156

Laborde, Cécile, 202n
Lacan, Jacques, 28n, 171n
Laitinen, Arto, 132n
land, ownership, 45, 179
  right to occupy, 45, 212–20
  use, 217, 219–20, 225
language, 43, 103, 112–13, 116, 136, 149–52, 156, 175, 181, 199
  standardization of, 181, 183
Larkins, Jeremy, 216n
Larmore, Charles, 50n
Las Casas, Bartolomé de, 30
law, 16, 21, 29, 49–54, 66–67, 72–75, 78, 83–86, 102, 150–52, 170n, 187, 215
  canon, 34
  human rights, 24
  international, 27, 81, 103n, 135, 205, 222
  of peoples, 25, 40, 178
  of Return, 103
  of war, 121, 195
Lebanon, 221
Leibniz, Wilhelm, 19
Leopold, Aldo, 219
liberalism, 27, 41, 49, 57, 81, 111, 205, 209
  political, 5
Liberia, 157
libertarianism, 41–42, 205, 227
liberty, 51, 81, 139
Lincoln, Abraham, 208
Locke, John, 39, 42, 60, 213n, 215
Lovett, Frank, 202n, 203n

McBride, Cillian, 209n
Machiavelli, Niccolò, 53–54
MacIntyre, Alasdair, 26, 41, 105, 157n, 168n, 169, 172n, 191n
marginalization, 111, 203, 211
Markell, Patchen, 190n
Marxism, 151
Masada, 221
Mazzini, Giuseppe, 222
mediation, 6, 89, 225

membership, 2, 24, 35, 39–44, 79, 101–06, 137–40, 156–57, 170, 176–77, 200, 202, 204
determination of, 3, 6, 13–15, 21, 59–63, 86, 128, 152, 155, 161, 166, 169, 191–93, 206–14
political, 1, 22, 29–32, 103, 127, 129, 224–30
and rights, 51, 129–30
Walzer on, 91–100
memory, collective, 168n, 170
Menke, Christoph, 78n
Merleau-Ponty, Maurice, 165
migration, 99–100, 225–30
international, 32, 43–44, 67, 183
labor, 96, 100
Mill, John Stuart, 25, 36, 39, 208, 222
Miller, David, 34n, 145n, 155n
modernity, 35, 49, 53, 136, 171
Moellendorf, Darrel, 61, 108–10
monarchy, 54, 160, 207
money, 163, 174
Moore, Barrington, 188n
Moore, Margaret, 155n, 216n, 222n, 224n
moral community, 1, 26, 28n, 31–32, 101, 113, 190
global, 57–58
moral status, 7, 42, 124–25, 197, 200
morality, 28, 36, 48–57, 107, 136
of groups, 163–64
and narrative, 167–68
public versus private, 53–54
Mouffe, Chantal, 81
multiculturalism, 3, 33, 127, 131, 182n
myth, 167–68, 181

Nagel, Thomas, 41n
narratives
and agency, 157, 162, 167–70, 173
and community, 73, 156–57, 170n, 176, 179, 199
and justice, 26
Näsström, Sofia, 77
nation, 26–27, 37, 128, 162, 168–70, 175, 178, 181–84, 215–17, 222–29
-building, 10, 46, 127, 149, 156–58, 180–81, 184, 223
-states, 2, 25, 66, 147, 151, 166, 176, 207, 219, 228
national boundaries, 46, 58, 127, 141, 144, 176, 183
national identity, 36, 38n, 82, 84, 94, 116, 127, 145, 180, 226–28
nationalism, 3, 11, 25, 29, 33, 37, 38n, 44, 47, 57, 60–61, 64, 102–04, 110, 128, 155, 158, 166, 170, 172, 178, 181, 192, 201, 223–34, 227
nationality, 4, 98, 100, 102, 104, 110, 113, 145n
natural law, 27, 49, 37, 53, 56, 101, 130, 154, 171, 207
naturalization, 3, 32, 62, 95, 99–100, 166, 180, 208
networks, 35, 58, 70, 112, 124–25, 130, 132n, 134, 141–42, 158, 177, 179
non-domination, 10, 128, 139, 147–48, 153, 191, 197, 202–05, 209–14, 219–20
Norway, 1
Nozick, Robert, 8, 42, 46
Nuremberg Laws, 24n
Nussbaum, Martha, 15n, 120n, 145n

Offe, Claus, 77, 79, 138
Okin, Susan Moller, 55n
O'Neill, Onora, 9, 24n, 122–28
O'Neill, William, 38n
oppression, 98, 187, 190n, 203n
ostracism, 29
outsiders, 25n, 28n, 41, 52, 62, 74n, 95–98, 124, 136–38, 148n, 156, 169, 175, 177n, 178–79, 211, 226–27, 229

Palestine, 218, 220, 230
paradox, 40, 70–89
alethiological, 86
versus antinomy and fallacy, 86–87, 143
of civic virtue, 74–75
constitutional, 78
constitutive, 8, 72–89
democratic, 81–82, 140
of democratic justification, 83
democratic voter, 83n

paradox – *Continued*
demos, 77, 139, 146
founding, 72–79, 13n, 196
of legal interpretation, 83–84
of peoplehood, 79–81
political, 84–85
of precommitment, 75–76
revision, 73, 79–85
of revolutionary authority, 76
of the ship of Theseus, 73n
of sovereignty, 74n, 88n
Parfit, Derek, 167n
participation, 26, 49, 51, 160, 208–10, 212, 214, 219, 229
particularism, 11, 81–82, 91, 105, 135–36, 152, 157–58, 162, 197, 201
patriotism, 3, 33, 79, 110, 193
peace, 29, 43, 57, 196–97
people-building, 155–58
peoplehood, 4, 79–80, 85, 155–58, 167, 180
Perry, Ronen, 18n
persecution, 44, 98–99, 106, 223
personhood, 36, 49, 101, 108, 112, 122, 125n, 139, 145, 162
Pesch, Heinrich, 206n
Pettit, Phillip, 202n, 203n
phenomenology
of communal formation, 11, 202
of injustice, 188
of moral acts, 163, 165
of responsibility, 200
of settling, 218, 220
philosophy of mind, 141
Pieper, Josef, 19n
Plato, 20, 84, 207
pleonexia, 188–89
pluralism, 28, 29, 83, 85, 90, 92, 95, 109, 113, 115
Pogge, Thomas, 101n, 107–08, 110
politics, 28, 48n, 73–89, 133, 149, 171
democratic, 79, 227
and ethics, 48–55, 135
identity, 3, 143
jurisgenerative, 82–83
of political membership, 156–59, 220
poor, 70, 80, 144, 209–10, 214
extreme, 58
preferential option for, 209, 214, 219
rights of, 19, 34–35, 97
population control, 212
power, 27, 66, 69, 74–75, 80, 84–85, 87, 92, 107, 111, 119, 123, 126–27, 141, 146–50, 156, 171, 183, 186, 202–03, 207
constitutional, 9
constitutive, 48, 67, 76, 85, 87, 96, 175–78, 182, 227
democratic, 75, 78
exemplary, 134n
proceduralism, 136
property, 5, 12, 120, 122, 129, 215–16, 218
acquisition of, 42, 215, 218, 227
common versus private, 34
intellectual, 146
rights, 32
proportionality, 195, 197, 211–12, 219, 229
protectionism, 227
public, 28, 140, 147
apologies, 46
and counterpublic, 49n
schools, 32
sphere, 49n, 83, 120, 130, 171, 209
utility, 122
will, 146

Quine, W.V.O., 87n

race, 24, 113, 155–56, 175
Rancière, Jacques, 80–81, 191
Raphael, D.D., 36n, 187
rationality, 136, 141, 142n, 172n
practical, 26, 113
Rawls, John, 1–2, 7–8, 12–15, 20, 24–26, 40–43, 46, 53, 66–69, 77, 91–92, 95, 103, 108–09, 120n, 121n, 126, 154, 159, 176, 178, 191n, 201–02, 209
reciprocity, 61n, 66, 230
redistribution, 26, 43, 61, 97, 129, 131, 143n, 144, 177, 180, 224
religion, 1, 7, 14, 26–27, 54n, 57, 71n, 83, 96, 98–99, 106, 109, 111, 151,

155, 156, 159, 162, 168, 175, 180–83, 195, 205, 215–16
representation, 33n, 80, 82, 144–45, 170, 176, 179
Republic, 54, 160, 207
of Letters, 57
Roman, 30
world, 50, 57, 67
republicanism, 139, 147, 155, 202, 204–05, 207, 209, 227
civic, 49, 109
residents, 14, 22, 96–97, 100, 112, 180, 223, 229
foreign, 22, 80, 99, 227, 229
responsibility, 10, 38, 46–47, 62, 68–69, 132, 153, 157, 161–69, 197–200, 204–06, 208, 213–14, 218–19, 221, 229
collective, 163–64, 173
ethic of, 55
mutual, 206, 228
political, 126–27
revolution, 32, 76–77, 79, 222
Rezaian, Jason, 102n
Ricoeur, Paul, 8, 84–85, 89, 134n, 168–69, 201n
right intention, 196
right of return, 103
right to have rights, 37, 58, 94
right-to-life movement, 32
right to place, 97, 100
rights, 13, 21–22, 30–37, 49, 51, 60, 81, 84–85, 105, 114–16, 120, 125, 146, 180n, 188, 227, 229–30
biotic, 7, 219
civil, 35
collective, 157, 164, 229
of future generations, 7
of indigenous peoples, 32, 147
of Man, 36
membership, 51
natural, 154, 205, 207
of nonhuman animals, 7, 32, 59
of the poor, 19, 35
of self-determination, 95, 99–100, 128, 222–23
of states, 90
territorial, 11, 45, 64, 96–97, 214–23, 225
to vote, 92
Risse, Mathias, 8, 62–64, 212–13
Rorty, Richard, 105
Rousseau, Jean-Jacques, 8, 74–75, 79, 88n, 164, 212
Rwanda, 43, 165–66, 169

Sack, Robert, 174n
Samaritans, 104n
Sanatana Dharma, 29
Sandel, Michael, 69n, 157n
Sangiovanni, Andrea, 58n
Sassen, Saskia, 176–77, 180n
Scarry, Elaine, 186
Scheffler, Samuel, 159
Scheler, Max, 206n
Schmidtz, David, 16n, 192
Scotland, 225
secession, 1, 3, 5, 11, 32, 47, 183, 214, 221–25
segregation, 183
Sellars, Wilfrid, 137, 197
Sen, Amartya, 14n, 77n, 121, 186
Shachar, Ayelet, 129
Shapiro, Ian, 175n, 191n, 203n, 204
Shklar, Judith, 186n, 188n
Shorten, Andrew, 221n
Sinclair, R.K., 21n
Skinner, Quentin, 202n
slavery, 14, 21–23, 29–30, 45, 71, 114
Slovenia, 132
Smith, Adam, 35n, 36n, 65n
Smith, Rogers, 146n, 155–60, 167, 170, 178
society, 25, 165
-building, 68
sociology, 4, 5, 126, 165, 175, 179
Soja, Edward, 217n
solidarism, 206n
solidarity, 11, 66, 69, 130–31, 151, 164, 179, 202, 206–07, 209, 212–13, 224, 227, 229–30
Somaliland, 1, 55
South Africa, 43
South Sudan, 1, 225, 230
sovereignty, 9, 10, 25, 35, 52, 72, 75–76, 84, 96, 121, 143n, 150–51, 158, 170–71, 180, 196, 216, 224–24

absolute, 156, 176
paradox of, 74n, 88
popular, 49, 80–82, 85
state, 35, 81, 90, 219
territorial, 213
state, 2, 19, 21, 25–26, 35–37, 38n, 40–43, 52–53, 60–68, 74–77, 81–83, 92–100, 102–03, 124–25, 131–32, 135, 140, 151, 158–59, 170, 175–78, 180–82, 207–08, 212, 215, 216n, 221–26, 228
-building, 10, 149, 158, 180, 184
city-, 21, 130
democratic, 25, 78, 83
liberal, 33, 182
of nature, 14, 73, 115
statelessness, 37, 58, 98, 100, 102, 108, 204
statism, 25, 62, 109, 227
Stout, Jeffrey, 39n
Strauss, Anselm, 24n
subjection, 63, 121, 203
subjugation, 203
subordination, 190, 203
subsidiarity, 11, 202, 207–09, 219, 225, 228
Sunstein, Cass, 221n
sustainability, 11, 46, 67, 212–13, 217–20, 225, 229
Swaziland, 43
Syria, 221

Taiwan, 1, 44
Talisse, Robert, 83
Tan, Kok-Chor, 24n, 110–11
taxation, 180, 183–84
Taylor, Charles, 28n, 73, 111n, 114–15, 131, 157n, 171–72
technology, 7, 16, 34, 158, 170, 183, 187, 194
communications, 58
information, 35, 44, 158
political, 216
territorial control, 96–97, 100, 180, 215–26
territory, 41, 45, 96–98, 100, 121n, 141, 158, 176–77, 180, 183, 200–01, 212–27, 230
theodicy, 71n
theology, 15n, 36, 41, 53, 71n, 109, 160, 195, 205
liberation, 111
moral, 106
Thévenot, Laurent, 27
Thompson, Janna, 47
Thompson, Michael, 112n
Tietz, Udo, 3n, 9, 130, 135–38
Tilly, Charles, 176, 179
Tomasi, John, 55n
tradition, 6, 7, 12, 26–29, 41, 49–50, 65, 71, 94, 99, 105–06, 108–09, 116, 135–36, 142–43, 172, 181–82, 195, 212–13
Tuomela, Raimo, 164–65
Turpin, Paul, 65n

UN Charter, 195
universalism, 5, 9, 11, 27, 28n, 39, 49, 81, 90, 101–02, 104–13, 116, 135, 152, 157, 197, 201
Uti possidetis, 218
utilitarianism, 36, 107, 120–22, 227

Van Parijs, Philippe, 113n
Vernon, Richard, 60n, 68
violence, 10, 46, 53, 66, 73, 84, 150–52, 197, 203, 210
virtue, 4, 12, 18, 21–23, 34, 49, 54, 87, 119–22, 169, 199, 211, 229
civic, 72, 74–75, 78–79, 87, 139, 227
Vitoria, Francisco de, 30, 194, 200, 210
voluntarism, 69, 74–75
voluntary association, 51
voting, 1, 83n, 92, 139, 209

Waldron, Jeremy, 48n
Walzer, Michael, 2–3, 9, 13, 37n, 40–41, 46, 84, 90, 91–106, 115–16, 137, 157n, 191n, 194, 205, 222n, 225
war, 29, 44–45, 52, 67, 92, 105, 139, 194–97, 205, 213
laws of, 92n, 121
Ward, Graham, 172n
wealth, 18, 20, 35, 92, 97, 112
distribution of, 91
Weber, Max, 55

Wellman, Christopher Heath, 227n
White, Harrison C., 181n
will, 49, 51–52, 76, 108, 112, 137, 163–65, 203n, 206
  collective, 78
  democratic, 75, 77, 78n, 109n, 146
  divine, 15
  general, 75
  joint, 164
  political, 166, 170
  of the sovereign, 82
Wittgenstein, Ludwig, x, 190
Wolgast, Elizabeth, 189
women, 14, 22, 29, 106n, 120n, 121
Wong, Cara J., 28n
World War I, 44
World War II, 36, 163, 196
Wyschogrod, Edith, 46n

Yack, Bernard, 178n, 181n, 186n
Young, Iris Marion, 9, 125–28, 190n, 198–99, 202, 203n, 204

Zionism, 220